IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

(BRAAMFONTEIN)

CC Case no. _____

SCA Case no. 378/2023

HC Case no. 47405/2020

In the matter between:

THOLO ENERGY SERVICES CC Applicant

and

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

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I, the undersigned

THABISO MOROAHAE

hereby make oath and state as follows:

[A] INTRODUCTION

1. I am an adult businessman and the member's interest holder in the applicant close corporation, Tholo Energy Services CC ("**Tholo**"). I am duly authorised to depose to this affidavit on the Tholo's behalf.

2. The contents of this affidavit are within my personal knowledge unless otherwise stated and are true and correct. Where I make legal submission, I do so on the advice of the applicant's legal representatives.

3. While I am advised that Rule 19(3)(c) of the Rules of this Court requires Tholo to include substantial legal submissions in this affidavit, full legal argument will be advanced on Tholo's behalf at the appropriate time. I therefore limit Tholo's legal submissions to the extent necessary.

4. I depose to this affidavit in support of an application for leave to appeal as contemplated in Rule 19. Tholo seeks leave to appeal the judgment and order of the Supreme Court of Appeal ("**the SCA**") handed down on 06 August 2024. I attach a copy of the SCA's

judgment and order as annexure "**A**", and I attach a copy of the court *a quo* (i.e., the High Court) judgment and order delivered on 02 February 2023 as annexure "**B**".

5. The application is filed timeously, in circumstances where the *dies* for filing the application for leave to appeal expires on 28 August 2024 in accordance with Rule 19(2).

6. Pursuant to the SCA judgment and order, there is no parallel application or appeal process pending before another forum. This Court's consideration of the matter is therefore appropriate and, as I demonstrate more fully hereinbelow, this Court's consideration of the matter is undoubtedly required in the interests of justice.

[B] SYNOPSIS

7. This matter served before the SCA on 10 May 2024. The SCA's judgment and order dismissing Tholo's appeal has severe implications not only for Tholo, but for also for all other licensed distributors of fuel ("**LDF**") and licensees of customs and excise manufacturing warehouses ("**VM**") conducting business within Republic of South Africa, for three principal reasons.

8. First, the SCA's judgment and order expressly authorised and condoned the conduct of the Commissioner for the South African Revenue Service ("**SARS**") to disregard his own final decision and determination of July 2017 under the Customs and Excise Act, 91 of 1964 (as amended) ("**the Act**"), and to continuously raise new issues and grounds to move the proverbial goalposts to the prejudice of a trader in July 2020 for the first time, but three years after SARS' audit and final determination.

9. While SARS arrogated itself this purported right – and as condoned by the SCA – under the rubric of a "wide appeal", the SCA ignored several fundamental administrative principles, to wit:

- SARS' reliance on new and additional grounds of assessment after the making of a final determination, and after the decision became final as contemplated in s 96(1) of the Act, was *ultra vires* the empowering provisions, including under s 47(9)(d)(i)(bb), read with s 77A (definition of "decision"), s 77F (the final decision by the appeal committee), and s 96(1)(b) of the Act.

- SARS was *functus officio* pursuant to the final decision by its appeal committee and was incapable of continuously altering or adding to the determination contained therein, to the ongoing prejudice of Tholo.

10. Despite the SCA's express approval of SARS' conduct (without specifically addressing or dispensing with Tholo's aforesaid arguments), same is manifestly administratively unfair and unjust, and in contravention and infringement of Tholo's rights under s 33 of the Constitution of the Republic of South Africa, 1996 ("**the Constitution**") to fair and just administrative action, as further enshrined in the provisions of the Promotion of Administrative Justice Act, 3 of 2000 (as amended) ("**PAJA**"). In addition, Tholo's rights to the resolution of a dispute in a fair public hearing as contemplated in s 34 of the Constitution was infringed due to the unfairness of SARS' aforesaid conduct during the proceedings, and Tholo being forced to deal with additional issues (raised in SARS' answering affidavit) in its reply.

11. Even worse, the SCA respectfully misconstrued and misapplied its own binding precedent in *Levi Strauss (SCA)*[1]:

> *"An appeal under s 49(7)(b) of the Act is an appeal against the determination. While it is an appeal in the wide sense, involving a complete rehearing and determination of the merits, it remains an appeal against what was determined in the determination, and nothing more. It is open to SARS to defend its determination on any legitimate ground, but it is not an opportunity for it to make a wholly different determination, albeit one with similar effect.".*[2]

12. The SCA's justification and approval of SARS' administratively unjust and unfair conduct is binding precedent on lower courts, and constitutes a license and free reign for SARS to continue to act in an administratively (and thus constitutionally) unjust and unfair manner to all traders, LDFs, and licensees of VMs with impunity, appropriating itself repeated opportunities to continuously broaden and supplement their impugned determinations up and until a High Court's judgment under a "wide appeal", armed with various additional "lawyers' points" long after the (final) administrative act. This (the binding precedent of the SCA) will remain, unless overturned by this Court on appeal.

13. Second, the SCA's judgment misinterpreted the requirements set out in the Act and in particular Note 12, Part 3 of Schedule 6 thereto, for an LDF's entitlement to a refund of duties and levies. Specifically, the SCA (like the High Court) accepted SARS'

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1 *Commissioner, South African Revenue Service v Levi Strauss South Africa (Pty) Ltd* 2021 (4) SA 76 (SCA) at [26].
See also the judgments in *Petroleum Oil and Gas Corporation of South Africa (SOC) Ltd v Commissioner for the South African Revenue Service and another* [2024] 1 All SA 824 (WCC) at [21] to [25]; *Groenewald NO and others v M5 Developments (Cape) (Pty) Ltd* 2010 (5) SA 82 (SCA) at [24] and [25].

2 This was stated in the context of the Commissioner's attempts in that matter to introduce new grounds for his determination in the High Court, as is evident from the judgment of the High Court [reported at *Levi Strauss SA (Pty) Ltd v The Commissioner for the South African Revenue Service* 2019 JDR 0488 (GP)] at [41]: *"In short, this was neither the basis upon which SARS made the determination which forms the subject matter of this appeal nor was it the case which the taxpayer came to meet. The powers of SARS are such that a court must be careful not to grant unto such a State entity greater latitude (to make errors or chop and change its mind or take the taxpayer unawares) than is either prudent or consonant with principles of fair procedure and justice."*

interpretation to the effect that the fuel must be obtained *from the VM itself*, as opposed to (from) the duty paid stocks *of a licensee* of a VM.

14. Contrary to this Court's established canons of interpretation in a constitutional era[3], the SCA failed to interpret the statutory provisions, the Rules, and Note 12 with reference to permissible and applicable context which was not disputed by SARS: the introduction by SARS of the duty-at-source ("**DAS**") scheme in 2003 and the subsequent deregistration of in-land depots as customs and excise special storage warehouses ("**SOS**"), which rendered it no longer necessary for LDFs to obtain fuel from a VM itself. It is for this reason that the relevant provisions, Rules, and Note refers to "duty paid stock" from "storage tanks" of a "licensee of a VM".

15. Of course, the reference to "duty-paid stocks"[4] expressly puts paid to the SCA's interpretation: for stocks to be "duty-paid", they would already have been removed from the VM by the licensee to other storage tanks. The SCA's interpretation of the relevant provisions was fundamentally flawed.

