IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

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

In the matter between:

THOLO ENERGY SERVICES CC Appellant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

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RESPONDENT'S WRITTEN ARGUMENT

CONTENTS

INTRODUCTION

1 The primary premise, upon which this application for leave to appeal is prosecuted, is the proposition that the jurisdiction of the High Court in considering an appeal in terms of section 47(9)(e) of the Customs and Excise Act, 1964 ("the Act"), admitted by the appellant as a wide appeal in the first sense referred to in Tikly[1], to determine the correctness of the determination, is nevertheless to be exercised within the limits of an administrative review, an appeal in the third sense referred to in Tikly, a limited rehearing confined to the decision-making process without regard to the correctness of the decision nor information, evidence or reasons not present at the time of forming part of the original determination.

2 A secondary premise is the proposition that where the determination was made pursuant to a flawed process, not only should the determination be set aside but a new determination should be made on the merits, in the appellant's favour, without regard to information, evidence or reasons not present at the time of forming part of the original determination.

3 The first proposition is not correct. The absurdity and internal contradiction is evident from its mere expression. Further the first proposition is contrary to the recent decision of this Court in *Commissioner for the South African Revenue Service and Another v Richards Bay Coal Terminal (Pty) Ltd*[2] in which the nature of a wide appeal in section 47(9)(e) and its contrast with an administrative review scrutinising the decision-making process was extensively canvassed.

4 The second proposition is not correct, not only because the first proposition is incorrect, but even if the context of a review limited to the decision-making process.

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[1] *Tikly andOthers v Johannes NO and Others 1963 (2) SA 588 (T) at 590G - 591A.*

[2] [2025] ZACC 3

The ordinary consequence of the setting aside of an invalid action is to remit it to the decision-maker for reconsideration[3]. Upon a reconsideration by the original decision-maker, and the court, in exceptional cases[4] the court, there is no reason in principle or logic why information, evidence or reasons not present at the time of forming part of the original determination should not be considered at that stage.

5 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, the SCA and is the issue in this Appeal.

6 The determination of this issue in the appellant's ("Tholo SA") favour is an essential requirement for the appellant to be entitled to a lawful claim for a refund of the fuel levy and Road Accident Fund levy ("fuel levies") in terms of section 75(1)(d) of the Act.

7 A proper appreciation of the determination which was the subject matter of an appeal to the High Court in terms of section 47(9)(e) of the Act is necessary in order to determine the question before the High Court, and the nature of the appeal process in the exercise of the appellate jurisdiction.

8 The appellant made claims for refunds, in terms of section 75(1)(d) of the Act on the basis that the relevant consignments of fuel were exported, as provided in rebate item 671.11. In considering the claims, the Commissioner made a determination that the relevant consignments of fuel were not exported, as provided in rebate item.

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[3] *National Energy Regulator of South Africa and Another v PG Group (Pty) Ltd and Others* 2020 (1) SA 450 (CC)

[4] Section 8(1)(c)(ii)(aa) of the Promotion of Administration of Justice Act, 2000

9 In the exercise of its appellate jurisdiction, High Court was required to consider the correctness of this determination. In addressing this enquiry, the High Court was required to conduct a complete rehearing of the merits of the matter with or without additional evidence or information as provided by the parties and make its own determination.

10 Of necessity, this requires of the High Court not to limit itself to a reconsideration of only the correctness of the grounds upon which the Commissioner made the determination, but to consider all the facts and evidence before the High Court to determine itself where the relevant consignments of fuel were exported, as provided in rebate item 671.11.

11 The provisions of rebate item 671.11 incorporated by reference requirements provided by the notes to the item, section 19A of the Act and the rules as well as the provisions of section 75(1)(d) of the Act, as the context in which the item has relevance.

12 The Commissioner contends that the fuel was not exported as provided in the rebate item on seven grounds:

12.1 there is no evidence that proves that the goods were manufactured in South Africa;

12.2 the fuel was not obtained from the stocks of a licensee of a licensed customs and excise manufacturing warehouse;

12.3 the fuel was not wholly and directly removed for delivery to Lesotho;

12.4 the fuel was not transported by a licensed remover of goods;

12.5 the fuel was not in fact removed by Tholo SA, a licensed distributor;

12.6 Tholo SA did not pay the debt in respect of which the refund was sought to be claimed; and

12.7 the fuel was unlawfully exported from South Africa to Lesotho without a necessary export permit.

