IN THE CONSTITUTIONAL COURT

CCT Case No: CCT/104/23
SCA Case No: 1299/2021
KZN(D) Case No: D10030/2019

In the matter between

THE COMMISSIONER OF THE SOUTH AFRICAN REVENUE SERVICE First Applicant

THE CHAIRPERSON, EXCISE APPEAL COMMITTEE Second Applicant

and

RICHARDS BAY COAL TERMINAL (PTY) LTD Respondent

FILING NOTICE

PLEASE TAKE NOTICE THAT the respondent serves and files its Grounds of Opposition.

DATED AND SIGNED AT UMHLANGA ON THIS 9TH DAY OF MAY 2023.

RESPONDENT'S ATTORNEYS

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(Respondent's Attorneys)
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TO:
The Registrar of the Constitutional Court
South Africa, Braamfontein, Johannesburg

AND TO:
Linda Mazibuko & Associates
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Ref: Mr Mazibuko/SW/SARS19/3
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LINDA MAZIBUKO & ASSOCIATES
RECEIVED WITHOUT PREJUDICE
DATE: 09/5/2023
TIME: 10:30
SIGN:

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GROUNDS OF OPPOSITION

I, the undersigned,

QUINTUS VAN DER MERWE

state under oath that:

1 I am a Partner at Shepstone and Wylie Attorneys, the attorneys of record of the Respondent, the Richards Bay Coal Terminal ("**RBCT**"). I am duly authorised to

depose to this affidavit, setting out RBCT's grounds of opposition to the application for leave to appeal.

2 The facts contained in this affidavit are true and correct, and, unless the contrary is stated, fall within my personal knowledge.

3 In this affidavit, I do not intend to deal with each and every paragraph in the founding affidavit in support of the application for leave to appeal to this Court by the Applicant ("**SARS**"), but to deal with the issues raised and to demonstrate why this Court should dismiss the application for leave to appeal with costs. Allegations which are not expressly admitted, or which are inconsistent with what I have said elsewhere in this affidavit, should be taken to be denied.

INTRODUCTION AND NATURE OF THE APPLICATION

4 RBCT operates one of the leading coal export terminals in the world at Richards Bay. It uses diesel locomotives to transport 100 coal wagon trains over rail lines on RBCT premises between:

4.1 rail siding 2279 at which Transnet Freight Rail electric locomotives deliver 200 wagon coal trains; and

4.2 the "tandem tipplers" which discharge coal from the wagons onto conveyor belts which deposit the coal in the stacking areas from which the coal will ultimately be loaded onto export ships.

5 The RBCT rail network comprises approximately 95 km and is able to handle multiple 100 coal wagon trains simultaneously. The RBCT rail network is not electrified and the tipplers cannot handle more than 100 wagons. So the RBCT rail network cannot be used by the Transnet Freight Rail locomotives pulling 200 coal wagon trains. Instead, the 200 wagon trains have to be split into two 100 wagon trains which are **hauled by the 9 diesel locomotives purchased and used by RBCT** over its rail network.

6 In 2001, the Department of Finance introduced a diesel rebate scheme pursuant to powers provided for in section 75 of the Customs and Excise Act ("**CEA**").[1] Under The rebate scheme applied *inter alia* to *"locomotives used for rail freight"* as made clear in Note (b)(iv) of Part 3 of Schedule 6 to the CEA. In 2009, RBCT registered for the diesel fuel levy refund scheme in relation to the the fuel used for its diesel locomotives. It thereafter claimed rebates for the period 2009 to 2017.

7 In its original application for registration and in all of its subsequent dealings with SARS, RBCT made clear all relevant facts relating to the nature of the operations in which its diesel locomotives were used.

8 On 22 April 2015, SARS gave RBCT notice that it intended to conduct an audit into RBCT's diesel rebate claims for the period 2013/01 to 2014/12. Some two and a half years later, on 4 December 2017, SARS issued a letter of demand to

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[1] Act 91 of 1964.

RBCT for repayment of R7 126 934.63, plus interest, which it alleged RBCT had claimed for "*non-qualifying activity*" under the diesel rebate scheme.

9 The letter of demand embodied a determination by SARS under section 47(9)(a) of the CEA that the diesel use by RBCT did not fall within the class covered by under Note (b)(iv) of Part 3 of Schedule 6 to the CEA.

