**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

Case No CCT 252/2024
SCA Case No: 378/2023
GHCP Case no: 2020/047405

In the matter between:

**THOLO ENERGY SERVICES CC** Applicant

and

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

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**RESPONDENT'S RULE 19(4) STATEMENT**

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## INTRODUCTION

1 The respondent opposes the application for leave to appeal. The grounds for such opposition are set out below.

2 In this statement, the applicant is referred to as "*Tholo SA*" and the respondent as "the Commissioner".

3 The principal issue in this matter is whether or not the relevant consignments of fuel were exported as provided in rebate item 671.11 in Part 3 of Schedule 6 to the Customs and Excise Act ("the Act"). This was the issue before the High Court and was the issue in appeal before the Supreme Court of Appeal.

4 The Commissioner made a "determination", in terms of section 47(9)(a)(i)(bb) of the Act, that the relevant consignments of fuel were not exported, as provided in rebate item 671.11 in Part 3 of Schedule 6 to the Act.

5 The word "determination" is used in parenthesis to denote a technical meaning. Although this is a decision by the Commissioner, it is different from an ordinary or other type of administrative decision or exercise of a discretionary power in that the Act, expressly gives an aggrieved person a right to appeal to the High Court against the correctness of the decision.

6 The Act expressly empowers the Commissioner to make a "determination", with an associated right of appeal in substantially identical terms, in four places:

6.1 section 47(9)(a) – "determinations" of the tariff headings, subheadings and items under which imported, manufactured or exported goods are to be classified, or whether such goods have been dealt with under tariff items specified in certain schedules to the Act;

6.2 section 49(6) and (7) – "determinations" of any matter in connection with provisions of international trade or customs agreements to which the Republic is a party;

6.3 section 65(4) and (6) – "determinations" of the transaction value of goods for customs duty purposes; and

6.4 section 69(3) and (5) – "determinations" of the value of goods manufactured in the Republic for the purposes of assessing excise duty.

7 Although a "determination" in relation to a tariff heading under which goods are to be classified upon importation, or the country of origin of imported goods, or the value for customs duty purposes or excise duty, may well affect and inform the liability or its quantum calculation of duty, the "determination" is not the same as a decision as to the existence of the liability or its quantum. That latter decision or conclusion might very well be affected by or flow from the "determination" but is not to be confused with the "determination".

8 Similarly, a "determination" whether goods have been dealt with under a particular tariff item specified in the schedule to the Act may well affect and inform the acquittal of liability for duty or, as in the present case, an entitlement to a refund of duty.

9 This distinction appears not to be appreciated by Tholo SA, as is evident in the formulation of its relief in its notice of motion in this Honourable Court in seeking an order to set aside the Commissioner's "determination": *"to disallow the applicant's . . . claims for refunds"*. The determination in issue was that the relevant consignments of fuel were not exported as provided in rebate item 671.11 in Part 3 of Schedule 6. It was as a result of such determination that the Commissioner refused to pay the refunds that had been claimed. A simple reference to the provisions of section 47(9)(a)(i)(bb) reveals that the Commissioner is empowered to make a decision whether or not

the fuel was exported as provided in the relevant item. The empowering legislation does not empower the Commissioner to make a "determination" to allow or disallow refunds. The power to allow or disallow refunds is an implied power that flows from the statutory power to make a "determination".

10 The distinction between a "determination" and any other decision is important because of the right of appeal that is associated with a "determination". The Supreme Court of Appeal, in ***Pahad Shipping CC v Commissioner, SARS*** **[2010] 2 All SA 246 (SCA)**, found that the statutory appeal of a "determination" is a "wide appeal" in the sense formulated by Trollop J **Tikly and others v Johannes NO and Others 1963 (2) SA 588 (T) at 590G - 591A**. This finding has been uniformly and unquestioningly applied in a number of subsequent decisions both of the various High Courts and Supreme Court of Appeal and is, with respect correctly so, not challenged in this application.

11 Whether a review under the Promotion of Administrative Justice Act, 2000 ("PAJA") can be brought against a "determination" simultaneously with, or in the alternative to, the statutory appeal and if so in what circumstances, is presently a matter before this Honourable Court in the case of **Commissioner of the South African Revenue Service and Another v Richards Bay Coal Terminal (Pty) Ltd – case number CCT 104/2023**.