16. The SCA's interpretation not only affects and prejudices Tholo, but the entire fuel and oil industry. This is evident from the SCA's judgment in *Tunica Trading*[5] which was handed down barely two weeks before its judgment in *Tholo*[6]. If the SCA's judgment

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3 *Airports Company South Africa v Big Five Duty Free (Pty) Ltd* 2019 (5) SA 1 (CC) at [29]; *Van Zyl NO v Road Accident Fund* 2022 (3) SA 45 (CC) at [130]; *Cool Ideas 1186 CC v Hubbard* 2014 (4) SA 474 (CC) at para [28]; *Afriforum v University of the Free State* 2018 (2) SA 185 (CC) at para [43], p 200H-201A; *Commissioner for the South African Revenue Service v United Manganese of Kalahari (Pty) Ltd* 2020 (4) SA 428 (SCA) at para [17] p 436; *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at [18].

4 See for example Rule 19A4.04(a)(i).

5 *Commissioner for the South African Revenue Service v Tunica Trading 59 (Pty) Ltd* [2024] ZASCA 115 (24 July 2024).

6 *Tholo Energy Services CC v Commissioner for the South African Revenue Service* [2024] ZASCA 120 (06 August 2024).

prevails, SARS would be allowed to frustrate and harass an entire industry, despite its own DAS scheme which it has implemented for the past 20 years since 2003.

17. Significantly, in a recent judgment by the Western Cape High Court[7], PetroSA (the same licensee from whose depots Tholo obtained consignments of fuel in Bloemfontein and Tarlton) succeeded in proving that a practice generally prevailing existed to the effect that set-offs (i.e., refunds) were allowed by SARS in respect of fuel levy goods removed or exported to African countries from unlicensed facilities, provided that fuel levy goods were duty paid stock. That court left open the issues pertaining to the interpretation of the relevant provisions, as it was unnecessary to do so.

18. Third, the SCA made various findings incongruent with the provisions of the Act, the Rules, and Note 12, in relation to SARS' asserted bases for opposing the tariff appeal, which will be concisely addressed later hereinbelow. However, the SCA's finding[8] that strict compliance with *all* legal requirements is required for an LDF to be entitled to a refund of duties and levies is significant. This, despite that it is undisputed that the objects of those provisions were achieved - i.e., it is not disputed that the fuel was in fact removed to Lesotho and exited the Republic, with the result that no duties or levies are due to SARS, and the refund stands to be paid to Tholo. The SCA's judgment in this respect again not only affects Tholo, but all LDFs, licensees of VMs, traders and persons seeking a refund of duties and levies under Schedule 6, Part 3 (including farmers).

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7 *Petroleum Oil and Gas Corporation of South Africa (SOC) Ltd v Commissioner for the South African Revenue Service and another* 2024 JDR 0135 (WCC) at [65] to [68].

8 *Tholo* SCA judgment at [50] and [51].

19. Notably, the SCA's aforesaid finding is in stark contrast with this Court's judgment in *Allpay*[9] that *"the central element is to link the question of compliance to the purpose of the provision"*.[10]

20. In the premises, this Court's jurisdiction is engaged on both bases contemplated by the Constitution: the first concerns the purely constitutional issues identified above (and amplified hereinbelow), while the second concerns discreet legal questions of considerable public importance: whether an LDF may obtain fuel anywhere in the Republic of South Africa from duty paid stocks held in storage tanks of a licensee of a VM, or whether the LDF must obtain such fuel from the VM itself.

21. It is evident from the High Court and SCA judgments in *PetroSA, Tunica* and *Tholo* that SARS has adopted a new, incorrect interpretation of the relevant provisions in the Act, the Rules, and Note 12, which is in clear contradiction of the provisions themselves, and contrary to the DAS scheme implemented by SARS for the past 20 years. An authoritative interpretation of the provisions and the requirements is required in the public interest.

22. It is significant that the court *a quo* granted Tholo leave to appeal directly to the SCA and not first to the Full Court of the Gauteng Division, due to the importance of the issues raised in the appeal. An authoritative interpretation of the relevant provisions is required.

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9 *Allpay Consolidated Investment Holdings (Pty) Ltd & Others v Chief Executive Officer,South African Social Security Agency & Others* 2014 (1) SA 604 (CC).
See also *BP Southern Africa (Pty) Ltd And others v Secretary for Customs and Excise and another* 1985 (1) SA 725 (A) at 734D-F.

10 Ibid., at [30]. As O'Regan J succinctly put the question in *African Christian Democratic Party v Electoral Commission and Others* 2006 (3) SA 305 (CC) at [25]: *"whether what the applicant did constituted compliance with the statutory provisions viewed in the light of their purpose"*.

23. This Court's consideration of the crucial legal questions is appropriate. The issues have been fully considered by both the High Court and the SCA; as such this Court is not required to sit as a court of first and final instance on the issues. They present *res nova*, novel legal questions which has not yet been determined by this Court.

24. The interests of justice manifestly support this Court's adjudication of the issues.

25. It is therefore submitted that leave to appeal stands to be granted, and that the appeal should be considered on its merits, which enjoy favourable prospects of success.

26. In amplification of the above, this affidavit is structured as follows:

- First, the parties are identified. The respondent, SARS, is an organ of State wielding public power. The fact that its current interpretation and application of the relevant statutory provisions contradicts its own previous application of such provisions under its own DAS scheme for the past 20 years presents another important constitutional and legal issue of general public importance.

- Second, a concise factual and procedural summary is provided, with brief elaboration on the legal arguments for Tholo. This demonstrates that no real or material dispute of fact exists, that the internal administrative appeal process provided in the Act was exhausted, that it is in the interests of justice that leave to appeal be granted, and that this matter properly presents itself for this Court's consideration on its merits.

- Third, to the extent required, the additional issues belatedly and impermissibly relied upon by SARS to oppose the tariff appeal are addressed.

- Fourth, the High Court and SCA judgments are briefly discussed to demonstrate the incorrect findings by both courts.

- Lastly, I conclude by summarising the constitutional and other bases upon which leave to appeal ought to be granted by this Court.

[C] THE PARTIES

27. The parties are cited in this application as they appeared in the High Court and the SCA.

28. The applicant is Tholo Energy Services CC, registration number 2009/044089/23, a close corporation duly incorporated in terms of the Close Corporations Act, 69 of 1984 (as amended), with its registered address at 122 Pybus Road, Sandton, 2146. Tholo is a licensed remover of goods in bond, and a licensed distributor of fuel (LDF).

29. The respondent is the Commissioner for the South African Revenue Service, appointed in terms of the provisions of the South African Revenue Service Act, 34 of 1997 (as amended) with Head Office at Lehae La Sars, 299 Bronkhorst Street, Nieu Muckleneuk, Pretoria. The Commissioner and SARS exercise public power under national legislation, including the Act.

[D] FACTUAL AND PROCEDURAL SUMMARY

30. As stated, Tholo is an LDF and a licensed remover of goods in bond, *inter alia* removing diesel from the Republic of South Africa to BLNE-countries (including the Kingdom of Lesotho).

31. During the period April 2016 to June 2016 Tholo purchased[11] and collected 25 consignments of diesel fuel from the Petroleum Oil and Gas Corporation of South Africa (SOC) Ltd[12] for direct removal to the Kingdom of Lesotho.

