IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 104/23

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	First Respondent

NOTICE OF MOTION

PLEASE TAKE NOTICE THAT the applicant hereby applies for the following relief:

1 Granting the applicants leave to file a supplementary affidavit in the above application.

2 Further or alternative relief.

TAKE NOTICE FURTHER THAT the affidavit of **GREGORY LINDA MAZIBUKO** and its annexures will be used in support of this application.

DATED AND SIGNED AT Durban **ON THE** 19th **DAY OF JULY 2023.**

APPLICANTS' ATTORNEYS

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To:
The Registrar of the Constitutional Court
JOHANNESBURG

And To:

Shepstone & Wylie

(Respondent's Attorneys)

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JOHANNESBURG

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THE COMMISSIONER OF THE SOUTH AFRICAN REVENUE SERVICE	First Applicant
THE CHAIRPERSON, EXCISE APPEAL COMMITTEE	Second Applicant
and	
RICHARDS BAY COAL TERMINAL (PTY) LTD	First Respondent

SUPPLEMENTARY AFFIDAVIT

I, the undersigned,

GREGORY LINDA MAZIBUKO

state under oath as follows:

1 I am an attorney practising at Linda Mazibuko & Associates, the applicants' attorneys of record.

2 I am duly authorised to depose to this affidavit on behalf of the applicants. The facts contained herein are, unless the context indicates the contrary, within my personal knowledge and are to the best of my belief, both true and correct.

3 Where I make submissions of a legal nature, I do so on the basis of my own legal knowledge as well as the advice of the applicants' counsel.

THE FILING OF THIS AFFIDAVIT

4 I understand that in applications for leave to appeal to this Court, an applicant is ordinarily only entitled to file a founding affidavit and has no right of reply.

5 The applicants seek this Court's leave to file this short supplementary affidavit, which serves one limited purpose: to draw to this Court's attention a judgment, handed down by the Pretoria High Court on 17 July 2023, which is directly relevant to the present matter.

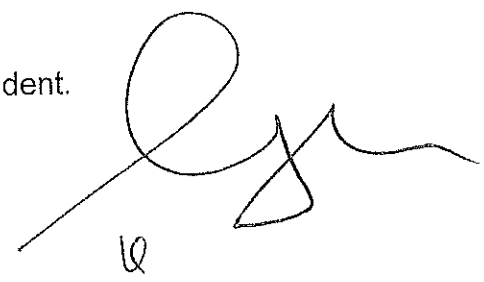
6 I respectfully submit that the filing of this further affidavit is in the interests of justice in that:

6.1 the judgment to which I will refer is directly relevant to the present proceedings, and particularly to the question whether the interests of justice favour the granting of leave to appeal;

6.2 the scope of this affidavit is limited drawing the judgment and its key extracts to the Court's attention, and reiterating that the existence of conflicting judgments is a significant factor in the interests of justice assessment;

6.3 it was not possible to refer to the judgment in the founding affidavit, or at any stage earlier than the filing of this affidavit, as the judgment was only handed down on 17 July 2023, and was only brought to my attention on 18 July 2023; and

6.4 there is no conceivable prejudice to the respondent.



THE GLENCORE JUDGMENT

7 In the founding affidavit, I explained that, apart from the present proceedings, the question whether the High Court has review jurisdiction in respect of challenges to tariff determinations under section 47(9) of the Customs and Excise Act 91 of 1964 ("**CEA**") has been considered on three other occasions:

7.1 In *Distell Limited,*[1] the Full Court held that the prescribed remedy is an appeal and not a review, and that because the appeal under section 47(9)(e) is an appeal in the wide sense, there is no need to resort to the Promotion of Administrative Justice Act 3 of 2000 ("**PAJA**") for purposes of a review.

7.2 In *BCE,*[2] the High Court held that the CEA did not oust the provisions of PAJA, and that an aggrieved party was not limited to the appeal procedure provided for in section 47(9)(e).[3]

7.3 In *Cell C,*[4] the High Court concluded that it lacked jurisdiction to hear a review of a tariff determination, because "*when one has access to the wide appeal remedy provided for in section 47(9)(e), the possibility of a review is excluded*".[5]

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1 Distell Limited v The Commissioner for the South African Revenue Services 2009 JDR 0337 (GNP).
2 BCE Food Service Equipment (Pty) Ltd v Commissioner for the South African Revenue Service [2017] ZAGPJHC 243 (12 September 2017).
3 Id para 7.
4 Cell C (Pty) Ltd v The Commissioner for the South African Revenue Service [2022] ZAGPPHC 152 (11 March 2022)
5 Cell C para 33.

8 As of 17 July 2023, there is now a fourth decision. It is *Glencore Operations SA (Pty) Ltd and Others v Commissioner for the South African Revenue Service and Another* (Case No: 15988/2020). I attach a copy of the judgment marked "**SA1**".

9 In *Glencore,* the applicant (like RBCT in the present case) brought a statutory appeal in terms of section 47(9)(e) of the CEA and a review in terms of the PAJA.[6] The Court (per Collis J) noted, with reference to the High Court decision in the present matter,[7] Glencore's contention that the provisions of PAJA were not ousted by section 47 of the CEA.

10 However, in relation to the question whether a review under PAJA was available in addition to the wide appeal under section 47(9)(e), the Court referred to the decision in *Cell C* as follows:

> "[25] In Cell C v SARS Tolmay, J held that a litigant faced with an adverse finding by the Internal Administrative Appeal Committee, has only one remedy, being an appeal in terms of Section 47(9)(e) of the Customs and Excise Act. The following passages of the judgment are instructive:
>
> > "[33] On a proper interpretation of the CEA, the court retains review jurisdiction in certain circumstances, but when one has access to the wide appeal remedy provided for in s 47(9)(e), the possibility of a review is excluded. Relying on a wide-appeal and a review application in the same application creates a number of difficulties. As is by now clear, a wide appeal entails a complete de novo hearing; a review on the other hand is restricted to procedural issues. Sars was

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6 Para 2.

7 Para 2. The Court did not refer to the SCA decision in the present matter. I presume this is because *Glencore* was argued on 22 July 2022, and the SCA decision in the present matter was only handed down on 31 March 2023.

clear that it did not contend that review procedure would generally be unavailable. If I understand the argument correctly, it is that, by virtue of the provisions of s 47(9)(e), review procedure which would otherwise be available will not be available. The consequence of this is merely that if one has access to a wide appeal, one cannot in the same breath resort to review proceedings. I am of the view that this is indeed the correct approach. This approach gives effect to the purpose of the CEA and does not limit access to justice.

[34] It must be emphasised that if Cell C succeeds in its statutory appeal against the redetermination, then the redetermination, including the retrospectivity, will be set aside. The merits of the determination must be dealt with, together with the effective date.

[35] As already stated a s 47(9)(e) appeal embraces review grounds. The fact that there is an element of discretion is no obstacle, as a wide appeal is a complete rehearing in which the court itself exercises a discretion on the facts before it. In Commissioner for the South African Revenue Service v Afri-Guard (Pty) Ltd the full court confirmed this." (Emphasis in original).

11 Collis J went on to signal her agreement with the approach adopted in *Cell C* as follows:

"[26] The above reasoning employed by Tolmay J, I find favour with and is consequently endorsed by this Court. The present application will thus be dealt with, within the ambit of section 47(9) (e) of the Customs Act. It follows that an appeal of this nature constitutes a hearing *de novo*."

12 The upshot is that there are now:

12.1 two decisions of a single judge (*Cell C* and *Glencore*) and one decision of a Full Court (*Distell*), which have found that that the wide appeal under section 47(9)(e) precludes an applicant from instituting review proceedings;

12.2 two decisions of a single judge (*BCE* and the present matter), and one decision of the SCA (in the present matter), which have found that, notwithstanding the wide nature of the appeal under section 47(9)(e), an applicant is nevertheless entitled to institute review proceedings.

13 I respectfully submit that the existence of these conflicting judgments on the specific issue at stake in the present matter demonstrates that it is in the interests of justice for the appeal to be heard, and for this Court finally to settle the legal position.

CONCLUSION

14 For the reasons set out above, I ask that:

14.1 SARS be granted leave to file this further affidavit; and

14.2 SARS be granted leave to appeal.

GREGORYY LINDA MAZIBUKO

I hereby certify that the deponent has acknowledged that he 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 **JOHANNESBURG** on this the 19th day of July **2023**, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended by R1648 of 19 August 1977, and as further amended by R1428 of 11 July 1989, have been complied with.

COMMISSIONER OF OATHS

VIREN SINGH
COMMISSIONER OF OATHS
PRACTISING ATTORNEY R.S.A.
239 MATHEWS MEYIWA ROAD
(Stamford Hill Rd.)
GREYVILLE, DURBAN, 4001

Full Names in Print:

Designation:

Area:

"SA1"

OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED

17 JULY 2023

DATE OF JUDGMENT **SIGNATURE**

CASE NO: 15988/2020

In the matter between:

GLENCORE OPERATIONS SA (PTY) LTD First Applicant

ARM COAL (PTY) LIMITED Second Applicant

GOEDGEVONDEN JOINT VENTURE Third Applicant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE First Respondent

ANAND KHELAWON N.O. Second Respondent

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on CaseLines by the Judge or her Secretary. The date of this judgment is deemed to be 17 July 2023.

JUDGMENT

COLLIS J

INTRODUCTION

[1] This application concerns the eligibility of diesel refunds claimed by the Goedgevonden Joint Venture ("JV") in terms of section 75(1A) of the

Customs and Excise Act[1] ("Customs Act") read with item 670.04 of Part 3 of Schedule No. 6.

[2] This is a statutory appeal in terms of section 47(9)(e) of the Customs Act against a determination made by the Commissioner,[2] confirmed on appeal by the latter's National Appeal Committee. The Applicants also seek relief based on the Promotion of Administrative Justice Act ("PAJA").[3] In this regard it is contended that the provisions of PAJA have not been ousted by section 47 of the Customs Act. [4]

[3] As per the Notice of Motion, the applicants seek the following relief:

3.1. "That the Applicants' appeal against the determination contained in Annexure "FA2" to the founding affidavit and against the confirmation of the determination by the SARS Internal Excise Appeal Committee as contained in Annexure "FA3" to the founding affidavit, be upheld.

3.2.