12 In relation to Tholo SA seeking to engage judicial review jurisdiction in respect of the "determination", the Commissioner's contentions may be summarised as follows:

12.1 Tholo SA's right under section 33 of the Constitution, to administrative action that it lawful, reasonable and procedurally fair is given effect by the existence of the corresponding statutory right to a wide appeal against a "determination", which statutory right permits Tholo SA to challenge, in a High Court, the correctness of the "determination" on its merits, without having to meet the threshold of identifying an error in the procedure and without having to avoid a challenge on the correctness of the exercise of a discretion, thus rendering recourse to PAJA unnecessary; and

12.2 to the extent that a review application under PAJA is theoretically possible, the statutory appeal in the Act is an internal remedy provided for in the Act which ought, in the absence of exceptional circumstances, to be exhausted before review jurisdiction is engaged under PAJA. Where a High Court has considered and determined a wide appeal, either confirming the "determination" or making a different "determination", attempting thereafter to engage the High Court's review jurisdiction under PAJA would lead to an absurdity, as

the effect of the Commissioner's "determination" would have been superseded by the results of the order of the High Court on appeal.

## FACTUAL BACKGROUND

13 Tholo SA is a close corporation incorporated in South Africa by Mr Moroahae, its sole member.

14 Tholo Energy Services (Pty) Ltd ("Tholo Lesotho") is a private company incorporated in the Kingdom of Lesotho by Mr Moroahae, who is also its shareholder and sole director.

15 Tholo Lesotho carries on business in Lesotho in the course of which it supplies fuel to its customers there, who are mainly companies operating in the construction and mining industry such as Letseng Diamonds (Pty) Ltd ("*Letseng*") and Storm Mountain Diamonds (Pty) Ltd ("*SMD*").

16 Tholo Lesotho sources the fuel it supplies to its customers from South Africa, and it uses the identity particulars and credentials of Tholo SA in its transactions with its South African suppliers and with the Commissioner.

17 Although it has been denied that Tholo Lesotho uses the identity particulars and credentials of Tholo SA in its transactions with its South African suppliers and with the Commissioner, the denial is not (and could not be) substantiated with any evidence.

18 Even where documents were created and used for the purpose of showing that Tholo SA participated in the purchase and export of fuel to Lesotho, it is clear from the details appearing in those documents that they lack genuineness. For example:

18.1 "Tax invoices" issued by Petro SA to Tholo SA reflect the latter's income tax reference (9418 145 16 3) instead of a VAT reference, which invalidates the documents as tax invoices;

18.2 Tax invoices issued by Tholo SA to Tholo Lesotho are:

18.2.1 on the former's letterhead describing the entity as "Tholo Energy Services (Pty) Ltd" – Tholo SA is a close corporation;

18.2.2 reflect Tholo SA's VAT reference number (4580 257 99 8), which differs from that used in the Petro SA invoice;

18.2.3 provides the banking details of Tholo Lesotho's for a bank account in Lesotho; and

18.2.4 the purchase price is denominated in Lesotho currency, Maloti, and not the South African Rand.

19 Tholo SA had no real involvement in the purchase of fuel from South Africa and its export and removal to Lesotho. For example:

19.1 Although the founding affidavit and the customs declaration documents declare that the relevant fuel was removed to Lesotho by Tholo SA as a licensed distributor and remover of goods in bond, the removal was undertaken by Tholo Lesotho using Lesotho tankers. Tholo SA appears to have conceded this fact.

19.2 Tholo SA did not pay Petro SA for the fuel, Tholo Lesotho as the true purchaser and exporter of the fuel to Lesotho paid Petro SA. This goes to show that Petro SA's invoice to Tholo SA was nothing more than a sham.

19.3 Notwithstanding its allegations in the founding affidavit that Tholo SA's customers in Lesotho are its own customers, when it was pointed out in the answering affidavit that those customers are in fact Tholo Lesotho's customers, Tholo SA could not dispute that fact.

20 Tholo SA has conceded that the storage tanks from which the fuel was obtained by Tholo Lesotho in Petro SA's depots in Bloemfontein, Tzaneen and Alrode are not licensed as manufacturing or storage warehouses. The origin of the fuel is that it was sold by BP to Petro SA; the fuel was not even indirectly from Petro SA's licensed warehouse.

21 In March 2017, Tholo SA submitted four claims for refund of fuel levies in the sum of R4 254 924.80 in respect of 25

consignments of fuel purchased by Tholo Lesotho from South Africa and exported to Lesotho.

22 On 20 July 2017, the Commissioner disallowed the refunds claimed on the basis that the requirements for the refund had not been complied with, which included a "determination" that the fuel had not been exported as provided in the rebate item.