32. While PetroSA is the licensee of a VM at Mossel Bay, Tholo collected and removed the diesel from PetroSA's duty-paid stocks as follows:

32.1 22 consignments were obtained at PetroSA's storage tanks at its depot in Bloemfontein;[13] and

32.2 The remaining 3 consignments were collected from PetroSA's storage tanks at Tzaneen (2 consignments) and from Total at Alrode (1 consignment), who is the licensee of two VMs, at Germiston and Durban.

33. Every consignment of fuel was removed from the Republic of South Africa to the Kingdom of Lesotho, and the consignments were duly cleared by SARS Customs officials.[14] Tholo as LDF consequently in March 2017 submitted four claims totalling R 4,254,924.80 with SARS to obtain a refund of the DAS paid on the fuel.

34. On 03 May 2017 SARS issued a notice of intent to refuse the refund, but a week later (on 09 May 2017) SARS withdrew the aforesaid notice of intent and instead issued a request for information to Tholo.

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11 The invoice was issued to Tholo, while payment was made by an affiliated Lesotho entity, Tholo Energy Services (Pty) Ltd.

12 "PetroSA".

13 PetroSA is the owner of the Bloemfontein depot, having acquired same from BP during 2012.

14 It is undisputed that the fuel was removed to Lesotho.

35. SARS subsequently issued a notice of intent to disallow the refund claims on 27 June 2017, Tholo responded thereto on 30 June 2017, and on 20 July 2017 SARS issued its notice of final disallowance to Tholo.

36. Only two issues formed part of and was relied on by the respondent as part of his final determination:[15]

36.1 First, the alleged contravention of s 64F(1)(b) of the Act, in that (according to the respondent) the fuel was required to be loaded at the VM itself;[16] and

36.2 Second, Tholo was not in possession of export permits issued by the ITAC, and there was therefore alleged non-compliance with ss 38 and 41 of the Act, read with Rule 64F.04.[17]

37. On 31 July 2017, eleven days after the determination, Tholo embarked on an internal administrative appeal process against the respondent's determination of 20 July 2017. This culminated in a long and protracted affair, with representations being made before SARS' Excise Appeal Committee, an inspection *in loco* by the Committee being held a year later in June 2018, and new issues being continuously raised by the Committee which did not form part of the determination that was the subject of the internal administrative appeal.[18] It is undisputed between the parties that the parties jointly

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15 SARS expressly withdrew and abandoned reliance on certain other adverse findings pertaining to perceived differences in quantities of fuel, and the description of the fuel on customs forms and documentation.

16 Annexure "NOM2" to HC notice of motion, para 5.1 to 5.1.3.

17 Ibid., para 5.5 to 5.5.6.

18 The Committee relied on the judgment of ***Levi Strauss SA (Pty) Ltd v The Commissioner for the South African Revenue Service* (20923/2015) [2017] ZAGPPHC 990 (02 May 2017)** (presumably at [24] to [32]) in support of its conduct.

determined during the inspection *in loco* that the fuel was locally manufactured at PetroSA's VM.

38. Ultimately, a year and a half later in December 2018 and after substantial effort and delay, another committee (the Branch Office Appeal Committee) adjudicated the internal administrative appeal in favour of the respondent, relying on (only) the issue that the fuel was not removed from a VM.[19]

39. On 08 October 2019 Tholo gave notice of its intended legal proceedings to SARS. Another long and protracted process followed with yet another SARS official, again seeking substantive additional information and documents from Tholo on no less than three occasions under the pretext of "evaluating the merits of the intended litigation". Such SARS official then impermissibly (and in circumstances where the determination was already final in terms of s 96(1)(b) of the Act) re-investigated the whole matter over a period of nine months, which resulted in a 16-page document *inter alia* stating the following:[20]

39.1 SARS was entitled to oppose the intended litigation on different or additional factual and/or legal bases than those contained in the letter communicating the decision to refuse the four refund claims dated 20 July 2017 (i.e. the final determination by the Commissioner); and

39.2 SARS would therefore proceed to oppose the intended litigation by Tholo on six additional grounds in support of his decision to disallow the refund claims.

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19 Such decision was confirmed by the same Committee on 07 March 2019.

20 Annexure "NOM1" to HC notice of motion, SARS' response to notice of litigation in terms of s 96(1) of the Act.

40. It is in these circumstances that Tholo approached the High Court in terms of a tariff appeal for relief to obtain payment of its refunds.

41. As demonstrated hereinbelow:

41.1 SARS' reliance on additional issues (i) in its response to Tholo's notice of litigation, and (ii) as part of its answering affidavit, was *ultra vires*, and SARS was *functus officio* under the empowering provisions in the Act;

41.2 The nature of a wide appeal does not (contrary to the High Court and the SCA's judgments) enable or authorise SARS to introduce new legal or factual bases in opposition to a tariff appeal against its impugned final determination.

41.3 SARS' interpretation of the requirements of the Act for an LDF to be entitled to a refund, is incorrect; and

41.4 The two issues forming part of SARS' final determination of 2017 ought to have been determined in Tholo's favour by the High Court and the SCA.

SARS' reliance on additional issues not part of his final determination, was *ultra vires* the Act

42. In prayer 1 of its notice of motion in the High Court, Tholo sought an order declaring that SARS' purported determination on 15 July 2020 (contained in its response to Tholo's notice of litigation), seeking to supplement and vary its final determination dated 20 July 2017 was invalid.

43. Although the respondent conceded in his answering affidavit that the July 2020 document was not a determination in its own right,[21] the respondent nevertheless contended that *"(t)he grounds for the determination are as set out in SARS determination dated 20 July 2017 read with SARS response to the section 96 notice dated 15 July 2020"* (sic).

44. The respondent's reliance on additional grounds for his determination is unjustifiable. Once the respondent's determination of 20 July 2017 in terms of s 47(9)(a) of the Act was the subject of proceedings in terms of Chapter XA of the Act and became a final decision subject to a tariff appeal in terms of s 47(9)(e), the respondent could not amend or vary such determination to the prejudice of Tholo.

45. SARS was only entitled to amend or vary its determination in the limited instances provided for in the Act. Significantly: s 47(9)(d)(i)(bb) expressly prevents SARS from unilaterally amending or withdrawing a determination on the bases set out in the subsection, where a determination was subject to a process under Chapter XA of the Act. It is submitted that a contrary outcome cannot be achieved by dint of SARS' election to supplement the grounds, in the manner in which he has elected to do.

46. Under Chapter XA of the Act (with reference to the meaning of "decision" in s 77A, and the powers of an appeal committee under s 77F) SARS' decision was *final* as contemplated in s 96(1)(b) of the Act.

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21 HC answering affidavit, para 25 and 26.

47. The right of appeal to the High Court in terms of s 47(9)(e) of the Act can logically only arise when SARS has made a final determination.[22] In terms of s 47(9)(b)(ii)(bb) of the Act, the respondent's final determination of 20 July 2017 remains in force until it is no longer compatible with a final judgment by the High Court or a judgment by the SCA, from the date of such judgment.

48. In the premises, it is submitted on behalf of Tholo that:

48.1 Once SARS' determination is a final decision as contemplated in s 96(1)(b) of the Act, it is of force and effect until such time as being set aside by an order of this Court as provided in s 47(9)(b)(ii)(bb).

48.2 It remains operative, and is incapable of being varied or altered by SARS to the prejudice of Tholo.

49. Any supplementation of the grounds of and findings in SARS' final determination of July 2017 to the detriment of Tholo constitutes an impermissible amendment or variation thereof, and is *ultra vires*.