13 The essence of the appellant's complaint is that the Commissioner's grounds of opposition to the appeal, which were articulated in the response to the notice in terms of section 96 of the Act, and were persisted with in the answering affidavit, more extensive than the grounds and reasons for the original determination. Consistent with the two contentions upon which the appellant prosecutes this appeal is the contentions that in considering the statutory wide appeal, the High Court ought to have disregarded the evidence and facts supporting these grounds, in making a determination in coming to a conclusion that the appellant had exported the goods as provided in rebate item 671.11.

14 The respondent's contention is that given the function of the High Court in the wide appeal to conduct a fresh rehearing, its jurisdiction should not be limited to the record and reasons that served before the original decision-maker. Such a limitation is applicable when examining only the decision-making process, in circumstances where if the decision is set aside, the matter will be reconsidered and at that stage evidence, information and reasons not present at the time of or included in the first decision, may legitimately be considered.

RELEVANT FACTUAL SUMMARY

15 Tholo SA is a close corporation incorporated in South Africa by Mr Moroahae, its sole member.[5]

16 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.[6]

17 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*").[7]

18 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.

19 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],[8] the denial is not (and could not be) substantiated with any evidence.

[5] Core bundle, p 89 para 30.

[6] Core bundle, p 89 para 31.

[7] Core bundle, p 89 para 32.

[8] Core bundle, p 145 para 28.

20 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:

20.1 "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;

20.2 Tax invoices issued by Tholo SA to Tholo Lesotho are:[9]

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

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

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

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

21 There are more facts that show that there is no substance in Tholo SA's purported involvement in the purchase of fuel from South Africa and its export and removal to Lesotho. For example:

21.1 Although the founding affidavit[10] and the customs declaration documents declare that the relevant fuel was removed to Lesotho by Tholo SA as a

[9] Record, Vol 2, p 209.

[10] Core bundle, p 41 para 21.3.

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.[11]

21.2 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.[12] This goes to show that Petro SA's invoice to Tholo SA was nothing more than a sham.

21.3 Notwithstanding its allegations in the founding affidavit that Tholo SA's customers in Lesotho are its own customers,[13] when it was pointed out in the answering affidavit that those customers are in fact Tholo Lesotho's customers,[14] Tholo SA could not dispute that fact.[15]

22 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.[16] It appears that the origin of the fuel is that it was sold by BP to Petro SA.[17]

23 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.

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[11] Core bundle, p 144 para 27.2.

[12] Core bundle, p 41 para 21.2.

[13] Core bundle, p 40 para 18.

[14] Core bundle, p 89 para 32.

[15] The replying affidavit does not address this allegation.

[16] Core bundle, p 139 paras 22.2 – 22.4.

[17] Core bundle, p 25 paras d – e; Record, Vol 1, p 109 para 4.

24 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.

25 On 31 July 2017, Tholo SA then prosecuted an internal administrative appeal.[18]

26 On 10 December 2018, the committee hearing the internal administrative appeal dismissed the appeal in full.[19]

27 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.[20]

28 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.[21]

THE LEGAL PRINCIPLES

Determinations by the Commissioner and Wide Appeal

29 Section 47(9)(a) empowers the Commissioner to make determinations that fall into two broad categories. Section 47(9)(d) empowers the Commissioner to amend or withdraw and make new determinations. The first broad category under section 47(9)(a), is the determination of tariff headings, subheadings or items of any schedule under which goods, either imported or manufactured or exported are to be classified, section 47(9)(a)(i)(aa). The second is the determination whether goods so classified

[18] Record, Vol 1, p 108.

[19] Record, Vol 1, pp 137 – 138.

[20] Record, Vol 1, pp 143 – 162.

[21] Core bundle, pp 6 – 21.

have been dealt with in terms of such tariff items or other items specified in any schedule, section 47(9)(a)(i)(bb).

30 Section 47(9)(e) of the Act provides for appeals against tariff determinations 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.