3.2.1. That the decision in paragraphs 6.2 and 6.4.3 of the determination in Annexure "FA2" be set aside and

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1 Act 91 of 1964 ("the Custom Act").
2 The Commissioner for the South African Revenue Service or "SARS".
3 Act 3 of 2000.
4 Richards Bay Coal Terminal (Pty) Ltd v CSARS Unreported Case High Court KZN D10030/2009); BCE Food Service Equipment (Pty) Ltd v CSARS (27982/2015) [2017] ZAGPJHC 243 (12 September 2017).

replaced with a decision that the diesel utilised in the activities as described in paragraph 4.4 of Annexure "FA6" to the founding affidavit qualifies for the diesel refund;

3.2.2. That the findings by the Internal Excise Appeal Committee in paragraphs 2(i) and (2(ii) of Annexure "FA3" be set aside and be replaced with the following findings respectively:

3.2.2.1. That the Third Applicant has not contravened Note 6(f)(ii)(cc) of Schedule 6 of Part 3 of the Customs and Excise Act, 91 of 1964 ("*the Act*") and that the Third Applicant is not disentitled from receiving the diesel refund by virtue of the fact that it does not have a valid mining right in its name;

3.2.2.2. That the diesel utilised in the activities as described in paragraph 4.4 of Annexure "FA6"to the founding affidavit qualifies for the diesel refund.

3.3. In the alternative to the relief sought in prayers 1 and 2 above in relation to the decision of the Internal Excise Appeal Committee, that the decision of the said Committee as contained in Annexure "FA3" to the Founding Affidavit be reviewed and set aside.

3.4. In the alternative to prayer 3 above, that the following decisions in Annexure "FA3" be reviewed and set aside:

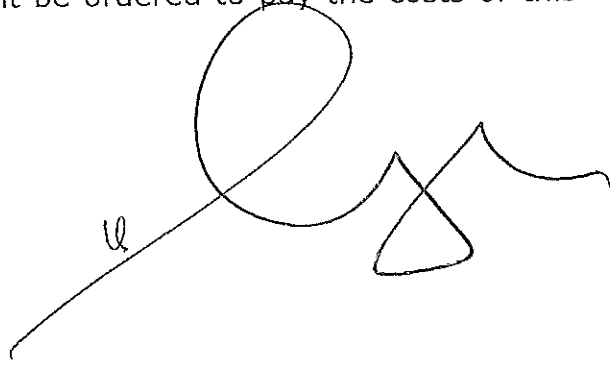
3.4.1. The decision in paragraph 2(i) thereof that the Third Applicant is disentitled from claiming the diesel refunds as it does not have a valid mining right in its name;

3.4.2. In the alternative to prayer 4.1 above, that the failure or refusal to exercise the discretion provided for in note 5 to Part 3 in Schedule 6 to the Act be reviewed and set aside;

3.4.3. The decision in paragraph 2(ii) of Annexure "FA3" that the Third Applicant is not entitled to the diesel refund in respect of what was considered to be crushing and screening activities;

3.4.4. The decision in paragraph 4 of Annexure "FA3" to recoup the amount of R82,984,080.00, with interest, from the Third Applicant.

3.5. That the First Respondent be ordered to pay the costs of this application."



[4] As a result of the outcome of the recent judgment by the SCA in Glencore[5], the Applicants elected to limit the relief[6] claimed by them in this appeal to the decision of the National Appeal Committee of 13 June 2019, raising the debt from R5 099 995.21 to R82 984 080.00. This decision ought to be set aside in its entirety, alternatively in part on the basis that the demand for R82 984 080.00 (plus interest) is unlawful.

[5] As regards the affidavits filed before this court, the applicant on 13 September 2021, filed its first Supplementary Affidavit without seeking leave of the court to do so. As no leave was sought, it follows that none was granted. As such same was not considered as part of the evidentiary material placed before this Court.

[6] On 19 January 2022, the Applicant proceeded to file a Second Supplementary Affidavit. Albeit that leave of court was sought to admit same this affidavit, no persuasive explanation was given as to why the affidavit has been filed out of time and why this which the applicant now wishes to present in the Second Supplementary Affidavit, was not traversed in the affidavits already filed by the applicant.

[7] Generally, only three sets of affidavits are permissible in motion proceedings and parties are only to file further affidavits with the leave of the court, which will be granted provided good reason for this is shown.

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5 Unreported judgment: CSARS v Glencore Operations SA (Pty) Ltd 2021 JDR 1806 SCA.

6 See Section [H] for the relief sought.

The decision of James Brown & Hamer (Pty) Ltd v Simmons NO [1963] 4 All SA 524 (A) 528, elucidates the basis upon which a court will exercise its discretion to admit further affidavits.

[8] In exercising my discretion and in the interest of the administration of justice, I do not deem it prudent to admit these further affidavits filed by the applicant for reasons mentioned above.

ISSUES FOR DETERMINATION

[9] As per the joint practice note filed 5 July 2022, the following issues were listed as issues in contention:

9.1 Whether the Third Applicant (Goedenvonden JV) was the person in possession of the necessary mining authorisation granted or ceded in terms of the Mineral Petroleum Resources Development Act 28 of 2022, as contemplated in **Note 6 (f) (ii) (cc)** of PART 3 of Schedule No. 6 of the Customs and Excise Act, 1964.

9.2 In the alternative: Whether the Commissioner properly **exercise his discretion** (to allow the refunds for Goedgevonden JV in terms of **Note 5** of Part 3 of Schedule No. 6 to the Customs and Excise Act, 1964).

9.3 Whether the National Appeal Committee (in issuing the letter dated 13 June 2019-annexure FA3 to the Founding Affidavit) had the jurisdiction to entertain the appeal.

9.4 Whether the National Appeal Committee was authorised to deal with the appeal after a delay of four years.

9.5 Whether the National Appeal Committee (in issuing the letter dated 13 June 2019-annexure FA3) was empowered to make a **new determination** by adding a finding in paragraph 2(i) that the JV did not comply with Note 6(f)(ii)(cc) (concerning the mining authorisation) and by raising the demand from R5 099 995.21 to R82 984 080.00.

9.6 Whether the National Appeal Committee was empowered to **amend the original determination** in terms of section 47(9)(d) of the Customs and Excise Act, 1964 (as contemplated by SARS), as part of the internal administrative appeal instituted by the Applicants under Chapter XA of the Act.

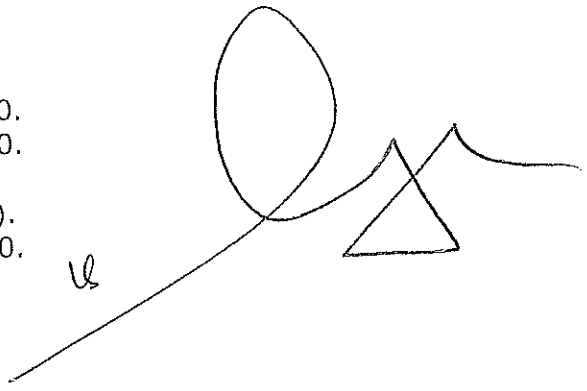
BACKGROUND

[10] The Goedgevonden JV was established by the First Applicant ("GOSA") and the Second Applicant ("ARM") in 2006. GOSA holds a 49% interest and

ARM a 51% interest in the JV.[7] The business of the JV is the thermal mining of coal on various properties in the district of Witbank, Mpumalanga.[8]

[11] The JV agreement is consistent with sections 2(d) and (f) and section 12 of the Mineral and Petroleum Resources Development Act[9] ("MPRDA") by expanding the opportunities for historically disadvantaged persons to enter into and actively participate in the mineral and petroleum industry and by promoting and advancing the social and economic welfare of all South Africans.

[12] The JV is in terms of section 51(1) of the Value-Added Tax Act ("VAT Act")[10] deemed to carry on an enterprise separate from its members (i.e GOSA and ARM) and therefore liable to be registered as a VAT vendor. The JV therefore registered as a vendor for value-added tax ("VAT") purposes. The JV also registered as a "user" for diesel refund purposes under the Customs Act,[11] in terms of the Note 6(f) of Schedule 6 to the Customs Act.



7 Founding Affidavit para 30 CaseLines 001-20.
8 Founding Affidavit para 31 CaseLines 001-20.
9 Act 28 of 2002 ("MPRDA").
10 Value-added Tax Act 89 of 1991 ("VAT Act").
11 Founding Affidavit para 32 CaseLines 001-20.

[13] In terms of the Joint Venture Agreement, it was agreed that the Joint Venture constitutes a relationship of co-ownership between the joint venturers, and that the Joint Venture assets and Joint Venture obligations be dealt with as in terms of the agreement (clause 2.5.2).[12]

[14] SARS conducted an audit into the JV's compliance with the diesel refund provisions for the period June 2012 to September 2014 ("the relevant period").

[15] On 6 March 2015 SARS issued a determination in terms of 47(9)(a) of the Customs Act,[13] in respect of Goedgevonden mine. SARS determined that the JV did not comply with the requirements of the diesel refund provisions for the relevant period in the following manner:

1.1 Crushing and screening: Diesel rebates were disallowed for equipment used by the contractor Liketh for "crushing and_screening and processing of coal", not constituting

12 CaseLines 001-64.
13 Founding Affidavit Annexure "FA2" CaseLines 001-175.

primary production activities in mining; paragraph 6.2 of the letter of findings.[14]

1.2 Light Delivery Vehicles (LDV's): diesel rebates were disallowed for light delivery vehicles/busses for failure to provide detailed records (less than 15% of diesel rebates claimed for period[15]); paragraph 6.3 of the letter of findings.[16]

1.3 Equipment allocated to "Plant": Diesel rebates were disallowed for Authorizer and Telehandler THL01 (**87 025.49** litres[17]), used in the crushing and screeding "plant"; paragraph 6.4.1 of the letter of findings.[18]

1.4 Diesel rebates were disallowed for equipment used by the JV allocated to the cost centre "plant" (the crushing and screening plant); paragraph 6.4.3.[19] Diesel rebates were *inter*

14 CaseLines 001-179.
15 Replying Affidavit para 148 CaseLines 004-42.
16 CaseLines 001-179.
17 CaseLines 004-60.
18 CaseLines 001-180.
19 CaseLines 001-180.

alia disallowed for a Crane CRH01 (**11 632** litres[20]) and Forklift FRL01 (**1 359.57** litres[21]).