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22 *Baking Tin (Pty) Ltd v Minister of Finance NO and another* 69 SATC 171 (C) at p 173:
"In his Replying Affidavit, Mr Spence (on behalf of Applicant) states that
'I am advised that the right of appeal described in section 47(9)(e) of the Customs Act can logically only arise when the Commissioner has made a final determination. If a tariff determination has been resubmitted to the Commissioner for his reconsideration in terms of section 47(9)(d)(bb) then the date of the determination will be the date upon which the final determination is made. This will be the date upon which the Commissioner either amends the determination which has been submitted to him for reconsideration, or advises the importer that his earlier determination is final and will not be amended.'
I entirely agree with the advice given to Mr Spence. Any other construction would, in my view, be unfair, unworkable and contrary to the provision for reconsideration of determinations.".

SARS was *functus officio* / Administrative (un)fairness

50. Tholo is advised that, once an administrator has given a final decision by exercising a discretionary power, he or she may not reverse or alter that decision. The administrator is *functus officio*.[23]

51. Uncertainty is to be eliminated so that persons whose interests are affected by the decision can safely rely on or act upon the decision until or unless it is set aside by a court.[24] Two considerations arise: the need for finality or certainty on the one hand, and flexibility and administrative efficiency on the other.[25]

52. In general, the *functus officio* doctrine applies only to final decisions, so that a decision is revocable before it becomes final. Finality is a point arrived at when the decision is published, announced or otherwise conveyed to those affected by it.[26]

53. Whether an administrator is *functus officio*, or whether he or she has the power (express or implied) to reverse or change his or her own decision, is a matter of statutory interpretation.[27]

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23 The rule is concerned with the official's own power to alter or reverse his or her decisions without the intervention of the court. See the discussion in *The Law of South Africa* (LAWSA), Administrative Justice (Volume 2, Third Edition), at Chapter 18, and the authorities referred to by the authors.
Financial Services Board v De Wet 2002 (3) SA 525 (C) at para 147.

24 *Welgemoed v The Master* 1976 1 SA 513 (T) at 520E.

25 Baxter, Administrative Law at 372.

26 *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye and Laser Institute* 2014 (3) SA 219 (SCA) at [15].

27 The foundational principle of constitutional supremacy and the rule of law ultimately govern the question of *functus officio*.

53.1 The authorising statute must be constitutional so as to ensure that the enabling provision does not have the effect of sanctioning of arbitrary and capricious administrative acts; and

53.2 The power to revisit a decision will have to be exercised in a manner that is rationally justifiable and not arbitrary. The revisiting of prior decisions is subject to the principle of legality and may constitute administrative action in terms of PAJA which requires the application of fair procedure.[28]

54. An administrator is *functus officio* once a final decision has been made and will not be entitled to revoke or alter the decision in the absence of statutory authority to do so. *Hoexter* states[29] that although enabling legislation may expressly provide for variation or revocation by the administrator or a higher authority and prescribe conditions, the demands of the Constitution must be borne in mind: the legislature would not be entitled to confer an unlimited or too extensive power of revocation, as this would undermine the rule of law. Due regard must also be had to the requirements of procedural fairness, especially where variation or revocation will affect rights adversely.

55. It has been demonstrated that, once a determination by SARS constitutes a "final decision" in respect of which a tariff appeal may be instituted in terms of s 47(9)(e) read with s 96(1)(b) of the Act, SARS cannot revisit or alter or supplement the (final) decision.

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28 Section 1 of PAJA defines "decision" to mean *"any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to (a) making, suspending, revoking or refusing to make an order, award or determination; ...".*

29 Hoexter's *Administrative Law in South Africa*, Third Edition, JUTA at pp 384.

56. SARS therefore was and remains *functus officio*, and can only amend the determination in accordance with an order by a court in terms of s 47(9)(c) of the Act.[30]

57. In addition, even if SARS was entitled to amend or vary its impugned final determination (which its isn't), SARS' administrative act in varying the determination would remain subject to (but would infringe upon) the prescripts of s 33 of the Constitution and the provisions of PAJA. There is no legal certainty, or procedural or administrative fairness and justice to be found in SARS' conduct. The prejudice to Tholo is manifest.

58. As demonstrated by the facts in this matter, where SARS continuously raised new issues more than 3 years after its audit and determination, any adverse additional findings or issues raised by SARS after its final decision, ought to be held to be administratively unjust, procedurally unfair, and constitutionally invalid.

The nature of the tariff appeal proceedings

59. This matter pertains to a tariff appeal in terms of s 47(9)(e) of the Act. The SCA and the High Court relied on the existence of a wide appeal, to justify SARS' belated reliance on various new issues.[31]

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30 The Full Court in *Tunica Trading 59 (Proprietary) Limited v The Commissioner, South African Revenue Service* 2022 JDR 0967 (WCC) accepted at [59] that the Commissioner would in these circumstances be *functus officio*.

31 The SCA held in *Pahad Shipping CC v The Commissioner For The South African Revenue Service* 2009 JDR 1322 (SCA) at [14] that a tariff appeal in terms of s 65(6) of the Act is an appeal in the wide sense, i.e., a complete re-hearing of the case and a fresh determination of the merits of the case with or without additional evidence or information, with reference to *Tikly and other v Johannes and others* 1963 (2) SA 588 (T) at 590F-591A.

60. SARS' contentions originate from a High Court judgment in an interlocutory application in the unreported judgment of *Levi Strauss (2017)*[32], where it was held that appeals against value determinations (s 65(6) of the Act) and origin determinations (s 49(7) of the Act) were appeals in the wide sense. The High Court also remarked (with reliance on this Court's judgment in *Kham*[33]) that there was no legal basis *for the introduction of a limitation on the respondent* to the effect that the respondent could not rely on a new *legal* or factual basis, other than the basis on which he became satisfied in making the determination.[34]

61. It is submitted that the ***Levi Strauss (2017)*** matter was manifestly incorrectly decided insofar as it concerned the statement that SARS could at will introduce new legal and factual grounds after a final determination. That court's reliance on ***Kham*** was also ill-founded, as that case concerned the jurisdiction and *review* powers of the Electoral Court to review a decision of the Electoral Commission in terms of s 20(1) of the Electoral Act[35], not a tariff appeal under the Act, and this Court did not make any finding in ***Kham*** to the effect that an administrator may go beyond the *findings or legal grounds* contained in his decision.[36]

62. The ***Levi Strauss*** matter thereafter again progressed to the High Court, and thereafter to the SCA:

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32 *Levi Strauss SA (Pty) Ltd v CSARS* (unreported) Gauteng Division, Pretoria, case no. 20923/2015 at [24] to [34].

33 With reliance on *Kham and Others v Electoral Commission and Another* 2016 (2) SA 338 (CC) at [41].

34 The *Levi Strauss (2017)* judgment was incorrect. There is no support in the *Kham* judgment for the proposition that the respondent is entitled to raise additional legal grounds or findings for his determination.