10 It does not appear from any of the allegations made by SARS that the audit revealed any material facts of which SARS was previously unaware. Instead, what appears to have happened is that SARS has now adopted a new (and, it is submitted, incorrect) legal interpretation of Note (b)(iv) of Part 3 of Schedule 6 to the CEA. On the basis of this new and questionable legal interpretation, SARS now contests RBCT's eligibility for the diesel rebate on the basis of facts about the nature of RBCT's rail freight operations that have always been made clear to SARS.

11 From facts disclosed to RBCT by SARS, it appears that the change of position from SARS was triggered by a secret policy directive from Treasury, the existence of which was only disclosed to RBCT on 27 November 2018 (long after the determination) and the contents of which SARS still refuses to disclose.

12 Despite the fact that the audit appears to have been entirely irrelevant to SARS's decision to reverse its previous interpretation of Note (b)(iv) of Part 3 of Schedule 6 to the CEA, SARS used the fact of the audit to invoke section 47(11) of the CEA to push the effective date of the determination back to 23 April 2013 which was two years prior to the audit commencement date. By so doing, it claimed

more than double the amount that it would have been entitled to claim if the effective date of the determination was determined under section 47(10) which ordinarily provides for an effective date of two years prior to the determination (which in this case, would have been an effective date of 5 December 2015).

13 The letter of demand expressly referred RBCT to its rights both to lodge an appeal under the CEA and to bring judicial review proceedings under PAJA. Thus in paragraph 4, it stated:

> *"Should you wish to impugn any of the decisions recorded herein you are referred to the provisions of section 7, read with section 9 of the PAJA and sections 77A-H of the Customs Act read with the rules thereto"*

14 On 9 February 2018, RBCT lodged an internal appeal in terms of s 77 of the CEA. On 7 February 2019, the internal administrative appeal committee of SARS, the Excise Appeal Committee, rejected RBCT's appeal. No reasons were provided.

15 Thereafter, RBCT applied to the KwaZulu-Natal High Court, Durban on 26 November 2019. RBCT sought the following relief:

15.1 RBCT's primary relief was to **appeal** the decision of the Excise Appeal Committee and, if successful on that score, for the decision of the Excise Appeal Committee to be substituted with one: (a) upholding RBCT's appeal to it, and, (b) setting aside SARS' letter of demand;

15.2 In the alternative, RBCT sought to **review and set aside** both the Excise Appeal Committee's decision to reject its appeal and SARS' decision to issue the letter of demand.

16 In the Notice of Motion, RBCT called upon SARS under Rule 53 of the Uniform Rules of Court to disclose the Record of Decision in relation to the impugned decisions.[2] SARS refused to do so. It also refused to provide any reasons for its decisions (and to date has not done so). Despite its express statement to the contrary in the letter of demand, and despite the absence of any express ouster in the CEA or any other legislation, of the High Court's review jurisdiction over tariff determinations made by the Commissioner, SARS now maintains that tariff determination decisions are immune from judicial review under PAJA.

17 On 30 January 2020, RBCT served a Rule 30A Notice on SARS, followed by a Rule 30A Application calling upon SARS to produce the Record of Decision. It based its Rule 30A application not only on Rule 53 but also on Rule 35(11). It is this Rule 30A Application, and SARS's refusal to produce the Record of Decision in response thereto, that is the genesis of SARS's current application for leave to appeal to this Court.

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[2] The impugned decisions were fully described in the Notice of Motion as follows:

> 1. The decision taken by the Internal Administrative Appeal Committee of SARS on or about 7 February 2019, rejecting the Applicant's appeal and confirming a Letter of Demand which had been issued by SARS on 4 December 2017, in which SARS issued a determination and demand for the repayment of fuel levy refunds claimed and received by the Applicant, by virtue of the provisions of s 47(9)(a), (10) and (11) of the Customs Act, read with s 44(11)(a) thereof; and
>
> 2. SARS's decision of 4 December 2017 to issue the Letter of Demand referred to in the previous paragraph.

The High Court and SCA judgments

18 Both the High Court and the Supreme Court of Appeal rejected SARS's arguments:

18.1 The High Court (per Topping AJ) granted RBCT's compelling application, and ordered SARS to produce the record within 10 days.[3] Topping AJ held that "*this Court's review jurisdiction has not been excluded in the present instance*" and accordingly directed compliance with the provisions of section 53(1)(b).