31 This appeal concerns a determination made in terms of section 47(9)(a)(i)(bb) of the Act authorises the Commissioner to determine in writing *"whether goods . . . have been . . .exported as provided in . . .other items specified in any such Schedule.*"

32 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.

33 In *Pahad Shipping CC v Commissioner, SARS*,[22] the SCA was concerned with an appeal against the judgment of the High Court on appeal to it against a value determination made by the Commissioner in terms of section 65. The court held referred to the three possible meanings to the word "appeal" formulated by Trollop J in *Tikly*. The SCA held that in this context the statutory appeal was an appeal in the wide sense, a complete rehearing with or without additional evidence or information.

34 Importantly, there were three reasons for this finding.

[22] *Pahad Shipping CC v Commissioner, SARS* [2002] 2 All SA 246 (SCA) at para [13].

34.1 The Act does not require of the Commissioner to hear evidence, to give any reasons for his determination or to keep any record of proceedings, which militate completely against the 'appeal' being an appeal in the strict sense.

34.2 It is implicit that the determination by the Commissioner ceases to be in force from the date of a final judgment by the High Court, the SCA or this Court that the court must itself make a determination upon appeal to it.

34.3 There is no provision for a hearing before the determination by the Commissioner the Legislature must, have intended 'appeal' to be an appeal in the wide sense.

35 This reasoning and conclusion of the SCA in *Pahad Shipping* applies equally to appeals against tariff appeals, such as in the present case. This much is accepted in Tholo SA's heads of argument,[23] but which argues that there must be an interpretation of a narrow appeal in terms of constitutional prescripts.[24]

36 The SCA confirmed that the statutory appeal is an appeal in the wide sense, involving a complete rehearing and determination of the merits and it is open to the Commissioner to defend the determination on any legitimate ground.[25]

37 As a wide appeal, it is a hearing *de novo* where the court conducts a complete investigation of the merits of the matter, admitting new evidence and information in order to make a fresh determination of the issues.

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[23] At p 21 para 47.1.

[24] At pp 22 – 23 para 47.5

[25] Commissioner, South African Revenue Service v Levi Strauss South Africa (Pty) Ltd 2021 (4) SA 76 (SCA) at para 26.

38 Not only are courts permitted to admit new evidence and new information in a section 47(9)(e) appeal, they rely on the parties' assistance by producing new evidence and information in those proceedings to assist them to arrive at the correct decision. In *Commissioner, SARS v Toneleria Nacional RSA (Pty) Ltd,*[26] the SCA expressed its frustration at the parties' failure to provide the court with additional new evidence and information on the products that had to be classified in an appeal against tariff determination and the industry in which they are produced, forcing the court to resort to the internet to supplement the limited evidence at its disposal.

Control as a Feature of the Act

39 In terms of section 2 of the Customs and Excise Act 91 of 1964 ("*the Act*"), the Commissioner is charged with the administration of the Act and his duties, function and powers are as set out in the Act.

40 The preamble to the Act records as part of its objects *the prohibition and control of the importation, export, manufacture or use of certain goods*.

41 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. 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.

42 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

[26] Commissioner, SARS *v Toneleria Nacional RSA (Pty) Ltd*, 2021 (5) SA 68 (SCA), at para [29]

exercise control over the goods being imported or exported as well as the levying of customs duty.

43 In *Gaertner and Others v Minister of Finance & Others*,[27] Rogers J, as he then was, devoted parts of the judgment to an explanation of the mechanics of the Act, making the following points.

43.1 The Act contains various provisions aimed at controlling the movement of imported and excisable goods until any relevant duty has been paid. The reasons for this are not hard to discern.

43.2 The duty payable on goods is determined with reference to their value, character and quantity. SARS may thus wish to examine the goods to see that they accord with what it has been told.

43.3 Once goods are beyond SARS' reach it may prove difficult to recover the duty from the liable party. An important feature of SARS' control is that goods may not be moved from a particular controlled environment until 'due entry' has been made of the goods, even though the goods might only be moving from one controlled facility to another. There is a limited number of forms of entry permitted by the Act. The one which gives rise to the payment of customs duty or excise duty (as the case may be) is entry of goods for home consumption.

43.4 Entry refers to the administrative process in which prescribed forms and documentation are submitted to SARS (together with payment of duty where applicable) before the goods may be moved from the controlled environment.