35 Act 73 of 1998 (as amended).

36 *"[41] ... Instead it is the widest possible type of review where the decision in question is subjected to reconsideration, if necessary on new or additional facts, and the body exercising review power is free to substitute its own decision for the decision under review ... ".*

62.1 In the High Court (2019), the following was held:[37]

> *"[41] In short, this was neither the basis upon which SARS made the determination which forms the subject matter of this appeal nor was it the case which the taxpayer came to meet. The powers of SARS are such that a court must be careful not to grant unto such a State entity greater latitude (to make errors or chop and change it's mind or take the taxpayer unawares) than is either prudent or consonant with principles of fair procedure and justice."*

62.2 In the SCA (2021), it was held:[38]

> *"[26] ... An appeal under s 49(7)(b) of the Act is an appeal against the determination. While it is an appeal in the wide sense, involving a complete rehearing and determination of the merits, it remains an appeal against what was determined in the determination, and nothing more. It is open to Sars to defend its determination on any legitimate ground, but it is not an opportunity for it to make a wholly different determination, albeit one with similar effect."*

63. It is submitted that in considering and interpreting s 47(9)(e) of the Act to determine the nature of a tariff appeal, this Court should take cognisance thereof that the Act constitutes pre-Constitutional era legislation, and that this Court ought to interpret the subsection consistently with the Constitution, including Tholo's right to just administrative action under s 33 of the Constitution, and its right to a fair hearing under s 34 of the Constitution.[39]

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37 *Levi Strauss SA (Pty) Ltd v The Commissioner for the South African Revenue Service* 2019 JDR 0488 (GP) at [41].

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

39 *Cool Ideas 1186 CC v Hubbard and another* 2014 (4) SA 474 (CC) at para [28], p 484E-485B.

64. It is therefore submitted that this Court should authoritatively interpret the subsection - and the parties' rights in a tariff appeal - in light of the current Constitutional dispensation and whilst being cognisant of the provisions of PAJA, the administrator's authorised powers in terms of the enabling legislation, and Tholo's constitutional right to just administrative action and a fair hearing.

65. A wide appeal does not afford the respondent the power to vary or alter his determination to the prejudice of Tholo, where such powers are not authorised in terms of the enabling legislation, PAJA, or the Constitution. The *Levi Strauss* matter (2017) was therefore incorrectly decided, and without due regard to the provisions of the Act, administrative fairness, or constitutional prescripts.

66. Although SARS would, as part of a wide appeal, be entitled to lead additional *evidence* in support of his final determination (for example, additional records showing that the fuel was collected elsewhere than a VM, or an affidavit from ITAC further demonstrating that no export permit was issued), the respondent remains bound to the bases and findings in his determination, and is not entitled to vary (alter or supplement) same.

67. In the premises, the additional grounds relied on by SARS fall outside of the ambit of his final determination, and do not form part of the justiciable issues in the tariff appeal.

68. There are therefore (only) two issues in the tariff appeal:

68.1 The alleged requirement that an LDF must collect fuel levy goods from a VM itself, or whether the fuel levy goods may be collected from the *stocks of a licensee of a VM* anywhere in the Republic of South Africa; and

68.2 The alleged requirement of an export permit issued by the ITAC, for an LDF to be entitled to a refund of DAS in terms of the Act.

First issue: The alleged requirement to collect fuel from the VM itself

69. In his final determination, the respondent determined that Tholo did not comply with s 64F(1)(b) of the Act, in that *"the fuel was not obtained from a licensed customs and excise manufacturing warehouse"*.[40]

70. Section 64F(1) contains a definition of the term "licensed distributor", defining the term to mean any person who:

> *"(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;*
> ..."

71. It is evident that an LDF must obtain the fuel from the duty-paid stocks of a licensee of a VM. This accords with the relevant refund provisions of Note 12 of Schedule 6 to the Act. However, SARS (and both the High Court and the SCA) misinterprets the subsection and the refund requirements.

72. First, SARS ignores the words *"...of a licensee..."* in the subsection. This is impermissible, renders the words meaningless, and changes the effect of the subsection.

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40 Annexure "NOM.2" to the HC notice of motion, para 5.1.1 to 5.1.3.

72.1 The term "licensee" is defined to mean *a person or company that has a license to make or use something.*[41]

72.2 PetroSA is the licensee of the VM. "The licensee of the VM" cannot be reasonably construed to be the VM itself.

73. Second, Rule 19A4.04(a)(i) provides that *"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"*, while subrule (a)(ii) provides that *"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"*.

74. Third, no provision in either the Act, the Rules, or Note 12 requires an LDF to obtain the fuel from the VM itself.

75. Fourth, while SARS has not disputed that it introduced the *duty-at-source* scheme and deregistered all inland depots twenty years ago in 2003, it simply ignores the issue.

75.1 Prior to the DAS scheme, this meant that duties and levies was only payable upon the *sale* of the fuel, and most oil majors had licensed storage depots at

41 Oxford Advanced Learners Dictionary, 10th Edition, 2020.

inland locations to move fuel product from a VM before the sale (i.e., before payment of duties).

75.2 With the advent of the DAS scheme, all fuel removed from a VM is duty-paid stock, and it was no longer necessary to store such fuel at an SOS depot. This eased the administrative and control burden on SARS. Where a person removed or exported the fuel from the Republic, that person would then seek a refund of the duties and levies paid (as is the case with Tholo).

75.3 After the introduction of the DAS scheme in 2003, virtually all inland depots were deregistered as SOS warehouses.[42]

76. In a recent judgment by the Western Cape High Court[43], PetroSA (the same licensee from whose depots Tholo obtained consignments of fuel in Bloemfontein and Tarlton) succeeded in proving that a practice generally prevailing existed to the effect that set-offs (refunds) were allowed by SARS in respect of fuel levy goods removed or exported to African countries from unlicensed facilities, provided that fuel levy goods were duty paid stock. That court left open the issues pertaining to the interpretation of the relevant provisions, as it was unnecessary to do so.

77. The refund provisions in Note 12, the relevant statutory provisions and the rules all *specifically* provide that the LDF must obtain fuel from a licensee's duty paid stocks (i.e. fuel levy goods entered for home consumption after having been removed from a VM). Tellingly, the requirement to obtain fuel from "duty paid stocks" puts paid to the

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42 These facts are confirmed in SARS' Discussion Document on the Rewrite of the Excise Legislation, dated 01 March 2019.

43 *Petroleum Oil and Gas Corporation of South Africa (SOC) Ltd v Commissioner for the South African Revenue Service and another* 2024 JDR 0135 (WCC) at [65] to [68].

contention that the fuel must be obtained from a VM: such fuel has not been entered for home consumption, and is not "duty paid stock".

78. There is no obligation (express or implied) upon an LDF to collect the fuel levy goods from a VM.[44]

79. In the premises, SARS' first ground of refusal was incorrect. Tholo was entitled to obtain the fuel from PetroSA's duty paid stock at its depot and storage tanks at Bloemfontein and Tzaneen, and from Total at Alrode. Tholo was not obliged to collect the fuel at PetroSA's VM at Mossel Bay.

Second issue: The alleged requirement of an export permit

80. In SARS' final determination, reliance was placed on the provisions of SARS' External Oil Directive in support of the allegation that an export permit from ITAC was required for the "export" of fuel levy goods from South Africa to Lesotho. SARS contended that there was non-compliance with ss 38 and 41 of the Act, and Rule 64F.04.[45] Yet SARS did not place the External Oil Directive before the High Court to substantiate his contentions.