18.2 The Supreme Court of Appeal (per Ponnan JA) similarly rejected SARS's arguments. Ponnan JA held, with reference to this Court's judgments in **Pharmaceutical Manufacturers**,[4] and **Fedsure**,[5] that SARS's argument misconstrues what is sought to be vindicated in a review, namely, the right to just administrative action.[6] As Ponnan JA explained:

> *"A decision may be correct but taken unlawfully or unfairly. The correctness of a decision in no way negates the right of a person adversely affected by administrative action to a lawful and fair decision. SARS' argument also flies in the face of the principles that underpin the exercise of all public power and undermines the very important principle in our law that decisions should not be taken in secret and that administrative bodies such as SARS can and should be held accountable for their actions. Thus, disclosure of the record is essential to give effect to a litigant's rights under section 34 of the Constitution."*

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[3] Judgment of Topping AJ, Annexure LM1 to the Application for Leave to Appeal.

[4] Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others [2000] ZACC 1; 2000 (2) SA 674 (CC) para 45.

[5] Fedsure Life Assurance Limited and Others v Greater Johannesburg Transitional Metropolitan Council and Others [1998] ZACC 17; 1999 (1) SA 374.

[6] SCA judgment para 21

18.3 Ponnan JA further emphasised the important role that litigation plays in the "*discovery of the truth*"[7] and relied on this Court's judgment in **HSF** which emphasised the constitutional requirements of openness and accountability as well as the danger of illegalities perpetuated by state entities being concealed from scrutiny.[8]

19 SARS now applies for leave to appeal against the judgment of the Supreme Court of Appeal to this Court. I emphasize that the present dispute relates only to the obligation of SARS to furnish the Record of its Decision. This is important because SARS approaches this Court seeking to turn the present dispute into a test case as to whether tariff determinations under section 47(9)(a) of the CEA are subject to judicial review under PAJA. RBCT respectfully maintains that, given the facts of its case, it will be entitled to a Record of the Decision whether or not tariff determinations are subject to judicial review under PAJA because, quite aside from any right of review, a fair hearing of its High Court appeal will not be possible without production of the Record of Decision. So the test case desired by SARS will not arise in the context of this application for leave to appeal and it is not in the interests of justice to entertain an appeal in this matter which is against an order to produce the Record of Decision and will not reach the underlying issue on which SARS seeks a test case.

20 Quite aside from the unsuitability of the present case for any attempt to resolve the underlying issue which SARS seeks to be decided by a test case, SARS has

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[7] SCA judgment para 26 citing Riddick v Thames Board Mills Ltd [1977] 3 All ER 677 (CA) at 687.

[8] SCA judgment para 27 citing Helen Suzman Foundation v Judicial Service Commission 2018 (4) SA 1 (CC) para 59, 64-67 and 69.

no prospects of success on that underlying issue. That is an additional obvious reason to refuse leave to appeal.

21 I address these two flaws in the application for leave to appeal sequentially.

THE PRESENT DISPUTE WILL NOT REACH THE ISSUE WHICH SARS WANTS DECIDED BY WAY OF TEST CASE

SARS's Contention that Grounds of Review can be Advanced as Grounds of Appeal

22 SARS cannot suggest to this Court that the CEA deprives taxpayers of any remedy for violation of their fundamental rights to administrative justice, because such an argument would be constitutionally untenable. So the cornerstone of its "no review" argument is the proposition it advances in paragraph 6 of its founding affidavit in this application for leave to appeal. In paragraph 6 SARS contends that the appeal under section 47(9)(e) of the CEA is such a wide appeal that the taxpayer can run "*any ground that they would have in a review*" [9] as a ground of appeal and that, in this way "*the rights of review are respected*".[10]

23 But once the case of SARS is based on the proposition that a taxpayer is entitled to advance any ground of review as a ground of appeal, it is untenable for SARS to maintain that it can stultify the right to advance grounds of review as grounds of appeal by refusing to produce the record. Many grounds of review cannot be

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[9] SARS application for leave to appeal, para 6.

[10] SARS application for leave to appeal, para 6.

run properly without a record. The very purpose of requiring a review respondent to furnish the applicant with a record is to enable the applicant and the Court properly to investigate the legality and regularity of the decision brought under review.

24 So once RBCT has advanced grounds of review in the primary proceedings, even if these are to be treated as grounds of appeal, rather than grounds of independent review proceedings, RBCT must be entitled to the record of decision that it seeks, not only under Rule 53 but also under Rule 35(11).

On the Facts of the Principal Dispute there can be no Fair Hearing of an Appeal or a Review without the Record of Decision

25 The general proposition set out above is illustrated particularly well by the facts of the present case. This is because, as pointed out above,

25.1 SARS maintains that the determination that is at issue in these proceedings is legally linked to the audit process that commenced on 22 April 2015, more than two and a half years before the letter of demand was issued in December 2017.