23 On 31 July 2017, Tholo SA then prosecuted an internal administrative appeal.

24 On 10 December 2018, the committee hearing the internal administrative appeal dismissed the appeal in full.

25 On 8 October 2019, aggrieved by the confirmation of the determination by the National Appeal Committee, Tholo SA issued a section 96 notice in terms of which it notified the Commissioner of its intention to institute legal proceedings, setting out the cause of action.

26 On 15 July 2020, the Commissioner delivered its response to the section 96 notice in which it set out its proposed grounds for opposing the intended appeal.

**OUTLINE OF THE GROUNDS FOR OPPOSITION**

27 Section 75(1)(d) provides for refund of fuel levies actually paid at the time of entry for home consumption in respect of any fuel levy goods ("*diesel*") manufactured in South Africa.

28 The refund claims were made in terms of section 75(1)(d) of the Act, read with rebate item 671.11 in Part 3 of Schedule 6 to the Act.

29 The only "determination" that was ever made was that Tholo SA had not exported the various consignments of fuel as provided in rebate item 671.11 in Part 3 of Schedule 6 to the Act. This was the only "determination" that the Commissioner could make within the scope of section 47(9)(a)(i)(bb) and the only "determination" which could competently be appealed.

30 Accordingly, the grounds or reasons for the "determination", be they factual or legal findings, are not "determinations" on their own. It is Tholo SA's failure to make the distinction between the grounds of the "determination" and the "determination" itself that is destructive of this application for leave to appeal.

31 The principal foundation for this application is that the Commissioner was not entitled, when opposing the appeal, to introduce facts or legal arguments that were not to be found in the reasons for the "determination". In so doing, Tholo SA overlooks the distinction between an appeal and a review and further loses sight of the fact that even if this were a review, Tholo SA's notice of motion required the High Court to make its own "determination" just as the Act and case authority requires the High Court to do in a wide appeal.

32 When undertaking this exercise in an appeal, or even in a review making a substitutionary order under section 8(1)(c)(ii) of PAJA substituting the original decision, the High Court must of necessity consider all available evidence and information and cannot disregard such information simply because it was either not before the Commissioner or that such evidence or information did not form part of the original decision of the Commissioner.

33 If accepted, the principal foundation of this application would lead to an absurdity – namely that the High Court ought to find as a matter of fact and law that the goods had been exported as provided in item 671.11 in Part 3 of Schedule 6 to the Act, merely because the Commissioner was incorrect in his original reasons for making a "determination" to the contrary and that the High Court ought to make the opposite "determination" – closing its eyes to other evidence and facts indicating that the goods had not been exported as provided in item 671.11 in Part 3 of Schedule 6 to the Act.

34 When the Commissioner did raise these additional grounds and reasons, which were certainly communicated no later than 15 July 2020, in response to the notice of intended legal proceedings, the Commissioner did not make another "determination" and most certainly did not make, or attempt to make another "determination" when raising these grounds in the

answering affidavit opposing the appeal. At that stage, it is only the High Court that could make a new "determination".

35 To establish this Court's jurisdiction in terms of section 167(2)(b) of the Constitution, Tholo SA contends that:

35.1 the wide appeal issue gives rise to a constitutional matter for the purpose of section 167(2)(b)(i) of the Constitution; and

35.2 the compliance issue, which concerns interpretation of the provisions of the Act that must be complied with to qualify for refund, raises arguable points of law of general public importance.

36 It is submitted that the intended appeal does not engage the jurisdiction of this Court for the following reasons:

36.1 The alleged constitutional matter does not arise.

36.2 The compliance issue does not raise arguable points of law of general public importance, or at all and has no prospects of success.

*Wide appeal issue – no constitutional matter*

37 Tholo SA contends that the Commissioner is not permitted to rely on non-compliances not previously specified in the

determination letter ("*new grounds*") to oppose the appeal. Because, if the Commissioner is allowed to rely on new grounds:

37.1 Tholo SA's constitutional rights to just administrative action and to have its dispute resolved in a fair public hearing will be violated;

37.2 the Commissioner would be acting *ultra vires* the enabling provision; and

37.3 the Commissioner had become *functus officio*.

38 This proposed ground of appeal is baseless and unsustainable for the following reasons:

38.1 What is alleged to be new grounds forms part of the prerequisites for a refund which Tholo SA had to comply with to qualify for a refund. Accordingly, regardless of the Commissioner's reliance on the "new grounds", Tholo SA was always burdened with the onus of proving that each of those prerequisites had been satisfied.