[27] Gaertner and Others v Minister of Finance & Others 2013 (4) SA 87 (WCC) at paras [17] to [25] and 49.

43.5 In the case of excisable goods, the first element of control is that such goods may be manufactured only in a customs and excise manufacturing warehouse.

43.6 Excisable goods (and fuel levy goods) may only be stored in a storage warehouse specifically licensed to store such goods, such warehouses being subject to additional regulation over and above that applicable to ordinary storage warehouses.

43.7 The whole policy of the Customs Act, is that from the time of importation until the time of paying duty, customs shall not lose control of the articles imported. Imported goods shall be subject to the control of customs from the time of importation until delivery for home consumption or exportation. The object of that provision, if it were necessary to give any reasons for its enactment, is obvious; if once goods go into home consumption, that is, into circulation, it becomes almost impossible to trace them. The only security the customs authorities could have in such a case for the payment of duty would be in most cases the personal security of the importer. Therefore it is, if the Act is to be effective, that all through the dealings with the goods, from the time they are first imported until duty is paid, they must be kept under customs control.

44 Section 40 lays down various requirements for a valid entry and deems the absence of valid entry to be without “due entry”. The goods be properly described by the denomination and with the characters, tariff heading and item numbers and circumstances according to which they are permitted to be imported or exported.

Fuel is a Controlled Product

45 Fuel, similar to alcohol and tobacco, is a product that is highly regulated by the Act.

46 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.[28]

47 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.

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

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

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

48.3 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;

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

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

[28] See for example sections 19, 19A and 64F and the rules thereto.

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

49 Section 6 of the International Trade Administration Act, 2002 ("ITA") empowers the Minister responsible for trade and industry to prescribe that certain kinds of goods may not be exported from the Republic except under the authority of a permit..

50 Section 1 of ITA defines export as to take or send goods or cause them to be sent or taken from the Republic to a country or territory outside the Republic. In this context, the Republic is clearly the national territory of South Africa. The Republic is also in this context distinct from the Common Customs Area, which is the combined areas of the member states of the Southern African Customs Union.

51 In terms of Notice R92 of Government Gazette 35007 of 10 February 2012, the Minister prescribed that certain goods, described in schedules 1, 2 and 3 of the Notice, may not be exported except by virtue of an export permit issued in terms of section 6 of Act, 2002. Fuel levy goods including inter-alia petrol and diesel are included in schedule 1.

Premises are Licensed as Warehouses

52 Section 19 provides that the Commissioner may license warehouses ("*customs and excise warehouses*") approved by him for storage of dutiable imported or dutiable locally-produced goods ("*customs and excise storage warehouses*", "*storage warehouse*" or "*SOS*") or for the manufacture of dutiable goods from imported or locally-produced materials ("*customs and excise manufacturing warehouses*", "*manufacturing warehouse*" or "*VM*").

53 It is the warehouses or premises that are licensed, not persons, although the person for whom the premises are so licensed is referred to as the "licensee" and incurs the obligations to comply with the license requirements.

54 There is difference between a *manufacturing* warehouse and *storage* warehouse. Although the same person may own and operate both types of warehouses, the activities that are licensed and the compliance obligations imposed differ.

55 In this context, it is submitted that reference to licensee is a reference to the person who applied for and obtained a licence for particular premises and as such is a reference to such person that is limited to the conduct of activities and business at and in respect of the warehouse.

56 Thus the status enjoyed as a licensee is in respect of and tied to particular premises that are licensed as a customs and excise warehouse. It follows that the privileges and obligations of a licensee do not extend to business activities of the person concerned conducted at other premises or activities unconnected with the licensed premises.

Manufacturing, Storage and Removal of Fuel

57 Section 19A confers upon the Commissioner powers to prescribe rules regulating activities pertaining to excise and fuel levy goods. The Commissioner may by rule, in respect of any excisable goods prescribe inter alia any procedures or requirements or documents relating to the entry and removal of goods from and to any such customs and excise warehouse or for export or for use under rebate of duty.