[16] As a result, the JV was not entitled to some of the refunds paid to them for the period. The Commissioner demanded a repayment of the refunds in the amount of R4 584 824.96 plus interest of R515 170.25, totalling R5 099 995.21, acting in terms of section 75(7)(A) read with Note 6 of Part 3 of Schedule No. 6 of the Customs Act, and section 76A as well as sections 75(1C)(d)(i) and (ii) of the Customs Act. The JV repaid the amount but lodged an internal appeal to the IAAC in terms of Chapter XA of the Customs Act, which the Applicants now concede that in the light of the recent judgment in *CSARS v Glencore Operations (Pty) Ltd*[22] the appeal should have been dismissed. The applicants have now focused their attention on a different feature of their appeal of the decision of the IAAC, namely the powers of the IAAC. [23]

[17] On 17 June 2015 the Applicants instituted an internal administrative appeal in terms of Chapter XA of the Customs Act against the

20 CaseLines 004-62.
21 CaseLines 004-63.
22 [2021] ZASCA 111 (10 August 2021)
23 Annexure "FA3" CaseLines 001-196.

determination, appealing the findings set out in paragraphs 6.2[24] and 6.4.3[25] of the determination.[26] The Applicants also appealed the findings in respect of the diesel disallowed for the Telehandler, Crane and Forklift allocated to "the Plant".[27] However, they conceded that the diesel rebates claimed in respect of the LDV's were not eligible.

[18] The appeal was initially heard by the Regional Appeal Committee. On several occasions the Regional Appeal Committee requested further information from the JV, which was provided.[28]

[19] On 25 July 2017, more than two years after the lodging of the internal appeal, the Regional Appeal Committee "resolved" to refer the matter to the National Appeal Committee.[29] This was communicated to Goedgevonden on 4 August 2017.[30]

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24 CaseLines 001-179.
25 CaseLines 001-180.
26 Founding Affidavit Annexure "FA6" CaseLines 001-228.
27 Founding Affidavit Annexure "FA6" para 4.4 CaseLines 001-233.
28 Answering Affidavit paras 40.4-40.14 CaseLines 003-16 - 003-293.
29 Answering Affidavit para 40.17 Caselines 003-21.
30 Annexure "AA12" Caselines 003-97.

[20] Again, the National Appeal Committee requested information from the JV on several occasions.[31]

[21] On 13 June 2019, about four years since the lodging of the internal appeal, the National Appeal Committee confirmed the earlier determination and made the following findings[32]:

> *"2. i. Goedgevonden JV is a joint venture and does not have a valid mining right in their name. The mining right is held by one of the JV Partner's Glencore and not in the name of the Joint Venture which is a contravention of Note 6(f)(ii)(cc) of Schedule 6 Part 3 of the Act.*
>
> *ii. Crushing and screening are regarded as secondary mining activities and not primary and therefore not eligible activities as per Note 6(f)(iii)(cc) of Schedule 6 Part 3 of the Act.*
>
> *iii. Proper records are not maintained by the client indicating dispensing and the actual usage for LDVs/buses. These claims are therefore not quantifiable due to failure to provide proper usage records, showing eligible and non-eligible usage".*

[22] The National Appeal Committee then decided to "recoup the full amount of refunds for the audit period June 2012 to September 2014 amounting to R82 984 080.00 with interest".[33] As a matter of logic, the increase in the amount demanded (from R5 099 995.21 to R82 984

31 Answering Affidavit para 40.17 – 40.27 Caselines 003-21 – 003-40.27
32 Founding Affidavit Annexure "FA3" CaseLines 001-196.
33 CaseLines 001-197.

080.00) was a result of finding 2(i) concerning the mining right issue. The other findings are consistent with the earlier findings set out in SARS' determination of 6 March 2015.

[23] On the findings so made, the applicants herein contend that:

23.1 The IAAC did not have the power to increase the amount recoverable beyond the amount referred to in the SARS decision appealed against.

23.2 The IAAC decision was invalid as a result of undue delay.

23.3 The IAAC decision is time barred by the provisions of Section 47(9)(d)(ii)(bb) of the Customs Act.

23.4 On the merits, the JV complied with Item 670.04, Note 6(f) to Part 3 of Schedule 6 in that its reliance on Glencore's mining right was sufficiently compliant therewith.

[24] As mentioned in paragraph 2 above, the applicants have not only launched a statutory appeal in terms of section 47(9)(e) but also seek a review of the decision taken by the Internal Administrative Appeal Committee.

[25] In Cell C v SARS[34] Tolmay, J held that a litigant faced with an adverse finding by the Internal Administrative Appeal Committee, has only one remedy, being an appeal in terms of Section 47(9)(e) of the Customs and Excise Act. The following passages of the judgment are instructive:

> *"[33] On a proper interpretation of the CEA, the court retains review jurisdiction in certain circumstances, but when one has access to the wide appeal remedy provided for in s 47(9)(e), the possibility of a review is excluded. Relying on a wide-appeal and a review application in the same application creates a number of difficulties. As is by now clear, a wide appeal entails a complete de novo hearing; a review on the other hand is restricted to procedural issues. Sars was clear that it did not contend that review procedure would generally be unavailable. If I understand the argument correctly, it is that, by virtue of the provisions of s 47(9)(e), review procedure which would otherwise be available will not be available. The consequence of this is merely that if one has access to a wide appeal, one cannot in the same breath resort to review proceedings. I am of the view that this is indeed the correct approach. This approach gives effect to the purpose of the CEA and does not limit access to justice.*
>
> *[34] It must be emphasised that if Cell C succeeds in its statutory appeal against the redetermination, then the redetermination, including the retrospectivity, will be set aside. The merits of the determination must be dealt with, together with the effective date.*

[34] 2022 (3) SA 183 (GP).

[35] As already stated a s 47(9)(e) appeal embraces review grounds. The fact that there is an element of discretion is no obstacle, as a wide appeal is a complete rehearing in which the court itself exercises a discretion on the facts before it. In Commissioner for the South African Revenue Service v Afri-Guard (Pty) Ltd the full court confirmed this."

[26] The above reasoning employed by Tolmay J, I find favour with and is consequently endorsed by this Court. The present application will thus be dealt with, within the ambit of section 47(9) (e) of the Customs Act. It follows that an appeal of this nature constitutes a hearing *de novo*.

[27] An appeal within the ambit of section 47(9)(e) of the Customs Act, may take one of 3 forms namely:

27.1 An appeal in the wide sense, that is, a complete rehearing of and fresh determination on the merits of the matter with or without additional evidence or information; or

27.2 An appeal in the strict sense, a rehearing on the merits but limited to the evidence or information on which the decision under appeal was given and in which the only determination is whether that decision is right or wrong; or

27.3 A review, that is a limited rehearing to determine not whether the decision under appeal was correct or not, but whether the decision maker exercised his or her power and discretion honestly and properly[35].

35 *Tikly and others v Johannes NO and others* 1963 (2) SA 588 (T).

[28] From the caselaw, eight determining factors for characterisation may be distilled.[36] These can be listed as follows:

28.1 Whether the appellant is given a hearing before the initial decision maker. If the answer to this question is no, then it is likely to be a wide appeal.

28.2 Whether the initial decision maker is required to keep a record of the information upon which he or she bases the initial decision. If no, then it is likely to be a wide appeal.

28.3 Whether the initial decision maker is required to give reasons for his or her decision. If no, then it is likely to be a wide appeal.

28.4 The importance and consequence of the initial decision. If the decision has drastic consequences, it is more likely to give rise to a wide appeal.

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36 *Golden Arrow Bus Services v Central Road Transportation Board* 1948 (3) SA 918 (A) at 924; *SA Broadcasting Corporation v Transvaal Townships Board and others* 1953 (4) SA 169 (T) at 175-6; *Commercial Staffs (Cape) v Minister of Labour and another* 1946 CPD 632 at 638-641; *R v Keeves* 1926 AD 410 at 416-7; *Shenker v the Master* 1936 AD 136 at 146-7; *S v Mohammed* 1977 (2) SA 531 (A) at 538 D to G; *Hanley v Estate Agents Board* 1978 (3) SA 281 (T) at 286 A; *Rosenberg v South African Pharmacy Board* 1981 (1) SA 22 (A) at 28 B – C; *National Union of Textile Workers v Textile Workers Industrial Union (SA and others)* 1988 (1) SA 925 (A) at 939 B to C; *Smithkleine Beechim Pharmaceuticals (Pty) Ltd and others v Minister of Public Enterprises* 1994 (4) SA 382 (Spec CT) at 384 C to 386 E.

28.5 Whether experts sit on the appellate body. If so, it is likely to be a wide appeal because experts facilitate the appellate body's ability to interrogate the merits of the decision.

28.6 Whether there is a limit to the evidence or information that may be placed before the appellate body. If no, then it is likely to be a wide appeal.

28.7 Whether there is a limitation to the grounds on which an appeal may be based. If there is no limitation, it is likely to be a wide appeal.

28.8 The ambit of the appeal body's powers to correct the initial decision. The broader the powers, the more likely it is to be a wide appeal.

[29] In characterising the internal administrative appeal as an appeal in the wide sense or the strict sense, there are more features of the process which point to it being a wide appeal as oppose to a strict one. These features include the following:

29.1 The appellant is not given a full hearing before the initial decision maker.

29.2 The initial decision maker is not required to keep a record of the initial decision.

29.3 Experts sit on the Appeal Committee.

29.4 The Appeal Committee may call for additional information, documents and things which it regards as necessary to decide the appeal.

29.5 The grounds upon which an appeal may be lodged are not limited.

29.6 The powers of the Appeal Committee to decide an appeal are unrestricted.

[30] In *casu*, the applicant was not given a hearing before the initial decision was taken. Accordingly, I conclude that an appeal to an Internal Administrative Appeal Committee is a full appeal, and therefore a complete reconsideration of the whole decision appealed against. It is also on the same basis that I therefore conclude that the appeal is one in the wide sense and that the Appeal Committee is not bound to say yes or no but can make a finding that effectively amends the decision of the Commissioner.

[31] Prior to dealing with the merits of this appeal, this Court will first deal with the procedural issues raised by the applicants, as a decision on any one of the procedural issues will be dispositive of the appeal.

Issue of Jurisdiction

[32] The first issue for determination is whether the National Appeal Committee had the jurisdiction to entertain the appeal.