38.2 In any event, the "new grounds" were not new at all because they were already encompassed by the grounds for determination spelt out in the determination letter. The determination letter stated that:

38.2.1 a refund constitutes a tariff determination, therefore compliance with all the requirements for rebate item is a prerequisite for a refund.

38.2.2 the prerequisites for refunds prescribed in sections 75, 76, 64F and 19A – read with the rules thereto – had not been complied with.

38.2.3 On the basis of non-compliance, the refund claims were disallowed.

38.3 Even if the new grounds were indeed new, because a tariff appeal is a wide appeal, the Commissioner was entitled to rely on the new grounds to support the tariff determination, as long as those new grounds were pleaded.

38.4 For all these reasons, this proposed ground of appeal lacks merit and has no prospects of success.

39 On this basis, the constitutional matter relied upon to found jurisdiction in terms of section 167(2)(b)(i) of the Constitution does not arise.

*Compliance issue - no arguable point of law, no prospects of success*

40 It is submitted that the compliance issue does not raise arguable points of law of general public importance and have no prospects of success.

41 Save for the export permit requirement, it is not in dispute that the prerequisites for a refund are as listed in paragraph [49] of the SCA judgment. It is also not in dispute that each of these requirements must be met before the refund is granted. One such requirement is that diesel must have been carried by the licensed distributor of fuel ("*LDF*") using its own transport. Since it is common cause on the facts that the diesel in question was carried by Tholo Lesotho – not Tholo SA – using its own vehicles, this requirement was not complied with. Therefore, the refund claims do not qualify for refund and the appeal cannot succeed. For this reason alone, the intended appeal has no prospects of success.

42 In relation to the necessity of an import permit, the ministerial regulations require such a permit and no distinction is made between exports to a country within the customs union and exported to a country outside the customs union.

**APPLICABLE LEGAL PROVISIONS**

43 The purpose of the Act includes (1) the levying of customs and excise duties and (2) the control of importation, export, manufacture or use of certain goods. Therefore, the enforcement of the Act is not only about revenue collection; but the control of import, export, manufacture and use of goods is also a significant purpose of the Act and a key function of the Commissioner.

44 The entry of imported goods into (and for export from) South Africa is governed by an elaborate body of rules and procedures aimed at enabling the Commissioner to exercise control over the goods being imported or exported as well as the levying of customs duty.

45 The mechanics of the Act were conveniently described by Rogers J, as he then was, in ***Gaertner and Others v Minister of Finance & Others*** **2013 (4) SA 87 (WCC) at paras [17] to [25] and 49**.

46 Like alcohol and tobacco, fuel is a product that is highly regulated by the Act.

47 In order to effectively control certain activities involving fuel, the Act provides for *inter alia* the licensing and registration of the premises in which the controlled activities are undertaken.

48 Fuel manufactured, and entered for home consumption, in South Africa is subject to excise duty and fuel levies. In terms of section 75 of the Act, fuel manufactured in South Africa may in certain circumstances qualify for refund, subject to compliance with prescribed requirements.

49 There are various provisions in the Act that govern various activities relating to fuel such as the following:

49.1 Section 19, read with the rules thereto, provides for licensing of premises as manufacturing and storage warehouses;

49.2 Section 19A confers upon the Commissioner powers to prescribe rules regulating activities pertaining to excise and fuel levy goods;

49.3 Section 38(4), read with the rules thereto, regulating entry of *inter alia* fuel levy goods, time of entry and payment of duty and levies in respect of those goods;

49.4 Section 64F, read with the rules thereto, governing licensing of distributors of fuel;

49.5 Section 75 and 76 provides for the refund of *inter alia* fuel levy in respect fuel levy goods manufactured in South Africa; and

49.6 Schedule 6 to the Act providing for additional circumstances under which the fuel levy qualifies refund.

*Requirements for fuel levy refund*

50 Section 75(1) provides:

> *"(1) Subject to the provisions of this Act and to any conditions which the Commissioner may impose—*
>
> *(a) […]*
>
> *(d) in respect of … fuel levy goods manufactured in the Republic described in Schedule No. 6 … a refund of the excise duty, fuel levy or Road Accident Fund levy actually paid at the item of entry for home consumption shall be granted to the extent and in the circumstances stated in the item of Schedule No. 6 in which such goods are specified, subject to compliance with the provisions of the said item and any refund under this paragraph may be paid to the person who paid the duty …"*