58 Rule 19A4 regulates the removal of fuel levy goods from a manufacturing warehouse. It provides that:

> *"**19A4.04** Procedures relating to goods removed from a customs and excise warehouse*

(a)(i) Any fuel levy goods removed for any purpose by the licensee of a customs and excise warehouse must be removed from stocks which have been entered or are deemed to have been entered for home consumption in accordance with the provisions of these rules, hereafter referred to as "duty paid stock".

(ii) Where fuel levy goods are removed for any purpose specified in these rules requiring compliance with a customs and excise procedure either in respect of the removal, movement or receipt thereof, such goods may only be so removed from a storage tank owned by or under the control of a licensee of a customs and excise manufacturing or special customs and excise storage warehouse.

(iii) Only a licensee of such manufacturing warehouse or the special customs and excise storage warehouse contemplated in rule 19A4.01(b)(ii) or a licensed distributor as contemplated in section 64F may export fuel levy goods.

(iv) 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.

(v) When any fuel levy goods are transported by road for—

(aa) export;

(bb) removal to a BLNS country;

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."

59 In terms of rule 19A4.04(a)(iv) it is only a licensee of a manufacturing warehouse or a licensed distributor that may remove fuel to any BLNS country.

60 Removal of fuel levy goods for any purpose specified in the rules which requires compliance with a customs and excise procedure, such goods may only be so removed from a storage tank owned by or under the control of a licensee of a manufacturing or storage warehouse.

61 Rule 19A4.04(b)(i)(aa) requires that where fuel levy goods are exported, entry must be made on form SAD500, which is the export entry declaration. Rule 19A4.04(b)(ii) provides that fuel levy goods are exported by road forms SAD500 and SAD502 must be completed at the place of departure and that duly completed copies of these forms must accompany an application for a refund of duty by the licensed distributor.

62 Rule 19A4.04(c)(i) provides that the export procedure applies with the necessary changes being made for removals of fuel levy goods to BLNS country.

Claiming a Refund – the Act

63 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 any excisable goods or 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 time 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 or any person indicated in the notes to the said Schedule No. 6:*
>
> *Provided that any rebate, drawback or refund of Road Accident Fund levy as contemplated in paragraph (b), (c) or (d), shall only be granted as expressly provided in Schedule No. 4, 5 or 6 in respect of any item of such Schedule."*

64 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.

Licensed Distributor of Fuel

65 A licensed distributor 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)."*

66 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.*
>
> *(b) Unless the licensed distributor uses own transport, such fuel, if wholly or partly transported by road, must be carried by a licensed remover of goods in bond contemplated in section 64D.*
>
> *(c) The number and date of the invoice issued by the licensee of the customs and excise manufacturing warehouse from whom the licensed distributor obtained the goods for such removal or export must be reflected on the form SAD 500.*
>
> *(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.

The Rebate Item 671.11

67 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 reads as follows:

> *"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."*

68 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."*

69 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) The refund provided for in this item is subject to the provisions of section 75(11A).

(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."

Requirements for fuel levy refund

70 The following requirements must be complied with before the fuel qualifies for refund under rebate item 671.11:

70.1 The fuel must have been manufactured in South Africa;[29]

70.2 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; [30]

[29] Section 75(1)(d) of the Act.

[30] Rebate item 671.11, Note 12(b)(iii)(aa) of the general notes to Schedule 6 Part 3, paragraph (b) of the definition of "licensed distributor" in section 64F; rule 64F.06(d).

70.3 The fuel must be obtained from the stocks of a licensee of a manufacturing warehouse;[31]

70.4 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.[32]

70.5 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;[33]

70.6 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[34]

APPLICATION OF THE PRINCIPLES TO THE FACTS

New Grounds – Determination v Grounds

71 After it was pointed out in the answering affidavit that the Commissioner' response to the section 96 notice is not a determination in its own right but merely forewarned Tholo SA of the Commissioner intended grounds for opposing the appeal, Tholo SA has now abandoned the relief sought in prayer 1 of the notice of motion.

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[31] Rebate item 671.11, Note 12(b)(iii)(aa) of the general notes to Schedule 6 Part 3, paragraph (b) of the definition of "licensed distributor" in section 64F; rule 64F.06(d).

[32] Note 12(b)(iii)(aa), Rule 64F.06(d).

[33] Rule 19A4.04(a)(iv).

[34] Rule 19A4.04(a)(iv); Rule 64F.06(b).