[33] In this regard the Applicants contend that the National Appeal Committee acted outside the scope of its powers and that the exercise of power must be authorised by law. It argued that as the National Appeal Committee is a creature of statute it may therefore only exercise powers afforded to it by the empowering legislation.[37] Furthermore, that it is not competent for any appeal committee to confer upon itself functions or powers that it is not authorised to perform.[38] As such an administrator may not exercise any power and perform any function beyond that which is conferred upon them by law.[39]

[34] In this regard the relevant empowering provisions are contained in Chapter XA of the Customs Act, read with Rule 77H.01 to 77H.14.

[35] In terms of section 77B of the Customs Act, any a person who may institute judicial proceedings "in respect of any decision by an officer" may

37 GCC Engineering (Pty) Ltd v Maroos & Others 2019 (2) SA 379 (SCA) at para 23; Competition Commission of South Africa v Pioneer Hi-Bred International Inc & Others 2014 (2) SA 480 (CC) at para 38; Minister of Public Works v Haffejee NO 1996 (3) SA 745 (A) at 751F; Special Investigating Unit v Nadasen 2002 (1) SA 605 (SCA) at para 5.

38 Haffejee at 751F; and Special Investigating Unit v Nadasen at para 5.

39 Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council 1999 (1) SA 374 (CC) at para 58; Gauteng Gambling Board v MEC for Economic Development, Gauteng 2013 (5) SA 24 (SCA) at para 1.

before or as an alternative to instituting such proceedings, lodge an appeal –

35.1 to the Commissioner against a decision of an officer; or

35.2 to the appeal committee (contemplated in Chapter XA in respect of those matters and decisions of officers that the appeal committee is authorised by rule to consider and decide upon or make recommendations to the Commissioner).

[36] Rule 77H11 makes provision for three types of appeal committees, namely:

36.1 Customs and Excise Branch Office Appeal Committee at any branch or for a number of branches (called a "regional committee").

36.2 Tariff, Origin and Valuation Appeal Committee at Head Office.

36.3 Customs and Excise National Appeal Committee at Head Office ("National Appeal Committee").

[37] The "aggrieved person" is a "person affected by the decision that has a right to institute judicial proceedings...". The "amount to which the appeal

relates" means "the amount appealed against by the appellant as specified in the notice demanding payment issued by SARS" (Rule 77H.01).

[38] A Branch Office or Regional Appeal Committee "may not" decide an appeal where the amount exceeds R10 million [Rule 77H11(2)(b)(i)]. Such an appeal must be dealt with by the National Appeal Committee [Rule 77H(4)(c)(ii)].

[39] In terms of Rule 77H.04(5)(d) and (e), any appeal must include the grounds upon which the appeal is based as well as any new information which may impact the decision on appeal which was not available at the time when the decision was taken.

[40] In the present case counsel for the Applicants submitted that the "decision by an officer" that was submitted to an internal administrative appeal is embodied in the demand dated 6 March 2015. The determination subject to the appeal was issued at Branch Office level (Megawatt Park).[40]

[40] CaseLines 001-175.

[41] As the amount appealed against was less than R10 million, the internal administrative appeal was dealt with by the Regional Appeal Committee.

[42] Further, that as per the First Respondent's Answering Affidavit, the Regional Appeal Committee "came to the conclusion that Goedgevonden, being an unincorporated joint venture was accordingly not entitled to any claim at all, especially not under circumstances where the mining right relied upon was not issued to it, but to one of the joint venture partners..."[41]

[43] According to the First Respondent, the Regional Appeal Committee was faced with a dilemma: "if the matter was reconsidered in its entirety, the outcome would be that the demand of R5 099 995.21 would have to be increased to R82 984 080.00, which by far exceeded the jurisdiction of the Regional Appeal Committee, which is R10 million." [42] As a result, it was "resolved" to refer the matter to the National Appeal Committee.

[44] On point counsel for the Applicants therefore argued that the Regional Appeal Committee was however not statutorily empowered to refer any appeal to the National Appeal Committee. It was further not empowered to

[41] Answering Affidavit para 40.15 CaseLines 003-19.
[42] Answering Affidavit para 40.16 CaseLines 003-21.

direct that the National Appeal Committee must consider the appeal.[43] The Regional Appeal Committee is not an "aggrieved person" or the "appellant" in the internal administrative appeal.

[45] In addition counsel submitted that the National Appeal Committee was not empowered to make a decision according to the dictates of the Regional Appeal Committee. For the above reason counsel submitted that the decision is liable to be reviewed and set aside.

[46] The National Appeal Committee is only empowered to deal with a decision in respect of which the amount to which the appeal relates is more than R10 000 000 (Ten Million Rand).[44] Rule 77H.01 specifically defines the "amount to which the appeal relates" as "the amount appealed against by the appellant as specified in a notice demanding payment issued by SARS". There is thus no evidence that the Commissioner directed the National Appeal Committee to consider the matter.[45]

[47] It is for this reason that counsel submitted that the Regional Appeal Committee was not empowered to refer the internal administrative appeal

[43] Replying Affidavit para 52 CaseLines 004-19.
[44] Rule 77H.11(4)(c).
[45] Rule 77H.11(4)(d).

to the National Appeal Committee. In turn, the National Appeal Committee did not have the authority or jurisdiction to deal with the appeal instituted by the Applicants.

[48] For the above reasons, the decision of the National Appeal Committee dated 13 June 2019 ought to be set aside in its entirety, under appeal.

[49] In rebuttal on the issue of jurisdiction the First Respondent had advanced the following arguments in opposition:

49.1. Firstly, the Respondent submitted that the argument that the RAC is not statutorily empowered to refer an appeal to the NAC is misplaced. In this regard, Section 77E of the Customs Act provides for the appointment of "*a committee*". It does not create different committee with hermetically sealed jurisdictional packages. Furthermore, that the creation of various committees by the Commissioner in the Rules[46] is an administrative action by the Commissioner which does not result in an inconsistency with the Act.

49.2 Therefore, the "*resolution*" by the RAC to refer the matter to the NAC is not a decision on the appeal as provided for in Section 77E.02(a) but an administrative directive to ensure that a decision is made on the appeal by

46 See Rule 77H.11(2).

the internal administrative appeals committee created by Section 77E of the Customs Act.

49.3 Secondly, the RAC is not statutorily empowered to direct that the NAC must consider the appeal. The RAC, like the NAC were both created in terms of Section 77E of the Customs Act. Whilst the rules (which created an apparent dichotomy between the committees) is silent on what may be done if the RAC considers a matter to be beyond its jurisdiction, Section 77E does not envisage an outcome where the IAAC can decline to decide an appeal for lack of monetary jurisdiction. The power to administratively direct that the appeal be heard by the NAC is therefore a power that is of necessity implied in the power to consider the appeal.[47]

49.4 In LAWSA[48] the authors say:

> "Various formulae are used to determine these implied *powers but the various categories are not in themselves* exhaustive. What is important is to determine what the scope *and purpose of the empowering provision is and to see whether these implied powers fall within the scope and serve the purpose and also to ensure that the general principle of*

47 Section 77E.02(a).
48 Volume 2, 3rd Edition, paragraph 44.

legality is not infringed by the recognition of such implied powers".[49]

49.5 To administratively direct an appeal from one committee to another falls within the scope and serves the purpose of proper consideration and decision of an appeal. To deny such power to a committee will be to thwart the administration of the Act.

49.6 On the argument that the RAC is not an "aggrieved person" or "appellant", the first respondent submitted that this argument is also misplaced. The administrative directive in terms of which the matter was referred to the NAC, does not constitute the submission of an appeal as provided for in Section 77B and C.

49.7 On the argument advanced that the NAC cannot decide an appeal according to the dictates of the RAC, the first respondent agreed with the principle enunciated in section 6(2)(e) (iv) of PAJA, which provides that an administrator may not take a decision as a result of the unauthorised dictates of another person, the administrative directive of the RAC was neither "unauthorised" or "a dictate"[50].

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49 See also *Private Security Industry Regulatory Authority v Anglo-Platinum Management Services* 2007 (1) ALL SA 154 (SCA) at para 27.

50 See the Concise Oxford South African Dictionary SV "*dictate*":
"*(1)(v) State or order authoritatively control or decisively affect, determine,*
(2) ...
(3)(n) An order or principle that must be obeyed".

49.8 In relation to the amount to which the appeal relates, the applicants argued with reference to Rule 77H.01 that an amount is determined in the "*notice demanding payment, issued by SARS*". The only purpose of this definition, the first respondent submits, is to attempt to clarify the apparent dichotomy between the jurisdiction of the RAC and NAC. In addition, it was argued that the rules promulgated in terms of the Customs Act are administrative acts within the purview of PAJA. They are not legislation and must be interpreted as having the purpose of the Act in mind. The purpose of Section 77H is to create an effective procedure whereby appeals against a decision of the commissioner can be dealt with speedily and effectively without causing congestion of the rolls of the High Court. An interpretation which advances that purpose should be preferred to one which would create unnecessary and unwarranted obstacles to that process. The division of the workload between the RAC and the NAC (hinged as it were on the amount of the demand) serves the purpose of the Act, and a rule subsidiary thereto ought not to be interpreted as a hard and fast jurisdictional restriction. We therefore submit that the definition in rule 77H.01 is merely advisory and not a peremptory jurisdictional provision.

49.9 On the argument that the Commissioner did not "*direct*" the NAC to consider the appeal the first respondent argued as follows:

49.9.1 Whilst that statement is factually correct, it does not assist the applicants. Rule 77H.11(4)(d) to which the applicants refer should not be read selectively but as a whole. It reads as follows:

> *"The Customs and Excise National Appeal Committee must consider and decide appeals in relation to any decision involving –*
>
> *(a) A matter relating to licencing, registration, or accreditation;*
>
> *(b) A determination of the tariff value or origin of goods, taken at head office level;*
>
> *(c) A decision taken at branch office level –*
>
> *(i) By a person in charge of a branch office; or*
>
> *(ii) In respect of which the amount to which the appeal relates is more than R10 million, in the case of an appeal in respect of which it is possible to quantify an amount; and*
>
> *(d) Any matter other than those listed in subparagraph (a) to (c), as the Commissioner may direct."*

49.9.2 The decision appealed against, the First Respondent submitted, is contained in SARS' letter dated 6 March 2015[51]. It originates from a branch

51 Annexure "FA2".

office called "*Large Business Centre*" and is co-signed by Ludi Jonker, the Operations Manager of that branch and purports to be "*issued on behalf of the Commissioner for the South African Revenue Services*".