51 The rebate item relevant to a licensed distributor of fuel is rebate item 671.11 of Part 3 of Schedule 6 of the Act which provides for a rebate of fuel levy in respect of:

*"Goods liable to the fuel levy and Road Accident Fund levy as specified in Part 5A and Part 5B of Schedule No. 1 respectively, which, after entry or deemed entry for home consumption and payment of duty by a licensee of a customs and excise manufacturing warehouse as contemplated in section 19A and its rules, is obtained from stocks of such licensee and delivered to a purchaser in any other country in the common customs area by a licensed distributor contemplated in section 64F, subject to compliance with Note 12."*

52 Note 2 of the general notes to Part 3 of Schedule 6 reads as follows:

*"A rebate and refund of fuel levy and Road Accident Fund levy specified in Part 5A and Part 5B of Schedule No. 1, respectively, in respect of any goods specified in this Schedule shall, subject to the provisions of section 75, be allowed to the extent stated in this Part, in respect of such goods on compliance with the provisions of the item in this Part in which such goods are specified and of any notes applicable in respect of such item."*

53 Note 12 of the general notes to Part 3 of Schedule 6 provides as follows:

*"Notes for item 671.11 in relation to fuel which, after entry or deemed entry for home consumption and payment of duty by a licensee of a customs and excise manufacturing warehouse as contemplated in section 19A and its rules is obtained from stocks of such licensee and delivered to a purchaser in any other country in the common customs area by a licensed distributor contemplated in section 64F, subject to compliance with these Notes.*

*(a) [...]*

*(b) Requirements in respect of refunds:*

*(i) […]*

*(ii) Any application for a refund of fuel levy and Road Accident Fund levy in terms of this item shall be subject to compliance with –*

*(aa) section 64F and its rules;*

*(bb) rule 19A4.04 mutatis mutandis and any other rule regulating the movement of goods to which this item relates.*

*(iii)*

*(aa) Any load of fuel obtained from the licensee of a customs and excise manufacturing warehouse must be wholly and directly removed for delivery in any other country in the common customs area by the licensed distributor in order to be considered for a refund of duty.*

*(bb) A refund shall only be payable on quantities actually delivered to a purchaser in any other country of the common customs area."*

54 Section 64F(2)(a) provides that no person, except a licensee of a customs and excise warehouse, who removes to any other country in the common customs area or exports any fuel, which has been entered or is deemed to have been entered shall be entitled to any refund of duty unless such person is a licensed distributor as contemplated in this section.

55 A licensed distributor of fuel ("*LDF*") is defined in section 64F of the Act as follows:

*"licensed distributor" means any person who—*

*(a) is licensed in accordance with the provision of section 60 and this section;*

*(b) obtains at any place in the Republic for delivery to a purchaser in any other country of the common customs area for consumption in such country or for export (including supply as ships' or aircraft stores), fuel, which has been or is deemed to have been entered for payment of excise duty and fuel levy, from stocks of a licensee of a customs and excise manufacturing warehouse; and*

*(c) is entitled to a refund of duty in terms of any provision of Schedule No. 6 in respect of such fuel which has been duly delivered or exported as contemplated in paragraph (b)."*

56 Rule 64F.06 provides as follows:

*"64F.06(a) The procedures and other requirements prescribed in rule 19A4.04 which regulate the removal of fuel levy goods to a BLNS country or when exported shall apply mutatis mutandis in respect of fuel so removed to any other country in the common customs area or so exported as contemplated in section 64F and these rules.*

*...*

*(d) Any load of fuel obtained from the licensee of a customs and excise manufacturing warehouse must be wholly and directly removed for delivery to a BLNS country or exported, as the case may be, in order to be considered for a refund of duty."*

Emphasis added.

57 It is clear from the above provisions that the following requirements must be complied with before the fuel qualify for refund under rebate item 671.11:

57.1 The fuel must have been manufactured in South Africa;

57.2 The fuel must be obtained from the stocks of a licensee of a manufacturing warehouse;

57.3 The fuel must have been entered or deemed to have been entered for home consumption with payment of duty by a licensee of a manufacturing warehouse from whom it was obtained;

57.4 Only a licensee of such manufacturing warehouse or a licensed distributor as contemplated in section 64F may remove fuel levy goods to any BLNS country;

57.5 When any fuel levy goods are transported by road for export or removal to BLNS such removal shall only be by a licensed remover of goods in bond as contemplated in section 64D unless the goods are carried by the licensee or licensed distributor using own transport; and

57.6 Any load of fuel obtained from the licensee of a customs and excise manufacturing warehouse must be wholly and directly removed for delivery in any other country in the common customs area by the licensed distributor.