25.2 On this basis, SARS invokes section 47(11) of the CEA to push the effective date of the determination back from 4 December 2015 to 23 April 2013 and ends up claiming more than double the aggregate amount that it would have claimed if the effective date was governed by section 47(10) of the CEA, (which would have been the case absent the audit).

26 However, as pointed out above, it seems unlikely that the audit process commenced in April 2015 could have been legally relevant to the determination, because the facts of the RBCT situation have never changed and have always been disclosed. What changed in that period was not SARS's knowledge of the facts, but SARS's new legal attitude to facts that it has always known.

27 RBCT maintains that SARS's claim has no merit at all because it is based on an incorrect interpretation of Note (b)(iv) of Part 3 of Schedule 6 to the CEA. But quite aside from this defence on the merits, if RBCT is able to show that the April 2015 audit was irrelevant to the determination, it will have both:

27.1 a ground of review to challenge the legality of more than half of SARS's claim against it (which would be *ultra vires* section 47 of the CEA), and

27.2 a defence in the appeal against more than half of the quantum claimed by SARS.

28 The record of the decision will make clear:

28.1 whether or not the audit was in any way relevant to the determination,

28.2 whether or not the change of position from SARS was triggered by a secret policy directive from Treasury,

28.3 what the contents of that secret policy directive were, and

28.4 when the secret policy directive was issued by Treasury.

29 All of this evidence is needed by RBCT not merely to advance grounds of review, but also to advance a defence in the appeal that will negate more than half of the quantum claimed by SARS.

Conclusion

30 The orders of the High Court and SCA merely direct SARS to furnish the record of decision. In view of the contention advanced by SARS in paragraph 6 of its founding affidavit in the application for leave to appeal, any appeal against those orders must fail. If SARS accepts that grounds of review can be advanced as grounds of appeal, it must accept that an appellant is entitled to a record of decision to advance its grounds of review.

31 Quite aside from that general principle, the particular facts of the present dispute make clear that a record of decision is necessary to protect the fair hearing rights of RBCT not only in a review, but also in its High Court appeal against the SARS determination.

32 So, it is plainly not in the interests of justice to grant leave to appeal because:

32.1 The appeal of SARS will inevitably fail without even reaching the underlying issue that SARS wants to litigate in its test case.

32.2 Whether or not SARS has an institutional need for a ruling from this Court to determine whether taxpayers can review determinations as well as appealing them, this is <u>not</u> the case to have that debate.

32.3 SARS should simply deliver the Record to RBCT and if, at the end of the High Court hearing on the merits, there is still a live fight over whether RBCT is entitled to review the determination of the Commissioner, SARS can run their test case at that stage.

32.4 In the meantime, if the underlying issue arises in a judgment against SARS in a dispute that it has with another taxpayer, it can use that case to apply for leave to appeal to the Constitutional Court.

32.5 RBCT should not have to suffer the expense and delays of SARS's concerns about reviews when all that RBCT is seeking at this stage is a Record and, even on SARS's position, there is no plausible basis for refusing RBCT access to the Record.

33 For completeness, however, we should point out anyway that the SARS argument on the underlying issue that it seeks to have tested also has no prospects of success.

THE PRIMARY SARS ARGUMENT IS UNSUSTAINABLE

Introduction

34 SARS wants to use the present matter to test its proposition that the CEA excludes reviews against tariff determinations made by the Commissioner under section 47(9). This proposition is unsustainable. The SARS argument breaks down on five independent grounds:

34.1 It is constitutionally offensive and systemically problematic;

34.2 It flies in the face of basic principles of statutory interpretation under the Constitution;

34.3 It ignores the difference between a correct answer on appeal and a just and equitable remedy on review;

34.4 It wrongly presupposes that there can be only one correct answer on appeal; and

34.5 It fails to take account of the onus that operates in an appeal.

The SARS Contention is Constitutionally Offensive and Systemically Problematic

35 SARS seeks to protect its officers from judicial scrutiny of their procedurally unfair and irregular conduct on the basis that the taxpayer will always be able to obtain a correct answer on appeal to the High Court.

36 However, most taxpayers do not have the resources to take on SARS - so in the vast majority of cases, the first SARS decision is likely to be the only SARS decision.

37 If SARS officials know that their process will not be subject to scrutiny in review applications, it is inevitable that they will pay less attention to their constitutional obligations in relation to administrative justice, because they will never face the disciplining power of PAJA review or the requirement to produce the record of decision.