49.9.3 Therefore, counsel submitted that, even on a literal wording of Rule 77H.11(4), having regard to subrule (c) thereof, the NAC was expressly authorised to entertain the appeal even if the amount of the demand which initially gave rise thereto was less than R10 million, if the effect of the decision on appeal would exceed that amount.

[50] In determining the issue of jurisdiction it is apposite to take a closer look at the empowering provisions. The IAAC was created by the introduction of Chapter XA into the Customs Act on 4 June 2007 (Section 77A to 77HA). Section 77H empowers the commissioner to promulgate rules for the conduct of such appeals. He did so and promulgated rules 77H.01 to 77H.14.

[51] Rule 77H.11(1) provides for the establishment of a customs office Branch Appeal Committee (which may be constituted for a particular branch office or a number of branch offices) (this committee is referred to herein as the Regional Appeals Committee) and a National Appeals Committee.

[52] The former has jurisdiction "*in the case of an appeal in respect of which it is possible to quantify an amount to which the appeal relates*" where such amount does not exceed R10 million. In cases where that amount exceeds R10 million the branch office Appeal Committee or Regional Appeals Committee has no jurisdiction[52] and the appeal must be determined by the National Appeals Committee[53].

[53] In respect of the process to be followed by the IAAC the following is noteworthy:

53.1 An appeal must be submitted on a duly completed form DA51.[54]

53.2 The appeal must specify the grounds upon which it is made and must have attached to it all supporting documents.[55]

53.3 An appellant must request reasons for the initial decision against which he may wish to appeal.[56]

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52 Rule 77H.11(12)(b)(i).
53 Rule 77H.11(c)(ii).
54 Section 77C (1) read with Rule 77H.04(b)(i).
55 Rule 77H.04(b)(ii) reads with the Notes to Form DA51.
56 Section 77D.

53.4 Where the Commissioner or an Appeal Committee is satisfied that the appellant has not furnished all the information, documents or things required to decide the appeal, the commissioner (or the Appeal Committee as the case may be) must notify the appellant accordingly and request him or her to deliver the information, documents or things as specified in the notice.[57]

53.5 Appeal Committee are composed of officers who must have the necessary knowledge and skills to consider and deal properly with the sorts of appeal brought to the various Appeal Committees.[58] In this respect the members of the Appeal Committees are experts.

53.6 An Appeal Committee is empowered to consider and decide an appeal and to make a recommendation to the Commissioner.[59] Neither the Custom Act nor the Rules impose any restrictions upon the Appeal Committee to consider and decide an appeal.

[54] On behalf of the First Respondent it was argued that there can be little doubt that an internal administrative appeal is not a review. This they contend to be the case because in order for such appeal to be a review, there would have to be clear indications in the Customs Act or the Rules

57 Rule 77H.05(c).
58 Rule 77H.08(c).
59 Section 77E(2)(a) and (b).

that an Appeal Committee is confined to determining whether the initial decision was honestly and properly made and no more. This is not prescribed in any of the statutory instruments. It is on this basis that it was argued that to construe an internal administrative appeal as a review would be inconsistent with the powers given to the Appeal Committee under the Act and the Rules.

[55] On the question of jurisdiction, as I see it, Rule 70H merely regulates which committee should deal with an appeal, having regards to the monetary jurisdiction of the amount due. In *casu* it is so that the amount initially demanded fell within the monetary jurisdiction of the RAC. Where the RAC upon considering the appeal concluded that the amount demanded will increase which would fall outside of its monetary jurisdiction, it follows as a logical consequence that the appeal must be referred to the NAC, which in terms of the regulations carried the requisite monetary jurisdiction.[60] This referral of the matter by the RAC to the NAC is a necessary step which should have been embarked upon to ensure that the administration of the Act would not be frustrated. It does not amount to a decision on the merits or otherwise of the appeal. To reason otherwise is fictional and will lead to unintended consequences. On this reasoning the RAC once vested with an appeal, where the facts called for it, will not be able to increase an amount due to SARS which falls beyond its monetary jurisdiction fortuitously forgoing taxes due by taxpayers. This could not have been the intention of

[60] Rule 77H11 (2)(b)(i).

the legislature and it will certainly not do justice to the administration of tax affairs of a taxpayer.

[56] Consequently, I conclude that nothing in law prevents the NAC from dealing with an administrative internal appeal referred to it by the RAC.[61] Therefore, the NAC had the necessary jurisdiction to deal with the administrative appeal.

Undue delay

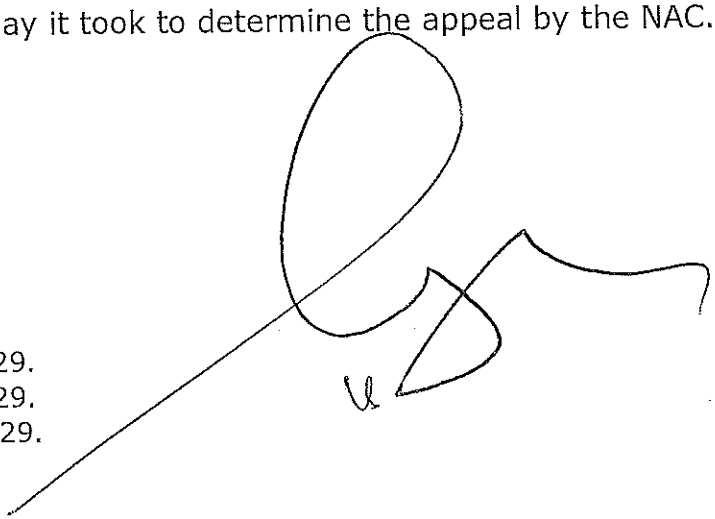
[57] As per the founding affidavit, the applicants assert that while the administrative appeal was lodged as far back as 17 June 2015, the respondent's decision on the internal appeal was only conveyed to the applicants on 13 June 2019, approximately four years later.[62]

[58] This despite the respondent's failure to indicate in terms of rule 77H.06(b) that more time is required to decide the internal appeal and the respondent having failed to determine the appeal within the period prescribed in the rules,[63] or any reasonable time where no time period is expressly prescribed.

[61] Section 77E of the Customs Act.
[62] FA para 52 Caselines 001-28. See annexure "FA3".
[63] FA para 53 Caselines 001-28.

[59] Albeit that after the internal appeal was lodged, the Respondent requested further information to which the applicants responded, such requests however did not justify the delay in deciding the internal appeal,[64] and the Commissioner being a creature of statute is only empowered to do what he is expressly, or by necessary implication, authorised to do by the Act.[65]

[60] It is on the above basis that counsel contended that the National Appeal Committee's decision ought to be set aside in its entirety, because of the inordinate delay. The committee was no longer empowered to consider the appeal.[66] SARS was required to deal with the appeal within 60 days as provided for in Rule 77H.08(1)(a), unless extended by SARS under Rule 77H.08(2), on notice to the taxpayer. SARS did not extend the period. Instead, SARS took nearly 4 years to finalise the internal administrative appeal. This is not acceptable, and also not sanctioned by the empowering legislation. The decision taken in June 2019, therefore ought to be set aside based on the inordinate delay it took to determine the appeal by the NAC.



[64] FA para 54 Caselines 001-29.
[65] FA para 53 Caselines 001-29.
[66] FA para 55 CaseLines 001-29.

[61] In response to the assertion of an undue delay, the respondent sets out that upon the appeal being lodged, the Regional Appeal Committee on several occasions requested further and supporting information. Based on the information received the RAC held the view that Goedgevonden was not entitled to any diesel refund claimed, but due to its monetary limitation of R10 million it escalated the appeal to the National Appeal Committee for determination. The latter likewise requested various further and supporting information from Goedgevonden and Glencore which was met with much resistance. Ultimately, Goedgevonden was informed of the outcome of the appeal by the National Appeal Committee.[67]

[62] On behalf of SARS therefore counsel had argued that in order to determine the question of undue delay, it is necessary to have regard to the chronology of events relevant to this issue and which is common cause between the parties. This can be tabulated as follows:

Date	**Event**
06/03/15	SARS issues letter of demand.
23/04/15	JV (through KPMG) requests reasons.
07/05/15	SARS gives reasons
19/06/15	JV launches internal appeal

[67] AA para 107 and 108 p 003-45.

19/08/15	Matter serves before RAC
08/09/15	RAC seeks further information
16/09/15	JV (Through KPMG) responds
17 and 18/10/15	RAC invites JV to present its case
2 to 5/11/15	RAC reconvenes
18/01/16	RAC seeks further information
05/02/16	JV responds
20/06/17	Commissioner decides to audit November 2015 to May 2017
25/07/17	RAC redirects matter to NAC
29/08/17	JV makes representations to NAC
07/09/17	NAC seeks further information
13/09/17	JV responds to NAC
02/11/17	NAC gives opportunity for further submissions
15/06/18	JV files further submissions
27/01/19	SARS letter of intention to assess and disallow refunds
30/01/19	NAC letter with prima facie findings
13/02/19	JV makes further representations
26/02/19	JV makes further representations
15/05/19	NAC takes decision
13/06/19	Decision communicated to JV

[63] Having regard to the chronology of events counsel had therefore argued that both the RAC and the NAC had allowed for further and supporting information to be placed before it before making a decision, in addition to further representations which was considered before any decision was made.

[64] It is so that the Internal Administrative Appeal Committee's jurisdiction to hear and entertain an appeal, lapses, if not decided within 60 days.[68]

[65] The 60 days provision is contained in Rule 77H.08(1) which reads as follows:

> *"An appeal must be decided –*
>
> *(a) Within 60 days from the date of submission of the appeal in accordance with rule 77H.04; or*
>
> *(b) If the appeal was incomplete within 60 days from which the date on which the complete appeal was submitted."*

[68] Heads of Argument, paragraph 42.

[66] SARS therefore contends that any delay in finalising the internal administrative appeal was not due to negligence on its part it or on the part of the National Appeal Committee, but was rather occasioned by extreme caution and diligence on the part of SARS.[69] In reply the applicants had argued that absence of any negligence on the part of SARS is of no moment and that the prejudice on the part of the applicant is severe.