*Determinations by the Commissioner and Appeal*

58 Section 47(9)(a)(i)(bb) of the Act authorises the Commissioner to make tariff determinations, it reads as follows:

> *"The Commissioner may in writing determine—*
>
> *(aa) [...]*
>
> *(bb) whether goods so classified under such tariff headings, tariff sub-headings, tariff items or other items of Schedule No. 3, 4, 5 or 6 may be used, manufactured, exported or otherwise disposed of or have been used, manufactured, exported or otherwise disposed of as provided in such tariff items or other items specified in any such Schedule."*
>
> Emphasis added.

59 Section 47(9)(e) of the Act provides for appeals against tariff determinations. It reads as follows:

> *"An appeal against any such determination shall lie to the division of the High Court of South Africa having jurisdiction to hear appeals in the area wherein the determination was made, or the goods in question were entered for home consumption."*

60 The power of the Commissioner to make a determination and a corresponding right of appeal to the High Court that is provided for in section 47(9) of the Act, in respect of a tariff heading, is repeated in substantially identical terms in section 49(7) in respect of the origin of goods, in section 65 (4) and (6) in respect of the transaction value of imported goods and in 69(3) and (5)

in respect of the value of goods manufactured in the Republic for excise purposes.

**WIDE APPEAL ISSUE**

61 There are three complete answers to the contention based on the wide appeal and the Commissioner' reliance on "new grounds".

*Tholo SA bore the onus to prove compliance with all the prerequisites*

62 In order to qualify for refund, Tholo SA had to establish that it had complied all the prerequisites for refund of fuel levies. As the SCA judgment emphasised in paragraph [50] of its judgment, each one of the requirements must be complied with.

63 The consequence of this is that, regardless of the Commissioner' reliance on the "new grounds", Tholo SA was always saddled with the onus of proving that each of those prerequisites for a refund had been satisfied.

64 Accordingly, the case that Tholo SA had to make out was not affected by the so-called "new grounds".

65 Therefore, the alleged violation of Tholo SA's constitutional rights is misconceived. So are the arguments based on the principles of *ultra vires* and *functus officio*.

*The "new grounds" were not new at all*

66 In any event, the "new grounds" were not new at all. They were already encompassed by the grounds for determination spelt out in the determination letter. The determination letter stated that:

66.1 a refund constitutes a tariff determination, therefore compliance with all the requirements for rebate item is a prerequisite for a refund;

66.2 the refund claims did not comply with the prerequisites for refunds prescribed in sections 75, 76, 64F and 19A read with the rules thereto; and

66.3 on the basis of non-compliance with the tariff item, the refund claims was disallowed.

67 Therefore, when the Commissioner delineated the specific requirements that it contended had not been complied with in its response to the section 96 notice, the Commissioner was merely particularising the non-compliances and not raising new ones.

*Wide appeal – determination vs grounds for determination*

68 Even if the particularised grounds were new grounds, because a tariff appeal is a wide appeal the Commissioner was entitled to rely on new grounds to support the tariff determination, as long as those new grounds were pleaded.

69 As set out above, Tholo SA confuses the "determination" with the grounds for the "determination". In the wide appeal, the Commissioner merely defended the "determination" but did not make a new "determination".

**NO ARGUABLE POINT, NO PROSPECTS OF SUCCESS**

70 Save for the export permit requirement, Tholo SA does not dispute that all the requirements, listed in paragraph [49] of the SCA judgment, must be complied with to qualify for refund.

*Manufactured in South Africa*

71 It is common cause that the consignments of fuel in question were obtained from the Petro SA depots in Bloemfontein, Tzaneen and Total's depot in Alrode. It is also admitted by Tholo SA that those depots are not licensed as manufacturing warehouses or storage warehouses.

72 Tholo SA's contention is simply that because the entities that own and operate those depots are licensees of manufacturing warehouses and storage warehouses, the consignments still qualify for refund.

73 It is an express requirement of section 75(1)(d) of the Act that the fuel levy goods are manufactured in South Africa.

74 Generally, imported duty-paid goods entered for home consumption that are thereafter exported, do not qualify for refunds of the duties that have been paid. Goods that are imported for purposes of export are dealt with just like other goods, no duties and levies are paid provided the exports are properly acquitted. Goods that are intended to be used in the Republic only escape duty that is otherwise payable if imported under a rebate item and subject to the control regime of the Commissioner.