38 That will mean there may be a substantial increase in unlawful unfair and irregular SARS decisions that never reach the courts.

The SARS Argument Flies in the Face of all Principles of Statutory Interpretation and Constitutional Jurisprudence.

39 SARS's interpretation invites this Court to read into the CEA an ouster of the review jurisdiction of all superior Courts. This interpretation is incompatible with:

39.1 the presumption against ousting the jurisdiction of the Court;

39.2 the rule of interpreting legislation to give effect to the spirit, purport and objects of the Bill of Rights;

39.3 the obligation on Courts under section 172 of the Constitution to declare invalid all administrative acts that are inconsistent with the fundamental right to just administrative action; and

39.4 the right of any victim of a violation of the fundamental right to administrative action to appropriate relief under section 38 of the Constitution.

SARS Fails to Appreciate the Difference between a Correct Answer on Appeal and a Just and Equitable Remedy on Review

40 The High Court on appeal under the CEA has only the rigid powers to uphold or set aside the determination. If it upholds the determination, it cannot mitigate the

consequences in relation to repaying past refunds with interest, even if justice and equity demand that it should.

41 In contrast, the High Court on review has the flexible remedial power under section 172(1)(b) of the Constitution to make any order that is just and equitable.

42 A just and equitable answer will frequently differ from a correct answer that rigidly applies the provisions of the CEA. The present case provides a good illustrative example in this regard.

42.1 RBCT has always been open and honest about the facts of its operations, from the time that it applied for registration in 2009 through to the present;

42.2 With full knowledge of all of the facts, SARS registered RBCT in 2009 and then accepted its rebate applications for years on end before it apparently changed its approach on the basis of a secret policy directive from Treasury;

42.3 SARS commenced an audit of RBCT in April 2015 then delayed more than two and a half years before first alerting RBCT to the possibility that SARS was revisiting its hitherto consistent interpretation of Note 6(iv)(b).

43 On these facts, if a Court were exercising remedial powers on review, even if it accepted SARS's new interpretation as correct, it may well decide that RBCT should be spared some of the retrospective consequences of the implementation of this new interpretation under its broad powers to grant just and equitable relief under section 172(1)(b) of the Constitution.

There is not only One Correct Answer on Appeal

44 SARS contends that a taxpayer is entitled only to a "correct" decision by the High Court.

45 But if there are cases on appeal to the High Court under section 47(9) where there can be multiple correct answers, the taxpayer is entitled to the benefit of a lawful and fair determination by the Commissioner (which may turn out to be better for the taxpayer than the "correct" answer given by the High Court).

46 There are several decisions under s 47(9) of the CEA which will involve the exercise of a discretion and thus a range of possible "correct" answers. By way of example, the Commissioner has a discretion in relation to fixing the effective date of a redetermination under s 47(9)(d)(ii).

The Onus

47 The SARS approach also ignores the importance of the onus.

48 The Commissioner must approach the original determination with an open mind and no preconceptions. Indeed, if the Commissioner were to make his determination based on a series of presumptions adverse to the taxpayer and unsupported by any evidence, the determination would be manifestly unfair and unlawful.

49 However, once the Commissioner has made his/her determination, the taxpayer carries an onus under section 102 of the CEA on a range of issues that may be in dispute on appeal to the High Court.

50 So, the factual enquiry before the Commissioner acting fairly may not have the same outcome as the factual determination before the High Court, and the Commissioner cannot, by acting, unfairly or irregularly, force the taxpayer to be satisfied with the different adverse factual determination before the High Court.

CONCLUSION

51 RBCT submits that there is no merit in SARS's application for leave to appeal and there is no reasonable prospect of a successful appeal against the judgments and orders of the High Court and Supreme Court of Appeal in respect thereof.

52 RBCT also submits that it is not in the interests of justice for this Court to grant leave to appeal and that there are no substantial points of law or factual issues of sufficient importance to justify the appeal. This case, properly conceptualised, is a simple one which concerns only the obligation to produce the Record. On SARS's *own* case before this Court (in which the wide appeal grounds under section 47 of the CEA encompass all the grounds of review), such Record must be produced.

53 In the premises, RBCT prays for an order dismissing SARS's application for leave to appeal with costs, such costs to include the costs of two counsel.

DEPONENT

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of his knowledge both true and correct. This affidavit was signed and sworn to before me at on this the day of 2023, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended, have been complied with.

COMMISSIONER OF OATHS
Full names:
Address:
Capacity:

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