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[44] In terms of Note 12 and the Rules:
- Only fuel levy goods entered or deemed to have been entered for home consumption may be removed to Lesotho;
- The licensee of a VM (i.e. PetroSA), and not Tholo, makes payment of DAS on fuel when entering such fuel for home consumption.
- The fuel was so entered for home consumption, and the DAS paid by PetroSA, when PetroSA moved the fuel from its VM and transported those goods via rail to its depot and storage tanks in Bloemfontein.
- The DAS paid by PetroSA are reflected on the licensee's DA 160 excise account, as required by Rule 19A4.02.
- The licensee of the VM (PetroSA) charges its client separately, which price is inclusive of DAS paid by the licensee when it entered the fuel levy goods for home consumption.

[45] In his answering affidavit, no substantiation was provided by the respondent in support of this ground of refusal: *"Tholo SA was not a holder of the required export permit issued by the International Trade Commission"* (sic).

81. It is common cause that Tholo did not have an export permit from ITAC for the exportation of fuel. SARS Customs never required Tholo to have a permit, and it did not "export" fuel, but rather "removed" it to a BLNE-country.

82. It is however notable that:

82.1 The Act, the Rules, and Note 12 of Schedule 6 to the Act differentiate between a "removal" of fuel levy goods to a BLNE country (or a country in the common customs area) in the Southern African Customs Union, and an "export" to other countries.

82.2 No "export" of fuel levy goods occurred.

82.3 No provision contained in Note 12 or the relevant sections of the Act, or the Rules require an LDF to be in possession of an ITAC export permit.[46] *A fortiori*, any insistence by the respondent on compliance with the provisions of another Act and its regulations (i.e. the ITA Act[47]) is irrelevant insofar as it concerns the refund provisions and does not affect Tholo's entitlement to the refunds.[48]

83. In addition, SARS' practice generally prevailing[49] at the time did not require any export permit for removal to a BLNE-country. Tholo demonstrated in its founding affidavit that:

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46 This includes s 19A and its rules, s 64F and its rules, s 75(11A), or any other *rule* regulating the movement of goods to which fuel levy goods relate).

47 SARS is not charged with the administration or enforcement of the ITA Act.

48 *Rennie NO v Gordon & another NNO* 1988 (1) SA 1 (A) at p 22E-F: Words cannot be read into a statute by implication unless the implication is a necessary one in the sense that without it effect cannot be given to the statute as it stands.

49 See s 44(11A) of the Act; and see *Commissioner for Inland Revenue v SA Mutual Unit Trust Management Co Ltd* 1990 (4) SA 529 (A) at p 536E-I.

83.1 SARS' own External Reference Guide: Oil Industry of 01 February 2011 provided that an export permit from ITAC was required only for export to countries outside of BLNE-countries but was not required for removals to such countries.

83.2 SARS' systems did not require an export permit for removals to BLNE-countries, and in all instances of the 25 consignments being removed to Lesotho, SARS Customs did not once require any export permit, and released the consignments to proceed to the border absent any such export permit.

83.3 None of the aforesaid allegations were either disputed or gainsaid by SARS.[50]

84. Therefore, should it be held that a belated *ex post facto* assertion by SARS pertaining to an ITAC export permit constitutes a requirement to be entitled to a refund, despite the practice generally prevailing as aforesaid, Tholo contends that there was substantial compliance with the provisions, regard had to their purpose.

85. Therefore, SARS' second ground of refusal stands to be rejected.

86. In the premises, the tariff appeal stood to be determined in Tholo's favour by the High Court, and on appeal by the SCA.

87. It is certainly, respectfully, in the interests of justice for this Court to grant the application for leave to appeal, and to hear and determine the appeal in Tholo's favour.

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50 HC founding affidavit, para 73 to 73.4; HC answering affidavit, para 85.

88. To the extent that this Court should (for whatever reason) find that SARS is entitled to continuously raise new issues which did not form part of the basis of its impugned (final) determination, despite Tholo's submissions hereinabove, then I refer to what is stated hereinbelow.

[E] THE (IMPERMISSIBLE) ADDITIONAL GROUNDS

First new ground: No proof that fuel was manufactured in South Africa

89. SARS contends that an LDF has to prove that the fuel obtained by it from the stocks of a licensee of a VM was manufactured within the Republic of South Africa.

90. This is incorrect. The source of the fuel (and where it was manufactured) is irrelevant when determining whether an LDF is eligible to a refund, regard had to Note 12.

91. While the issue of a "local import" was only raised in SARS' answering affidavit in relation to a solitary PetroSA invoice, Tholo demonstrated in his affidavits that the fuel was locally manufactured at PetroSA's VM, was transported via rail network to storage tanks at its depot in Bloemfontein (owned by PetroSA), and that the single instance of a "local import" referred to fuel acquired locally (the fuel was not imported from a foreign source).

92. Notably, it is undisputed that Tholo and the SARS officials on the Excise Appeal Committee established during an inspection *in loco* during June 2018 that the fuel levy goods were locally manufactured and originated from PetroSA's VM in Mossel Bay. SARS is bound to such fact.

93. In any event, SARS has not disputed the existence and contents of the SARS' Oil Industry External Standard, which provides that subsequent movement of fuel products which were imported and blended with locally manufactured product,[51] would be treated by SARS as movement of locally manufactured product.

94. The origin of the fuel is wholly irrelevant in terms of the respondent's own policy, read with s 19A(4)(a) and (b) of the Act, and no such requirement exists on the part of an LDF to qualify for a refund of DAS in terms of Note 12. The LDF obtains fuel from the stocks of a licensee of a VM on the premise that such fuel is locally manufactured.

95. Lastly, it would be nigh impossible for an LDF to investigate and prove the origins of fuel obtained from stocks of the licensee of a VM, as the LDF would not be privy to such information or proof. DAS is refundable as the fuel was removed to Lesotho and not locally consumed in South Africa.

Second new ground: Fuel levy goods allegedly not wholly and directly removed for delivery to Lesotho

95.1 SARS premises its contentions on the contention that (a) first the fuel levy goods were not wholly removed from a VM, as the fuel was first moved to a depot; and that (b) there were "discrepancies" between the volumes of fuel collected and delivered.

96. In respect of the first issue, SARS misconstrues the provisions. The LDF must, as soon as it obtained the fuel from the duty-paid stocks of a licensee of a VM, directly remove

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51 As contemplated in s 19A(4) of the Act.

the fuel to a BLNE-country. The requirement does not pertain to movements by the licensee of its own fuel to its in-land depots.

97. On the second issue, SARS withdrew, waived and abandoned the intended adverse finding against Tholo in respect of differing volumes of fuel pursuant to Tholo's representations, with full knowledge of the facts to which his determination pertained, as part of its final determination of July 2017. SARS is precluded from again raising the issue. In any event, Note 12(b)(iii)(bb) provides that *"a refund shall only be payable on quantities actually delivered to a purchaser in any other country of the common customs area"*.

Third new ground: Diesel not transported by an LDF or RIB[52]

98. The respondent contends that, because the fuel levy goods were physically removed by trucks owned by an affiliated company, Tholo Energy Services (Pty) Ltd[53], and not by trucks which is owned by Tholo, Tholo is not entitled to its refunds.

99. This issue was for the first time raised in SARS' answering affidavit.

100. In its replying affidavit, Tholo then explained that:

100.1 It is correct that the fuel levy goods were transported in trucks owned by Tholo Lesotho;

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52 Remover of goods in bond.
53 Registered in Lesotho ("Tholo Lesotho").