75 The fact that the relevant consignments of fuel were obtained from depots that are not licensed as manufacturing warehouses or storage warehouses means that such fuel was obtained from non-controlled environment. These goods are duty paid goods that are entered for home consumption. Having either escaped or not having been subject to a control regime that is licensed by the Commissioner, there is no way of showing or satisfying the Commissioner and the High Court that such fuel was manufactured in South Africa, as opposed to having been imported by BP. Once entered for home consumption, these goods leave the control regime of the Commissioner which is controlled by licensing.

76 In the absence of proof that the fuel in question was manufactured in South Africa, Tholo SA has failed to discharge

the onus it bears to prove that the fuel was manufactured in South Africa.

77 This means that Tholo SA has failed to bring itself within the provisions of section 75(1)(d) of the Act and, on this ground alone, the appeal falls to be dismissed.

78 Accordingly, the SCA was correct in paragraph [69] when it held that:

> *"The appellant's claim that it was established that the fuel was locally manufactured, is unsustainable on the evidence. None of the depots from which the fuel was obtained is registered with the Commissioner as a VM."*

*Not obtained from the stocks of a licensed warehouse*

79 It is common cause that the storage tanks from which the fuel was removed were unlicensed fuel depots. The fuel was purchased from Petro SA, who in turn had purchased same from BP.

80 Rebate item 671.11 provides for a rebate in respect of fuel levy goods which is obtained from stocks of a licensee of a manufacturing warehouse.

81 If the fuel had been manufactured in South Africa by BP, at best for Tholo SA, the fuel was first removed from the stocks of BP at

its licensed manufacturing warehouse and transported to Petro SA's unlicensed fuel depots.

82 As the fuel in question was obtained from depots that are not licensed as warehouses, such fuel was not obtained from the stocks of a licensee of a manufacturing warehouse.

83 Tholo SA contends that as long as the person from whom the fuel was acquired is a licensee of manufacturing warehouse, the fuel would qualify for refund, it does not matter whether the fuel was obtained from premises that are not licensed as a manufacturing warehouse. This contention is flawed:

83.1 It overlooks the fact that what is licensed is the premises hence the Act is at pains to specify that the licensee of a manufacturing warehouse.

83.2 It also ignores the need for fuel to be sourced from a strictly-controlled manufacturing warehouse.

83.3 It is inconsistent with the requirement that fuel must be manufactured in South Africa. Fuel from uncontrolled premises, even if those premises and fuel are owned by a person who also operates a licensed manufacturing warehouse, cannot be shown to be manufactured in South Africa.

83.4 Item 671.11 requires the fuel to obtained from stocks of such licensee as contemplated in section 19A and its rules. Section 19A deals with licensed warehouses and the rules under section 19A – rule 19A and its sub-rules deal with the procedure for removal from a licensed warehouse – there is no provision in the rules governing the obtaining of fuel, removing or exporting from unlicensed premises. The premises thus have to be licensed premises in order to comply with any provision of Rule 19A.

83.5 The contention rests on the assumption that Petro SA is a licensee of a manufacturing warehouse (Mossgas) and that somehow its status is the owner and operator of a refinery converting natural gas to fuel levy products becomes relevant in a completely different aspect of its business namely that of a merchant buying and selling of duty paid fuel levy goods, as opposed to a manufacturer and refiner for which it has premises that are licensed. In the context of the meaning of licensee as contended above, stocks of a licensee cannot included other stocks that were previously in BP's licensed warehouse and then removed to other premises, duty paid and no longer relating to the activities conducted at or in respect of the licensed warehouse, merely because Petro SA is a licensee of a

warehouse that is a manufacturing facility at some other place.

84 Accordingly, the SCA in *The Commissioner SARS v Tunica Trading, 59 (Pty) Ltd* (1252/2022) [2024] ZASCA 115 (24 July 2024) was correct when it held that:

> *"[76] What this shows, is that the purposes of the Act in securing goods and exercising physical control over goods stored in and removed to and from a customs and excise warehouse, would be subverted if those goods may be obtained from an intermediary. For these reasons, s 64F(1)(b), the Rules and the items of Schedule 6 require that fuel be obtained from a controlled environment."*

85 On this basis, the following finding in the SCA judgment is unassailable:

> *"[58] The appellant failed to establish that the fuel was obtained from stocks of the licensee at a licensed VM, as the Commissioner rightly determined. The fuel was removed from PetroSA's depots in Bloemfontein and Tzaneen, and from the depot of TotalEnergies in Alrode. The undisputed evidence is that none of these depots is a licensed manufacturing warehouse. Solely on this ground, the appeal in terms of s 47(9)(e) of the Act was correctly dismissed."*

86 On this basis, the relevant fuel consignments do not qualify for refund because they were not obtained from the stocks of a licensee of a manufacturing warehouse.