[67] Having regard to the chronology listed in paragraph 52 above, it is clear that on several occasions/intervals various supporting documentations and additional representations were received from the applicant which had to be given due consideration. This resulted in a delay in finalising the appeal. If the delay is prejudicial to the taxpayer, it could have elected not to furnish SARS with any additional information when requested to do so and further elected not to make additional representations to enable SARS to have finalised the appeal within the prescribed 60-day period. By fully participating in this process, it acquiesced with the period and the time it took to finalise the appeal albeit in the circumstances a period of 4 years.

[69] AA para 41 Caselines p 003-25; RA para 16 Caselines 004-9.

[68] Any prejudice further to the taxpayer in any event will further be mitigated by an appeal as in the present matter to a Court having jurisdiction. This is exactly the step taken by the JV in the present instance.

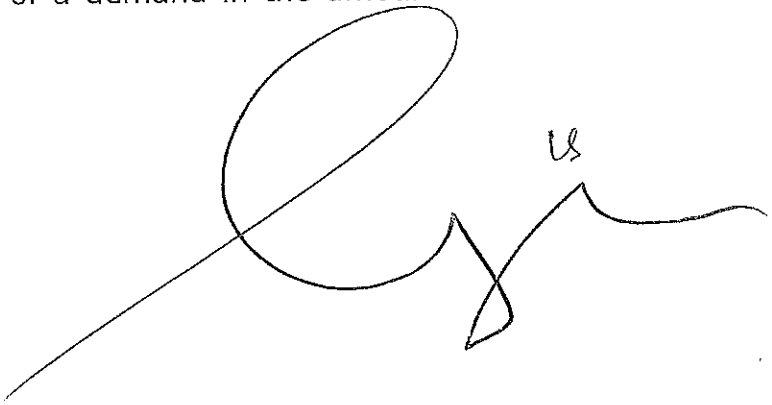
The Time Bar

[69] During the hearing counsel for the applicant advised the court that this preliminary point will not be persisted with. As such no further view will be expressed by this Court on this point.

Powers by the NAC to amend the decision appealed against.

[70] In this regard the applicant contend that the NAC was not empowered to amend the decision of the officer contained in the letter of 6 March 2015 by making a whole new determination in paragraph 2(i) that the JV did not comply with Note 6(f)(ii)(c), dealing with the mining authorisation.

[71] As a consequence, the committee was not empowered to raise the debt demanded from R5 099 995.21 to R82 984 080.00 and on this basis paragraph 2(i) of the decision of 13 June 2019 ought to be set aside together with the raising of a demand in the amount of more than R 82 million.



[72] In opposition the respondent had argued that in the event of this Court concluding that the NAC did not have that power to amend the decision appealed against, then the decision so taken by them, should simply be set aside and amended to read: "The appeal is dismissed."

[73] The demand made by SARS on 6 March 2015 came about as a result of an audit being conducted by SARS into JV's compliance with the diesel refund provisions for the period June 2012 to September 2014, resulting in a determination in terms of section 47(9)(a) of the Act. In this determination SARS found that an amount of R 5 099.995.21 was claimed by the JV in respect of ineligible use and consequently it demanded repayment of that amount.

[74] As mentioned, the JV repaid the amount but subsequently lodged an internal appeal to the IAAC in terms of Chapter XA of the Customs Act.

[75] By lodging an appeal, the body it appeals to must consider the merits of the determination *de novo* and it follows that if any liability is due to be paid/or refunded, it can also determine the applicable amount. The applicant herein objects to an amendment of the decision appealed against and holds the view that it can circumscribe to the body appealed to, the outcome of its decision. This simply cannot be, as it will go against the

whole tenor of an appeal. The party who lodges the appeal cannot dictate the outcome of an appeal, nor can it dictate the reasoning of the body to whom the appeal is made. In *casu*, the NAC acts independently and must bring to bear an independent mind to an appeal. Having acted independently, it can therefore find in favour of the JV or SARS and similarly it is open to determine the amount of liability due, if any. It then must follow, that it can determine the reasons to support its finding and that such reasons can change from those reasons initially proffered in the determination.

[76] It is for all of the above that I cannot find that the NAC did not have the powers to amend the decision appealed against by adding a finding that the JV did not comply with Note 6(f)(ii)(cc) concerning the mining authorisation and by raising the demand from R5 099 995.21 to R82 984 080.00.

Mining Authorisation

[77] On the merits, three issues arise, namely, whether the JV was entitled to rely on a mining authorization issued to only one of the JV partners? Secondly, whether the Commissioner had a discretion and did he fail to exercise that discretion and thirdly whether the Applicants' rebate claim should succeed?

[78] Note 6(f)(ii)(cc) of Part 3 of Schedule No.6 requires that the mining activities which qualify for a refund must be carried on by the holder or cessionary of the necessary mining authorisation granted or ceded in terms of the Mineral and Petroleum, Resources Development Act (MPRDA).[70]

[79] Before this Court, it is common cause that the mining right, is registered in the name of GOSA, not the JV.[71] SARS contends that "no legal business could be done by the 'joint venture' in terms of the said licence".[72]

[80] On behalf of the applicant it was submitted that a determination of the issues before this court concerns statutory interpretation. As a general rule, the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity.

[81] In this regard reliance was placed on the decision of Cool Ideas 1186 CC v Hubbard[73] where the Constitutional Court put three interrelated riders to this general principle:

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70 Act 28 of 2002.
71 Answering Affidavit Annexure para 91 CaseLines 003-41.
72 Answering Affidavit Annexure para 91 CaseLines 003-41.
73 2014 (4) SA 474 (CC) at para 28.

[i] the statutory provisions should always be interpreted purposively;

[ii] the relevant statutory provisions must be properly contextualised; and

[iii] all statutes must be construed consistently with the Constitution.

[82] An interpretation of a statutory provision that gives rise to an absurdity should be avoided where there is another reasonable construction that may be given to the provision.[74]

[83] Furthermore, if a specific power is absent from a statute, the creation of such a power by the Court will cross the divide between interpretation and legislation.[75] In such an instance, the Court will become the legislature. This offends the constitutional separation of powers principle.

[84] In addition, Section 39(2) of the Constitution determines that a Court, when interpreting any legislation, must promote the spirit, purport and objects of the Bill of Rights.

74 Satawa v Garwas 2013 (1) SA 83 (CC) at para 37.

75 National Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at para 18.

Submissions on behalf of the applicant

[85] On behalf of the applicant it was contended that SARS argues that in view of the fact that the JV was not in possession of the required mining authorization as contemplated in the MPRDA, it did not qualify for any diesel refunds.[76]

[86] Furthermore, that, properly construed against the purpose and context of the relevant provisions, Goedgevonden JV was entitled to claim the diesel refunds for the relevant period even though the mining right was held in the name of GOSA.[77]

[87] This approach the applicants' argued is consistent with the approach adopted by the Constitutional Court in assessing compliance with statutory requirements. What has to be ascertained at the outset is the purpose of the statutory requirement. Compliance is then assessed with reference to the purpose of the requirement. In Allpay[78] the following was stated:

> *"Assessing the materiality of compliance with legal requirements in our administrative law is, fortunately, an exercise unencumbered by excessive formality. It was not always so. Formal distinctions were drawn between 'mandatory" or "peremptory" provisions on the one hand and*

76 Answering Affidavit Annexure para 127 CaseLines 003-50.
77 Founding Affidavit para 60 CaseLines 001-35.
78 Allpay Consolidated Investment Holdings (Pty) Ltd & Others v Chief Executive Officer,South African Social Security Agency & Others 2014 (1) SA 604 (CC).

> *'directory' ones on the other. The former needing strict compliance on pain of non-validity, and the latter only substantial compliance or even non-compliance. That strict mechanical approach has been discarded. Although a number of factors need to be considered in this kind of enquiry, the central element is to link the question of compliance to the purpose of the provision. In this court O'Regan J succinctly put the question in ACDP v Electoral Commission as being* **'whether what the applicant did constituted compliance with the statutory provisions viewed in the light of their purpose'**. *This is not the same as asking whether compliance with the provisions will lead to a different result".*[79]

[88] Here GOSA is the holder of all three mining rights under which the JV's mining activities are conducted. These mining rights are:

88.1 Converted mining right MP30/5/1/1/2/169 MR in respect of various portions of the farm Goedgevonden. GOSA (previously known as Xstrata South Africa (Pty) Ltd) is the holder of this mining right.[80]

88.2 Converted mining right MP30/5/1/2/2/168 MR in respect of various portions of the farms Zaaiwater and Goedgevonden. GOSA is the holder of this mining right.

88.3 Converted mining right MP30/5/1/2/2/343 MR in respect of various portions of the farms

79 Allpay at para 30.

80 Annexure "AA11" CaseLines 003-81 – 003-96.

Ogiesfontein and Grootpan. GOSA is the holder of this mining right.

[89] It was submitted that the purpose of Note 6(f)(ii)(cc) (requiring the user to be the holder of a mining authorisation) is to require that the mining activities conducted by the user has been authorised under the MPRDA. For the present purposes, this has indeed been demonstrated by the following:

89.1 In terms of section 25 of the MPRDA the holder of a mining right must *inter alia:* [i] actively conduct mining in accordance with the mining work programme (subparagraph (c)); [ii] comply with the relevant provisions of the MPRDA any other relevant law and the terms and conditions of the mining right (subparagraph (d)) and [iii] comply with the conditions of the environmental authorisation (subparagraph (e)).

89.2 Section 5(2) of the MPRDA provides that the holder of a mining right is entitled to the rights referred to in that section and such other rights as may be granted to, acquired by or conferred upon such holder under this Act of any other law.

89.3 In terms of section 38A(1) of the MPRDA the Minister of Minerals and Energy is responsible for implementing environmental provisions in terms of the National Environmental Management Act 107 of 1998 ("NEMA"), as

it relates to prospecting, mining, exploration, production or activities, incidental thereto on a prospecting, mining, exploration or production area.

89.4 In terms of section 38A(2) of NEMA, an "environmental authorisation" issued by the Minister shall be a condition prior to the issuing of a permit or the granting of a right in terms of that Act.

89.5 Environmental authorisations are issued in terms of section 24 of NEMA. The Environmental Management Programme is provided for in section 24N(2) of that Act.