100.2 The nationality of the drivers and origin of the vehicles were at all relevant times disclosed to SARS; [54] and that

100.3 The particulars of the trucks were provided to SARS when Tholo applied for its registration as a licensed remover of goods in bond.

101. Tholo and Tholo Lesotho (affiliated entities) have the same member, director, and shareholder (namely myself).[55] The entities are connected persons, and they (and their assets) are under my control and direction.

102. I submit that the phrase "own transport" does not solely contemplate or pertain to the narrow issue of ownership, but also includes possession or control. The word "own" as an adjective and pronoun is defined to mean *(adj, pron) used to emphasise that something belongs to or is connected with somebody*.[56]

103. Tholo complied with the requirement of using "own transport".[57]

104. I also point out that it is undisputed that the fuel levy goods were actually removed to the Kingdom of Lesotho, in compliance with and satisfaction of the purpose of the fuel levy/duty rebate. There was therefore substantial compliance with the legal requirements, regard had to the purpose of the provisions.

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54 The details of the vehicles were captured on the bills of lading, CN2 and manifest documents, and the driver names, passport numbers and vehicle registration numbers were also captured.

55 This was correctly found by the High Court at [3] and [5] of its judgment.

56 Oxford Advanced Learners Dictionary, 10th Edition, 2020.

57 In addition, Tholo was a licensed remover of goods in bond, and would have been entitled to remove the fuel on that basis.

105. In ***BP Southern Africa (Pty) Ltd And others v Secretary for Customs and Excise and another***[58] this Court held that there existed no indication in the general scheme of the Act that non-compliance with a regulation (being no more than an administrative measure designed to ensure that fuel under rebate of duty is in fact delivered) was intended to deprive a supplier of his right to a rebate.[59]

106. In *Customs and Excise Service*[60] the learned authors state that:

> *"It appears that non-compliance with administrative requirements after entry would not disentitle a registrant to the rebate in respect of the goods entered under rebate of duty if the goods have been used or disposed of in accordance with the rebate provisions concerned".*[61]

107. In the premises, it is submitted that Tholo is entitled to payment of the refunds, notwithstanding the fact that Tholo was not the owner of the trucks used to remove the fuel levy goods to Lesotho.

Fourth new ground: Tholo allegedly did not make payment of DAS

108. The last additional ground for refusal relied upon by SARS comprises two contentions: (a) that Tholo did not make payment of levies, but that it was made by Tholo Lesotho; and (b) that a schedule provided by PetroSA allegedly shows that monies paid by Tholo Lesotho to PetroSA was not allocated to payment of levies, and that there was therefore "no payment of the levies at all".

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58 *BP Southern Africa (Pty) Ltd And others v Secretary for Customs and Excise and another* 1985 (1) SA 725 (A) at 734D-F.

59 At 736B-D: *"Consequently I have little doubt that it could not have been the intention to grant a right to a rebate subject to compliance with each and every provision of the Act and the regulations or at any rate such provisions as have a bearing on the entry or disposal of goods under rebate duty"*.

60 Cronje, LexisNexis (May 2021 – SI 50) at Chapter X, page 10-6(1).

61 An LDF obtains the fuel levy goods after entry for home consumption by the licensee of a VM.

109. SARS' contentions are ill-founded.

110. Although it is not disputed that Tholo Lesotho made the payments to PetroSA, the following considerations are relevant:

110.1 PetroSA's tax invoices were issued to Tholo for payment of fuel and DAS, and Tholo was therefore liable to PetroSA for payment.

110.2 Neither the law nor the Act requires Tholo as an LDF to have made payment itself, and neither the law nor the Act precluded Tholo Lesotho from making payment on Tholo's behalf to PetroSA. Such payment was effective in law to discharge the payment obligation on the part of Tholo.

110.3 Nothing contained in Note 12 and the relevant provisions of the Act or the rules require the LDF to actually make payment of the fuel levies. All that is required to be entitled to a refund is that an LDF must *obtain* the fuel from the stocks of the licensee of a VM.[62]

110.4 To date SARS has failed to disclose the legal basis in support of his assertion.

111. In respect of SARS' second argument that Tholo's payments were not "allocated" by PetroSA to DAS:

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62 In *Tunica Trading (HC)* at [62] to [68] and considering whether "obtain" includes "purchase", the Court held that it sufficed that the fuel is in fact obtained from the stocks of a licensee, and that payment could be made indirectly, even through an intermediary.

111.1 The documents relied upon by SARS in the court *a quo* were illegible, and the deponent failed to provide any explanation or interpretation of the document in the answering affidavit. As such, Tholo could not reply thereto.

111.2 To the extent that SARS attempted in the SCA to include more legible copies as part of that court's record (but which were not filed in the court *a quo*), Tholo objected thereto.

111.3 In any event, SARS misunderstands its own duty-at-source scheme, in that the DAS was paid *by PetroSA* when it removed the fuel from its VM and moved such fuel to its in-land depots. PetroSA recouped such levies from Tholo in its invoice. It is unknown what "allocation" had to occur according to SARS, and how it contends, specifically, that allocation by PetroSA is at all relevant to Tholo's entitlement to the refunds.

111.4 Tholo obtained a confirmatory affidavit from a PetroSA representative confirming the allegations concerning PetroSA made in the replying affidavit, including the fact that DAS was paid by Tholo.

112. In the premises, all the (impermissible) additional bases relied upon by SARS are incorrect.

[F] THE HIGH COURT AND SCA JUDGMENTS

113. I do not address the *minutiae* of the judgments hereinbelow. Tholo asserts that the SCA and the High Court respectfully fundamentally erred in their findings and orders, for the reasons aforesaid. I however point out certain apposite findings by the aforesaid courts, for purposes of this application.

114. Therefore, where I do not address a particular finding or statement contained in these judgments, I do not admit the correctness or veracity thereof. I have addressed the main grounds of the application for leave to appeal (and appeal) hereinabove, and further legal argument will be advanced in due course, at the direction of this Court.

High Court judgment

115. The court *a quo* bizarrely found that under s 2 of the Act it *must* prefer the respondent's interpretation, and that Tholo had an onus to show that the respondent's interpretation was *"patently incorrect or contrary to the purpose and objects of the Act"*.[63] This argument was already rejected by our courts some 70 years ago.[64]

116. The court *a quo*'s approach to the interpretation of the Act and the schedules thereto was therefore premised on an incorrect point of departure. This led thereto that it simply

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63 HC judgment at [30].

64 In ***Queen Slide Fasteners SA (Pty) Ltd v Commissioner of Customs*** **1953 (3) SA 195 (W)** at 197D-198B, the court - with reference to an identical provision in s 2 of the Customs and Excise Act, 35 of 1944 (repealed) - held:

"(It) does not, in my opinion, confer an absolute discretion (subject to review only) on the Commissioner. Every administrative Act of Parliament has to be under the administration of some public officer, and sec. 2 does no more than place the Customs and Excise Act under the administration of the Commissioner. Furthermore, nowhere in the Act is there any provision conferring a discretion on the Minister or on the Commissioner, except in relation to matters which are expressly mentioned. In particular no final discretion is conferred on the Commissioner as regards the interpretation of the schedule.