*Not wholly and Directly Removed*

87 If the fuel was manufactured in South Africa, at best for Tholo SA, the fuel was removed from BP's licensed warehouse to the depots and storage tanks from which it was then collected. This is not a direct removal and thus non-compliance with the provisions of rule 64F.06(d).

88 Note 12(b)(iii)(aa) provides that any load of fuel obtained from the licensee of a customs and excise manufacturing warehouse must be wholly and directly removed for delivery in any other country in the common customs area.

89 Therefore, the fuel did not comply with this requirement for refund and therefore does not qualify for refund.

90 It follows that the SCA judgment is correct in its finding that:

> *"[70] Assuming that the fuel was manufactured in South Africa (which was not established), it was first removed from a manufacturing warehouse for home consumption to the depots in Bloemfontein, Tzaneen and Alrode. Thereafter it was removed from those depots to Lesotho.*
>
> *[71] This is not a direct removal as contemplated in rule 64F.06(d), which states that the fuel must be wholly and directly removed for delivery to a BLNS country, in order to be considered for a refund of duty. The movement and storage of fuel in storage tanks, prior to export (or removal), does not comply with the requirement that the fuel be 'wholly and directly' exported.20 Similarly, Note 12(b)(iii)(aa) provides that any load*

*of fuel obtained from the licensee of a VM must be wholly and directly removed for delivery in any other country in the common customs area. For this reason also, the appellant did not qualify for a refund of the fuel and RAF levy."*

*Not transported by LDF using own transport*

91 Note 12(b)(ii)(aa), read with rule 64F.06 (b) and rule 19A4.04(a)(v), prescribes that when transported for export or removal to BLNS countries the fuel must be carried by an LDF using own transport.

92 Since it is common cause that the diesel was transported by Tholo Lesotho using its own tankers, this requirement was not complied with and the refund claims do not qualify for refund.

*No Export Permit*

93 The rules require that when exported, the fuel must be duly entered for export on form SAD500. Section 40 requires, for due entry, that there be disclosure of the conditions permitting the export and thus the export licence, if applicable.

94 It is common cause that Tholo SA did not have an export licence for fuel.

95 Tholo SA contends that the export licence is not required because the fuel was not exported but rather "removed". In the context of the rebate items in the Act, a terminological distinction is drawn between sending or causing goods to be sent from South Africa to the BLNS or later termed BLNE countries as

opposed to other countries. In respect of the former, the terms remove and removed are used, whereas in respect of the latter the terms export and exported are used.

96 Both are "exports" in the ordinary sense of the word. The distinction drawn in the Act is relevant. This is because in respect of excise duty only exports beyond the customs union qualify for refund of excise duty which is common across the union. An export within the customs union, although not qualifying for a refund of excise duty, qualifies for a refund of the fuel levies which are applicable in the Republic, but not necessarily so in other BLNE countries.

97 Whether a permit is required is not determined with reference to the Act but rather the International Trade Administration Act ("ITA"). The meaning of export in the ITA, the context in which the Ministerial prescription was made, relates only to goods being taken or sent from the Republic to a country or territory outside the Republic (that is to say "export" is used in its ordinary meaning).

98 There is no scope in the ITA for an interpretation that a country or territory outside the Republic is not outside the Republic because it is a member state of the customs union. The terminological distinction between export and remove is only applicable in the item because of the different duty consequences. Such a distinction has no place in the ITA which restricts and regulates the removal or export of goods outside of

the Republic without distinguishing one export from another with reference to the country of destination.

99 An export permit was required, which Tholo SA did not have. The goods were unlawfully exported under the ITA and its regulations and therefore there was no due entry and non compliance with the tariff item.

**CONCLUSION**

100 It is submitted that the intended appeal does not engage the jurisdiction of this Court for the following reasons:

100.1 The alleged constitutional matter does not arise.

100.2 The proposed grounds of appeal do not raise arguable points of law of general public importance and has no prospects of success.

101 On this basis, it is submitted that the application for leave to appeal falls to be dismissed with costs including the costs of two counsel.

DATED AT PRETORIA ON 11 SEPTEMBER 2024

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