89.6 Mining activities at the "Goedgevonden Complex" or "Goedgevonden Mine" operated by the JV, must be conducted in accordance with the provisions of inter alia the MPDRA, NEMA and the mining rights issued to GOSA.

[90] Counsel further submitted that the mining rights issued to GOSA were made subject to compliance with the JV agreement, as recorded in the notarial deeds themselves. It is recorded in all three deeds that:

> "NOW THEREFORE THE MINISTER CONVERTS THE HOLDER'S OLD ORDER MINING RIGHT SUBJECT TO THE FOLLOWING TERMS AND CONDITIONS"

[91] Further that the converted mining rights issued to GOSA expressly provide as follows in clause 17 of the notarial deed executed on behalf of the Minister of Minerals and Energy:[81]

> "In the furthering of the objects of this Act [MPRDA], the Holder [GOSA] is bound by the provisions of an agreement or arrangement dated 27 February 2006 [the JV agreement] entered into between the Holder/empowering partner and ARM Coal (Pty) Limited (the empowerment partner) which agreement or arrangement was taken into consideration for purposes of compliance with the requirements of the Act and or Broad Based Economic Empowerment Charter developed in terms of the Act and such agreement shall form part of this right".

[92] It is on this basis therefore that counsel had argued that by conducting the mining activities in joint venture with ARM, GOSA was (and is) using the mining right in accordance with its terms and conditions as contemplated in section 25(2)(d) of MPRDA and although GOSA is the registered holder of the mining right, Goedgevonden is authorised to

[81] CaseLines 003-90.

conduct the mining activities as a joint venture between GOSA and ARM. This is consistent with the purpose of Note 6(f)(ii)(cc) as explained above.

[93] For the above reasons, counsel had argued that to interpret Note 6(f)(ii)(cc) as contended for by SARS is unbusinesslike and leads to an absurd result, more so in circumstances where it is accepted by SARS that the creation of joint venture structures is common in the mining industry where Black Economic Empowerment programmes require a percentage Black ownership at mines.[82] SARS further accepts that the Department of Mineral Resources did not allow GOSA and ARM to hold the mining rights jointly.[83] However, in terms of section 51(1) of the VAT Act the JV was required to register for VAT purposes (separate from GOSA and ARM). As the VAT system is used to administer diesel refunds, [84] it is the VAT vendor that registers as a diesel refund "user" under the Customs Act. It would be absurd to, on the one hand, require the JV to register for VAT and diesel refund purposes, but on the other hand, to disallow the diesel refunds because the mining right is only registered in the name of one of the members of the JV. This is especially so in circumstances where joint title is not allowed by the Department of Mineral Resources and where GOSA is

82 Founding Affidavit para 38 CaseLines 001-24 read with Answering Affidavit para 92 CaseLines 003-41.
83 Founding Affidavit para 38 CaseLines 001-24 read with Answering Affidavit para 92 CaseLines 003-41.
84 Customs Act section 75(1A)(d)(ii).

required in terms of the law to exercise the mining right in terms of the JV agreement with ARM.

[94] A further argument advanced on behalf of the applicant is that SARS justifies its stance by arguing that the JV was not eligible for registration as a "user" under the Customs Act,[85] as it does not constitute a legal or natural person.[86]

[95] This argument adopted by SARS, counsel contends, is flawed on several levels. Firstly, SARS allowed Goedgevonden to register as a user in terms of section 59A of the Customs Act. The registration by the JV was an administrative act, standing as a fact, until set aside by a court of law.[87] The registration of the JV is still extant. When SARS evaluated the JV's application for registration as a user under section 59A of the Customs Act, it was satisfied at the time that the JV was a "person" or a "class of persons" liable for registration.

85 Section 59A read with 75(4A)(a).
86 Answering Affidavit paras 31 – 36 CaseLines 003-14 - 003-15.
87 Oudekraal Estates (Pty) Ltd v City of Cape Town 2004 (6) SA 222 (SCA) at para 40.

[96] Secondly, it is clear from the definition of a "person" in section 1 of the Customs Act and the Rules, that entities other than natural or legal persons may register under the Act. Section 59A allows for the registration of a "person" or "class of persons". In terms of section 1 of the Customs Act a "person" includes an insolvent estate, the estate of a deceased person and any trust. Notably, a "person" as defined in the Rules for section 95A of the Act includes the following:

> "*(a) any natural person or any insolvent or deceased estate;*
>
> *(b) any juristic person incorporated in the Republic or juristic person not incorporated in the Republic, or any other association of persons whether or not formed in the Republic;*
>
> *(c) any institution, including any scientific or educational institution, for the benefit of its members or the public whether or not established in the Republic;*
>
> *(d) a partnership;*
>
> *(e) a trust;*
>
> *(e) an organ of state".*

[97] In terms of the Interpretation Act,[88] a "person" includes any body of persons corporate or unincorporate.

88 Act 33 of 1957, section 2.

[98] For the above reasons, counsel submitted, that although the JV does not constitute a separate legal entity, it falls within the ambit of a "person" as contemplated in section 59A of the Customs Act, as well as the Rules. An association of persons which does not have a legal *persona* separate from its constituent members, may be a "person". The JV is a body of persons unincorporate whose common funds and assets are the collective property of its two members, GOSA and ARM.[89] It was therefore correctly registered as a "user" by SARS under the Customs Act.

[99] Counsel further submitted that even if the court is of the view that the JV is not a "person" for purposes of section 59A, it is certainly a "class of persons", of which the constituent members are GOSA and ARM.

[100] Premised on the above, the Applicants contend that there is compliance with Note 6(f)(ii)(cc), and the finding of the National Appeal Committee contained in paragraph 2(i) of Annexure "FA3" ought to be set aside. Consequentially, the demand for R82 984 080 ought to be set aside.

89 CIR v Friedman & Others NNO 1993 (1) SA 353 (A) at p 370 H.

[101] Even if the Court be of the view that the JV did not strictly comply with the provisions of Note 6(f)(ii)(cc), then it is contended by the Applicants that SARS ought to have exercised its discretion in favour of the JV, as it was in principle entitled to do in terms of Note 5 to Part 3 of Schedule No.6 to the Customs Act.

[102] Note 5 provides as follows:

> *"Except where the Commissioner authorises on good cause shown payment of a refund of duty granted in terms of any item of this Part to any other person on complying with such conditions as the Commissioner may reasonably impose in each case, such refund shall be paid only to –*
>
> *(a) ...*
> *(b) ...*
> *(c) a user as contemplated in this Part".*

[103] On 13 February 2019 the Applicants requested the Commissioner to exercise its discretion as provided for in Note 5 to Part 3 Schedule No. 6, allowing GOSA and ARM to retrospectively claim the diesel refunds according to their respective participation interests in the joint venture.[90] SARS failed to deal with the request and therefore it renders its conduct reviewable under section 6(2)(e)(iii) of PAJA.[91]

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90 Founding Affidavit para 57.2 read with Annexure FA7 para 3.20 CaseLines 001-30 and 001-242.

91 Founding Affidavit para 58.3 CaseLines 001-35.

[104] Albeit, that SARS in the answering affidavit contends that the request relates to a different audit period and is therefore not relevant,[92] the defensive stance adopted by SARS is unsubstantiated. The request was done in respect of the JV and its members, namely GOSA and ARM in general and not only in relation to the later audit period. Therefore, any decision by the Commissioner under Note 5, would naturally apply to all audit periods.

[105] The failure by SARS to deal with this request constitutes reviewable administrative action as contemplated in section 6(2)(g) of PAJA, constituting a failure to take a decision. This is plainly unlawful,[93] and the matter for this reason also ought to be referred back to SARS for further consideration.

Submissions on behalf of SARS

[106] On behalf of SARS, the following arguments were advanced in relation to the mining rights.

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92 Answering Affidavit para 112 CaseLines 003-46.

93 Director-General, Department of Rural Development & Land Reform v Mwelase 2019 (2) SA 81 (SCA) at para 30.

[107] SARS accept that a joint venture, being an unincorporate body of persons:

107.1 Is capable of being registered as an "enterprise" under the VAT Act;

107.2 Is capable of being registered as a "user" in terms of the Customs Act; and

107.3 Is capable of being registered as the "holder" of a mining right in terms of the Mineral and Petroleum Resources Development Act, Act 28 of 2002 (*"the MPRDA"*).

[108] Note 6(f)(ii) of Part 3 of Schedule 6 provides:

> *The mining activities which qualify for a refund of levies must be carried on –*
> *(aa) ...*
> *(bb) ...*
> *(cc) by the holder or cessionary of the necessary authorisation granted or ceded in terms of the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002).*

[109] Note 5(c) of Part 3 of Schedule 6 to the Customs Act provides:

> *Except where the Commissioner authorizes on good cause shown payment of a refund of duty granted in terms of any item of this Part to any other person on complying with such conditions as the*

Commissioner may reasonably impose in each case, such refund shall be paid only to –

(a) ...

(b) ...

(c) a user as contemplated in this Part.

[110] Note 6(a)(vii) provides:

"user", as defined in section 75 (1C)(b)(i) means, according to the context and subject to any notes to item 670.04, a person registered for value-added tax purposes under the provisions of the Value-Added Tax Act, 1991 (Act No. 89 of 1991), and for diesel refund purposes as contemplated in section 75 (1A) and (4A);

[111] Section 75 (1C)(b) of the Customs Act provides:

For the purposes of this section and the said item of Schedule 6-

(i) 'user' shall mean, according to the context and subject to any note in the said Schedule 6, the person registered for a diesel refund as contemplated in subsection (1A).

[112] On behalf of SARS the argument was advanced that albeit that the common cause facts are that Goedgevonden Joint Venture, is the "person" registered as "enterprise" under the VAT Act, and "User" registered under the Customs Act, it is not the "holder or cessionary" of a mining

authorization granted or ceded in terms of the MPRDA. This argument advanced by SARS, this court is in agreement with.

[113] In addition counsel submitted that no amount of interpretation of this provision, couched as it is, in peremptory terms, can authorise the Commissioner to pay a fuel levy refund to any person or persons who does or do not qualify as the "holder or cessionary" of such authorization.