72 However, relying on the *functus officio* doctrine, Tholo SA now contends that the Commissioner is not permitted to rely on new grounds to oppose the appeal or to justify the determination because the appeal is an appeal in a strict sense.[35]

73 This contention is unsustainable for two reasons. First doctrine *functus offico* is not applicable and second, the appeal is a wide appeal.

74 The *functus officio* doctrine applies to decisions and actions; not reasons. The Commissioner did not revisit or alter the determination (i.e. decision), it merely cited further reasons why the determination is unassailable.

75 Furthermore and in any event, the provisions of section 47(9)(d) expressly provide that with the exception of the determination being dealt with in Chapter XA of the Act, the Commissioner is empowered to amend any determination, or to withdraw and make a new determination, if it was made in error, or on any other good cause shown. Accordingly, the making of the determination under section 47(9) can never be subject to the doctrine of *functus officio* as the Commissioner is at large to revisit any such determination.

76 The contention that this is an appeal in the strict sense is contrary to the decisions of the SCA in *Pahad Shipping* and *Levi Straus.* The reliance on *Levi Straus* for the proposition that the Commissioner cannot defend the determination on grounds other than those advanced originally to justify the determination is simply incorrect. The relevant passage in *Levi Straus* expressly Commissioner to defend the determination on any legitimate ground.

77 In opposing the appeal, the Commissioner was not making a new determination. Once the appeal was initiated in terms the provisions of section 47(9)(e), it was only the

[35] Core bundle, p 133 paras 11 – 12; appellant's heads of argument, pp 12 – 19 paras 22 – 40.

High Court that makes a determination in those proceedings in the exercise of its appellate jurisdiction, the SCA or this Court on appeal to it. In the appeal proceedings, the Commissioner only makes representations, on the evidence now before court, as to the correctness of the determination that the goods were not exported as provided for in the tariff item.

78 In the exercise of its appellate jurisdiction, it is ultimately the High Court, the SCA or this Court that has to determine that question and must do so on the evidence before court.

79 What the court is seised of is the factual issue whether or not the fuel was exported as provided for in the item in the provisions of the Act.

80 Tholo SA conflates the determination with the original reasons. It is trite that even in a strict appeal, it is the decision that is appealed not the reasons. Tholo SA seeks a consideration only of those grounds originally advanced as justification for the determination and requests that this Court find in its favour on those grounds and that this Court should necessarily make a new determination that the goods were in fact exported as provided in the tariff item, notwithstanding that there is evidence before court that the goods were in fact not so exported, because these grounds were not originally relied upon by the Commissioner.

81 Even if the Commissioner were functus officio, neither the High Court, the SCA nor this Court is functus officio in the appeal. This is particularly so given that as observed in *Pahad Shipping*, the Commissioner is not required to hear evidence, to give any reasons for his determination or to keep any record of proceedings, or afford a hearing prior to making the determination. The Court in the exercise of the statutory appellate jurisdiction must make a determination. That it can only do on the evidence is presented before it in the appeal.

82 It accordingly follows, that if the Commissioner's determination was the correct determination, even if it were made on the wrong grounds or for the wrong reasons, the Court could never make a different and therefor wrong determination that is inconsistent with the law and the facts.

Manufactured in South Africa

83 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.

84 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.

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

86 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.

87 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 court that such fuel was manufactured in South Africa, as opposed to having been imported. Once entered for home consumption, these goods leave the control regime of the Commissioner which is controlled by licensing.

88 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.

89 The SCA was therefore correct when it held that:

> *"[69] The contention that the origin of the fuel is irrelevant, is directly at odds with s 64F(l) and (3) of the Act, the Ru]es and the items of Schedule 6. Since the appellant did not obtain the fuel from a licensed warehouse, it failed to show that the fuel was manufactured in South Africa, as contemplated in s 75(1) of the Act. In fact, one of the reasons for the determination was non-compliance with the provisions of s 75(1). The appellant's claim that it was established that the fuel was locally manufactured, is unsustainable on the evidence. one of the depots from which the fuel was obtained is registered with SARS as a VM."*[36]

90 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.

Not Obtained from the Stocks of a Licensee

91 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.

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[36] Main bundle Vol 3, p 263

92 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.