The Courts exist for the decision of disputes between litigants and it is not lightly to be inferred that the Courts are, in particular instances, deprived of their normal jurisdiction and function."

accepted SARS' interpretation of the requirements, *verbatim*,[65] and without having correctly considered the text or the (undisputed) context of the DAS scheme and the Rules at all.[66]

117. Like the SCA, the High Court preferred an approach suggested by SARS, namely that SARS has no discretion to approve a refund which does not comply with Note 12, supporting a "strict compliance" view. Both courts respectfully failed to have regard to the fundamental principle that DAS is not due or payable if the goods are in fact removed (or exported) from the Republic of South Africa, and not consumed therein. Therefore, provided the objects of the provisions have been achieved, substantial compliance must suffice in a constitutional era.

SCA judgment

118. The SCA's findings[67] that SARS disallowed the refund claims on the basis that " Tholo had not complied with the requirements for refunds …", and SARS' reference to generic and broad (unspecific) references to the sections of the Act in the letter of disallowance, respectfully portrays a skew picture of the reality of SARS' determination of July 2017. Only two bases were relied on by SARS in disallowing the refund claims (as set out hereinabove).

119. The SCA misunderstood the PAJA relief originally sought in prayer 1 of the notice of motion in the High Court,[68] which was aimed at reviewing and setting aside the Commissioner's *purported* determination of 15 July 2020 in his response to Tholo's

65 HC judgment at [65].
66 HC judgment at [32] to [45].
67 SCA judgment, para [2] and [14].
68 SCA judgment, para [4].

notice of litigation. This was however no longer required as the Commissioner conceded in his answering affidavit that it was not a determination at all.

120. The SCA's finding[69] that the consignments of fuel *"were collected on behalf of (Tholo) from depots of (PetroSA) for removal to Lesotho"* and that *"PetroSA is a licensee of a (VM)"*, ought to have been the end of the matter. I refer to what has been stated hereinabove.

121. The SCA's finding[70] that the consignments of fuel were removed to Lesotho is correct and demonstrates that the objects of the provisions have been achieved (the exit of the fuel from the Republic of South Africa), and that duties and levies stand to be refunded to Tholo.

122. Despite the SCA's very high-level reference at [22] to [24] to the arguments for Tholo in respect of SARS' *ultra vires* conduct, and the fact that SARS as administrator was *functus officio*, the SCA respectfully failed to deal with such arguments at all as part of its judgment. The SCA only considered the nature of a wide appeal at [33] to [40], without considering Tholo's substantive arguments, and incorrectly applying its own precedent in *Levi Strauss (2021)* at [37] of the judgment.

123. The SCA's finding[71] that, failing compliance with each and every requirement in the sections, Rules, and Notes, a refund may not be granted – despite that the objects of such had been achieved - is at odds with the judgments in *BP* and *Allpay*, and is wholly premised on pre-constitutional legal authority.

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69 SCA judgment at [7].
70 SCA Judgment at [10].
71 SCA judgment at [50] to [53].

124. The SCA's findings at [56] and [58] is incongruent with the actual provisions, Rules, and Notes. Tholo was never required to establish that "the fuel was obtained from stocks of the licensee *at a licensed VM*". The provisions, Rules, and Notes have no such words, contain no such requirement, and cannot reasonably be interpreted to mean such. The SCA respectfully misinterpreted.

125. The SCA's findings at [59] are manifestly incorrect. Tholo demonstrated, with reference to undisputed evidence from PetroSA, that the fuel was locally manufactured and transported via rial to the depots in Bloemfontein and Tarlton. While SARS made various bald allegations regarding the Transnet pipeline and the mixing of fuel in its answering affidavit, this was nothing but a red herring. Importantly, SARS cannot escape the undisputed evidence that its appeal committee was satisfied and accepted that the fuel was, in fact, locally manufactured.

126. While I deny the SCA apparent issue in [59] (second point) with the invoices issued by PetroSA to Tholo, this is somewhat bizarre, as SARS itself did not take issue therewith in its answering affidavit in the High Court. Tholo is manifestly prejudiced by the continuous raising of issues not contained in SARS' impugned final determination.

127. It is unknown to which External Oil Directive the SCA referred in [61] in support of its finding that Tholo did not have an alleged required ITAC export permit. The directive applicable at the time of the removal of the fuel to the BLNE countries was the External Reference Guide: Oil Industry (01 February 2011) referenced in para 73.1 of my founding affidavit, which provided that an export permit from ITAC was required only for export to countries outside of BLNS-countries, but not for removal to BLNS-countries. This was not disputed by SARS.

[G] CONCLUSION

128. For the reasons provided above, the requirements for leave to appeal to this Court are manifestly satisfied. This Court's jurisdiction under both ss 167(3)(b)(i) and (ii) of the Constitution is engaged.

129. The SCA's judgment:

129.1 Sets binding precedent for unlawful and unconstitutional conduct by an organ of State, SARS, to act in an administratively unfair and unjust manner in a tariff appeal under s 47(9) of the Act, contrary to ss 33 and 34 of the Constitution;

129.2 Sets binding precedent for the interpretation of the refund provisions contained in the Act, the Rules, and the Notes, and where an LDF is obliged to obtain fuel for removal to a BLNE-country; and

129.3 Sets binding precedent for the proposition that *strict* compliance is required in all instances, without exception, regardless thereof that the object of the legal requirements have been achieved, and that the Commissioner has no discretion to pay the refund. This, in circumstances where no duties and levies are due and owing to SARS upon the exportation or removal of the fuel, and where duties and levies accordingly stand to be repaid, constitutes the arbitrary deprivation of property prohibited in s 25 of the Constitution.

130. It is in the interests of justice to grant leave to appeal *inter alia* on the basis that good prospects of success exist. No development of the common law is required. The constitutional appeal hierarchy has been exhausted. No dispute of fact

requires resolution. Pure questions of law on which this Court has not yet pronounced are raised. The questions of law impact on the public in general and continue to affect Tholo, bearing directly on its ability to continue to exercise its right to trade. The questions for consideration also continue to govern the legality of SARS' exercise of public power, and its conduct in tariff appeals under s 47(9) of the Act.

131. This is a concise constitutional case concerning questions of law alone. The public interest in an authoritative interpretation by this Court is overwhelming. Not only Tholo, but also other LDFs, licensees of VMs, oil majors, licensed removers of goods in bond, the fuel industry, and also SARS, stand to benefit from a precedent pronounced by this Court on the correct interpretation of the requirements.

132. Tholo accordingly asks that leave to appeal be granted, and that the appeal be upheld with costs, setting aside the SCA's judgment and order, and substituting the High Court's orders for an order in the terms set out in the accompanying notice of motion.

T MOROAHAE
DEPONENT

I CERTIFY that the deponent has acknowledged that he knows and understands the contents of the afore going affidavit, that he has no objection to taking the prescribed oath and that he considers the oath to be binding on his conscience, and that accordingly the requirements as set out in Reg. No. 1258 of Government Gazette No. 3619, 21 July 1972 (as amended) have been complied with, which affidavit was signed and sworn to before me at Randburg on this the 28 day of AUGUST 2024.

Before me:

COMMISSIONER OF OATHS
CAPACITY:
AREA:
ADDRESS:

SIGNATURE 28 AUG 2024 DATE

Commissioner of Oaths (RSA)
Toby Menezes
Owner 3@1 Blairgowrie
Ref: 43/11/2017
Shop 19A, Blairgowrie Plaza
Conrad Drive
Blairgowrie, 2194
District. Randburg