[114] SARS thus refuted the argument that the JV, in terms of the mining right granted to GOSA, is authorized to conduct mining under the mining right granted to GOSA, as a joint venture.[94]

[115] Support for this argument counsel had argued, is found when regard is had to the provisions of clause 17 of the Notarial Deed which authorises GOSA, and not the JV, as holder (of the mining right) to conduct mining.

[116] Where the Minister of Minerals and Energy, in terms of the MPRDA, decided not to grant a mining right to the JV, SARS cannot disregard that

[94] Applicants' Heads of Argument, par 94.

decision for purposes of the fuel levy refund. In *casu* this is precisely what informed SARS' decision to refuse the payment of the refund.

[117] The interpretation adopted by SARS in respect of the relevant sections is rather more consistent and businesslike, as inconsistency will lead to unbusinesslike and absurd results.

[118] Further arguments advanced on behalf of SARS is that the Applicants having acknowledged that the registered "user" in terms of the Customs Act, is the Joint Venture, and having recognised that the registered VAT Vendor, in terms of the VAT Act, is the Joint Venture and further having also recognized that the Mining Right is registered, not in the name of the Joint Venture, but in the name of one of the JV Partners, the Applicants nevertheless argues as follows:

118.1 The mining right was a right formally granted to GOSA, but in substance the mining right authorises both GOSA and ARM to exercise the right in joint venture.

118.2 The mining right is an asset held by the Joint Venture (partners) as co-owners.

[119] The above arguments advanced by the Applicants SARS had submitted is untenable for the following reasons:

119.1 Mining rights are regulated, not by the Customs Act, but by the MPRDA.

119.2 In addition Section 5 of the MPRDA provides:

(1) A ... mining right ..... granted in terms of this Act and registered in terms of the Mining Titles Registration Act, 1967, (Act 16 of 1967), is a limited real right in respect of the mineral or petroleum and the land to which such right relates.

(2) The holder of a ... mining right ... is entitled to the rights referred to in this section and such other rights as may be granted to, acquired by or conferred upon such holder under this Act or any other law.

119.3 Section 11 of the MPRDA provides:

(1) A prospecting right or mining right or an interest in any such right, or a controlling interest in a company or close corporation, may not be ceded, transferred, let, sublet, assigned, alienated or otherwise disposed of without the written consent of the Minister, *except in the case of change of controlling interest in listed companies.*

(2) The consent referred to in subsection (1) must be granted if the cessionary, transferee, lessee, sublessee, assignee or the person to whom the right will be alienated or disposed of-

(a) is capable of carrying out and complying with the obligations and the terms and conditions of the right in question; and

(b) satisfies the requirements contemplated in section 17 or 23, as the case may be.

(3) The consent contemplated in subsection (1) is not required in respect of the encumbrance by mortgage contemplated in subsection (1) of right or interest as security to obtain a loan or guarantee for the purpose of funding or financing a prospecting or mining project by-

(a) any bank, as defined in the Banks Act, 1990 (Act 94 of 1990); or

(b) any other financial institution approved for that purpose by the Registrar of Banks referred to in the Banks Act, 1990 (Act 94 of 1990), on request by the Minister, if the bank or financial institution in question undertakes in writing that any sale in execution or any other disposal pursuant to the foreclosure of the mortgage will be subject to the consent in terms of subsection (1).

(4) Any transfer, cession, letting, subletting, alienation, encumbrance by mortgage or variation of a prospecting right or mining right, as the case may be, contemplated in this section must be lodged for the registration at the Mineral and Petroleum Titles Registration Office within 60 days of the relevant transaction.

119.4 It is common cause that the Joint venture's "right" to operate on GOSA's Mining Authorization has not been registered with the Mineral and Petroleum Titles Registration Office. Furthermore, that the registered mining right does not make reference to the Joint Venture or ARM.[95]

119.5 Moreover, in accordance with the provisions of section 11(1) the Registered Mining Right expressly records that it may not be alienated, etc without the written consent of the Minister.

[120] Before this court, it is common cause that the written consent of the Minister was not obtained as required in terms of section 11(1) of the MPRDA. Instead, the Applicants relied on the Joint Venture Agreement to which the Minister was not a party or signatory.[96] This much has been conceded by the Applicants.

[121] In addition clauses 1.2.4.17, 30 and 33 contains definitions of the "Goedgevonden Business", the "Joint Venture Business" and the Joint Venture Property", which includes the "old order mining right". It is trite law that all old order mining rights lapsed on 30 April 2005, which is one year after the MPRDA came into effect.

[95] Registered Mining Right Caselines 03-81.
[96] Caselines, 01-41.

[122] Clause 2.3.1 further records that GOSA would hold 49% and ARM 51% of the "Goedgevonden business" and clause 2.5.2 records that the parties intend that the JV would bring about a relationship of co-ownership of the JV assets. These recordals, this Court agrees, are nothing but mere recordals of the alienation by GOSA of the majority share in the mining right, an act which requires Ministerial consent in writing, and further registration in the Mineral and Petroleum Titles Registration Office.

[123] None of these recordals, take the matter any further, or record that Ministerial consent has been granted for the alienation of GOSA's 51% share in the mining right. The disposal of a controlling interest in a mining right requires ministerial consent in order for it to be valid.[97] In the absence of such Ministerial consent, the JV was not a holder of a mining right and it must therefore follow that SARS was not obliged to pay the diesel refund to the JV. To hold otherwise would constitute a proverbial cross of the divide between interpretation and legislation, the latter falling outside of the purview this court's functions.

[97] Mogale Alloys (Pty) Ltd v Nuco Chrome Bophuthatswana (Pty) Ltd and Others 2011 (6) SA 96 (GSJ).

[124] A further argument advanced by the Applicants is that the transaction is one where the mining right is held by the Joint Venture in substance, if not form. This argument however cannot succeed where the formalities of written consent and registration is required: in substance, the joint venture agreement is an agreement by which GOSA alienated 52% of its share in the mining right to ARM. Such a transaction, in order to be valid, requires Ministerial consent. It is common cause that this was not complied with. Furthermore, the fact that GOSA is obliged to comply with the joint venture agreement, does not convert the Joint Venture into the holder of the Mining Right. For the reasons made reference to above, this Court concludes that the JV did not comply with Note 6(f)(ii)(cc).

[125] On the argument that the IAAC failed to exercise a discretion in terms of Note 5(c), quoted in para 109 above, the exercise of the discretion is firstly dependent on good cause shown. Bearing in mind that the decision sought to be reviewed is a decision of the IAAC in relation to a refund claim for the period June 2012 to September 2014, it must be emphasised that the request to exercise a discretion was not addressed to the IAAC but to the Commissioner, and not in respect of the same period, but in respect of a different period under audit, namely November 2015 to May 2017.

[126] The request to exercise a discretion was only made on 13 February 2019, when the decision appealed against had already been made. It was never raised as a ground of appeal to the IAAC.

[127] This Court in Graspan[98] held that the discretion in terms of Note 5 does not arise:

> *[69] Note 5 envisages an instance where any refund due to a user is to be paid to another person, other than the user on good cause shown. It as such follows, that in order for the Commissioner to be called upon to exercise his discretion in terms of Note 5, the registered user should have been entitled to the refund. In the present instance this was not the position. The applicant was not entitled to a refund as it was not the holder of a mining right as from 15 August 2013. As such, it follows, that no reliance can be placed on the Commissioner to have exercised his discretion in terms of Note 5.*

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[98] Graspan Colliery SA (Pty) Ltd v Commissioner for the South African Revenue Service (8420/18) [2020] ZAGPPHC 560 (11 September 2020)

[128] This view adopted in Graspan, was quoted with approval in Glencore[99] and to date the Graspan decision has not been set aside on appeal.

[129] In addition, the Applicants raises as an excuse for the formation of the JV, the uncertainty that prevailed in February 2006 in the Department of Minerals as to how empowerment transactions should be structured and the parties' intention to conclude a legal transaction. There is no difficulty with that intention. However, what the Applicants do not begin to explain, is why, when clarity did arise, they failed to give effect to clause 2.3.5 of the JV Agreement, which expressly provides for the conclusion of a mining lease between the First and Second Applicants in terms of which the Goedgevonden Mining Right would be leased to the JV. Bearing in mind that the JV Agreement even provided for the conclusion of a contract, the draft of which was attached to the JV Agreement as annexure "D", this failure is even more telling.

[130] I agree that the complaint that the Commissioner (as distinct to the IAAC) failed to exercise a discretion in favour of the JV to deviate from the norm laid down in Note 5(c), to be without merit. No exercise of a discretion therefore arose.

[99] *CSARS v Glencore Operations SA (Pty) Ltd* [2021] ZASCA 111

ORDER

[131] Consequently, the following order is made:

131.1 The application is dismissed with costs, including the costs of two counsel.

C.COLLIS

JUDGE OF THE HIGH COURT

GAUTENG DIVISION

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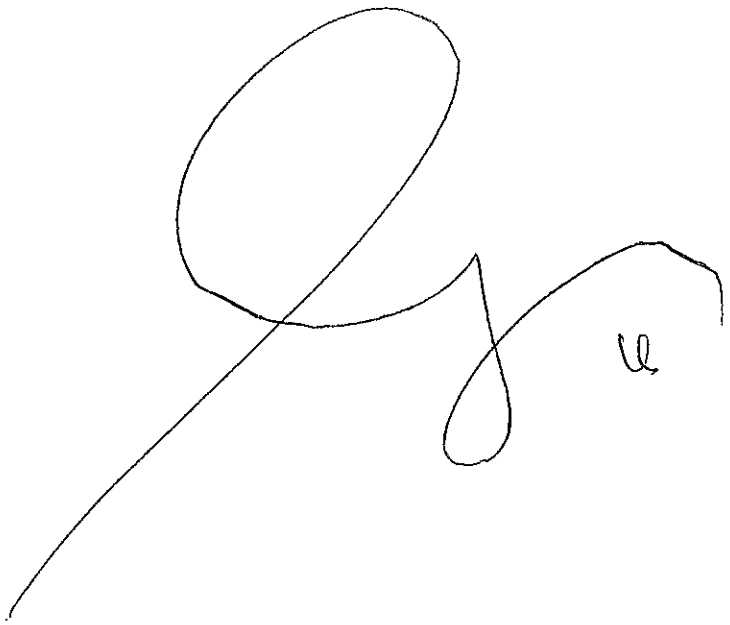
Date of Hearing : 22 July 2022

Date of Judgment : 17 July 2023