93 If the fuel had been manufactured in South Africa by BP, at best for the applicant, the fuel was first removed from the stocks of BP at its licensed manufacturing warehouse and transported to Petro SA's unlicensed fuel depots.

94 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.

95 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:

95.1 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.

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

95.3 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.

95.4 Item 671.11 requires the fuel to be 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 have to be licensed premises in order to comply with any provision of rule 19A.

95.5 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.

96 In both the SCA Judgment[37] in this matter and in *Tunica Trading*,[38] the SCA was correct that section 64F(1) means that the fuel must be obtained from the stocks of a "licenced customs and excise manufacturing warehouse – not a depot nor unlicensed premises".

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

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[37] At para [56].

[38] *Commissioner: SARS v Tunica Trading 59 (Pty) Ltd* [2024] 4 All SA 1 (SCA) at paras [63] – [77].

Not wholly and Directly Removed

98 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).

99 Further, 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.

100 On this basis too, the fuel did not comply with the requirements for refund and therefore does not qualify for refund.

101 Again, the SCA Judgment was correct when it held that, assuming that the fuel was manufactured in South Africa, it was first removed from a manufacturing warehouse to a depots in Bloemfontein, Tzaneen and Alrode. Thereafter, it was removed from those depots to Lesotho. This does not constitute a direct removal from a licensed warehouse to Lesotho.[39]

Fuel Not Transported by a Licensed Remover of Goods

102 Note 12(b)(ii)(aa) requires an application for a refund to be subject to compliance with section 64F and its rules.

103 Rule 64F.06 (b) requires that unless the licensed distributor uses own transport, if the goods are wholly or partly transported by road they must be carried by a licensed remover of goods in bond contemplated in section 64D of the Act.

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39 At paras [70] and [71].

104 Since Tholo SA had no vehicles designed to transport fuel, it is clear that the transportwas not with its own vehicle.

105 It is common cause that the fuel in question was removed for delivery in Lesotho by Tholo Lesotho and not Tholo SA.[40]

106 Tholo Lesotho is not a licensed remover of goods in bond.

107 The provisions of rule 64F.06(b) have not been complied thus the provisions of note 12 have not been complied with and the goods were not exported as provided for in item 671.11.

Fuel Not Removed by a Licensed Distributor

108 Both item 671.11 and note 12(b)(iii)(aa) require that the fuel must be ***removed for delivery*** in any other country in the common customs area ***by the licensed distributor***,

109 Since Tholo Lesotho is not a licensed distributor of fuel the goods have not been exported as provided for in item 671.11.

Tholo SA Did Not Pay the Duty

110 Item 671.11 requires compliance with Note 12. Note 12(b)(i) provides that the refund provided for in the item is subject to the provisions of section 75(11A). Section 75(11A) requires proof of payment of the duty.

111 As Tholo Lesotho paid the purchase price, inclusive of the duty, Tholo SA did not comply with item 671.11.

[40] Core bundle, p 143 para 27.2

No Export Permit

112 As set out above, the rules require that the fuel be duly entered for export on form SAD500, and section 40 requires disclosure of the conditions permitting the export and thus the export licence, if applicable.

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

114 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, 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 term removed is used, whereas in respect of the latter the term export is used.

115 Both are "exports" in the ordinary sense of the word. The distinction is relevant because in respect of excise duty only exports beyond the customs union qualify for refund of excise duty which is common across the union, whereas an export within the 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.

116 Whether a permit is required is not determined with reference to the Act but rather the ITA. The definition of export in 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. 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.

117 An export permit was required, which Tholo SA did not have. The goods were unlawfully exported and as such, not as provided in the tariff item.

COSTS

118 This application and its intended appeal prosecuted purely for the appellant's commercial interests. The case involved the vindication of constitutional rights. As such, the appellant should not enjoy Biowatch[41] protection from costs.

PRAYER

119 The respondent will move for an order that the application for leave to appeal be dismissed with costs including the costs of two counsel, alternatively if the application for leave to appeal is granted, that the appeal be dismissed with costs, including costs of two counsel.

JOHN PETER SC
N K NXUMALO
Respondent's Counsel
Chambers, Sandton
15 April 2025

[41] *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC)