IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT
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	First Respondent

NOTICE OF APPLICATION

PLEASE TAKE NOTICE THAT the applicant intends to apply to this Court, on a date determined by the Chief Justice, for an order in the following terms:

1 The applicant is granted leave to appeal against the whole judgment and order handed down by the Supreme Court of Appeal in case number 1299/2021 delivered on 31 March 2023.

2 The appeal is upheld with costs, including the costs of two counsel.

3 The order of the Supreme Court of Appeal is set aside and replaced with the following:

> "1. The appeal is upheld.
>
> 2. The order of the High Court is replaced with the following order: "The application is dismissed with costs, including the costs of two counsel".

4 Further and/or alternative relief.

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

TAKE NOTICE FURTHER THAT if you intend to oppose this application you are required, within ten days of service of this application on you, to lodge with the Registrar and to serve on the applicant's attorneys an affidavit setting out the grounds on which you oppose the application.

TAKE NOTICE FURTHER that the applicant has appointed the offices of **LINDA MAZIBUKO & ASSOCIATES** as its attorneys of record, at the address set out below, where he will accept all notices and processes in these proceedings.

DATED AND SIGNED AT DURBAN **ON THE** 21st **DAY OF APRIL 2023.**

APPLICANTS' ATTORNEYS

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RECEIVED COPY HEREOF WITHOUT PREJUDICE
THIS 21 DAY OF April 2023
AT 14:13 AM/PM
FOR SHEPSTONE & WYLIE ATTORNEYS
DURBAN

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and	
RICHARDS BAY COAL TERMINAL (PTY) LTD	First Respondent

FOUNDING 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.

4 As will appear more fully below, this matter turns on the basis on which tariff determinations may be challenged. The outcome will have important implications for the manner in which customs determinations are made and thereafter challenged under the Customs and Excise Act. This, in turn, has implications for revenue collection, which in the realm of customs runs into billions of rands each year.

5 At issue is whether a party dissatisfied with a tariff determination is confined to the statutory appeal to the High Court (as the revenue authorities contend), or whether, in addition, there is a right to review the decision (as the taxpayer contends).

6 The revenue authorities contend that the taxpayer is confined to the statutory appeal because that appeal is in the widest terms. It amounts to a complete rehearing at which new evidence may be adduced and the matter is decided on a correctness standard. In such an appeal, the taxpayer is entitled to advance any ground that they would have in a review.[1] In consequence, the taxpayer's rights of review are respected. But, in addition, the taxpayer gets a correct decision on the merits, a remedy not ordinarily available in a review.

PARTIES

7 The first applicant is the **COMMISSIONER OF THE SOUTH AFRICAN REVENUE SERVICE** ("**SARS**") which is an organ of state established in terms

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1 See Commissioner for the South African Revenue Service v Rappa Resources (Pty) Ltd [2023] ZASCA 28 (24 March 2023) paras 13 and 14, regarding the nature of a wide appeal in the Tax Court.

of the South African Revenue Service Act 34 of 1997, with its principal place of business at 61/62 Margaret Mncadi Avenue, Durban Central.

8 The second applicant is the **CHAIRPERSON OF THE EXCISE COMMITTEE,** an internal administrative appeal committee of the South African Revenue Service.

9 The respondent is **RICHARDS BAY COAL TERMINAL (PTY) LTD ("RBCT")**, a company duly incorporated and registered in accordance with the company laws of South Africa, and which has its principal place of business at the South Dunes, Richards Bay Harbour, KwaZulu-Natal where it operates the Richards Bay Coal Terminal.

OVERVIEW OF THIS APPLICATION

10 Section 47(9)(e) of the Customs and Excise Act 91 of 1964 ("**CEA**") provides as follows:

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

11 The Supreme Court of Appeal has held in relation to an identically worded provision in the CEA that such an appeal is one in the wide sense. It further held that the first-instance decision maker is not required to hear evidence, is not required to keep a record, and is not required to give reasons.[2]

12 This application for leave to appeal turns on a crisp question of law: is an aggrieved taxpayer, seeking to challenge a tariff determination, confined to the

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2 Pahad Shipping CC v Commissioner for the South African Revenue Services [2010] 2 All SA 246 (SCA).

remedy of a wide appeal under section 47(9)(e) of the CEA, or may it also challenge the tariff determination by way of judicial review?

13 The High Court held that both remedies are available: an aggrieved taxpayer may institute both a statutory appeal and a review to challenge a tariff determination. I attach the High Court judgment marked "**LM1**".

14 The Supreme Court of Appeal agreed, and dismissed SARS' appeal. I attach the SCA judgment marked "**LM2**". The essence of its decision was that a construction of section 47(9)(e) of the CEA which excluded the possibility of judicial review would undermine the constitutional right to just administrative action.

15 I submit that the High Court and SCA were mistaken. On a proper construction of the CEA, tariff determinations are of a preliminary nature, and an aggrieved taxpayer is afforded a *wide* appeal to the High Court under section 47(9)(e). In an appeal of this kind, new evidence may be adduced, the Court is not limited to the first-instance record or reasons, and, in appropriate circumstances, procedural shortcomings at first instance can be cured on appeal. This wide appeal is a far more potent remedy than a review, and its purpose, unlike that of a review, is to arrive at the correct decision. A taxpayer's right to just administrative justice is therefore amply protected in a wide appeal.

16 Indeed, to hold, as the High Court and SCA did, that an aggrieved taxpayer has a right of review against a tariff determination *in addition* to a right of wide appeal against the same decision leads to patent absurdity.

16.1 Consider, for example, a case in which SARS makes a tariff determination in a manner that is procedurally unfair, takes into account irrelevant considerations, and ignores relevant ones.

16.2 In such a case, in a review, the decision would have to be set aside by the High Court. The review proceedings could potentially then go through three courts – the High Court, the Supreme Court of Appeal and the Constitutional Court – only for the decision to be remitted to SARS for a new tariff determination to be made.

16.3 That new decision could then be challenged by way of a wide appeal, and again potentially go through three courts.

16.4 But, importantly, SARS might have been correct all along, even if for the wrong reasons. An enormous waste of time and judicial resources would have occurred, only for the decision ultimately to be corrected by way of the wide appeal. It is the very purpose of the section 47(9)(e) appeal to ensure that the decision is correct. And, ultimately, an aggrieved taxpayer can have no greater entitlement than to the correct decision.

16.5 Further absurdity would arise where, for example, an aggrieved taxpayer's wide appeal *fails* on the merits, in the light of new evidence put up by SARS, which demonstrates the tariff determination to be correct, but the taxpayer's review *succeeds*, on the basis that the limited evidence considered by the first-instance decision-maker did not justify the (ultimately correct) decision. That would result in the incongruous and undesirable situation that a decision conclusively found by the High Court to be correct on the merits, must nevertheless be set aside.

17 The remainder of this affidavit is structured as follows:

17.1 First, I outline the factual background to this application.

17.2 Second, I explain that this Court plainly has jurisdiction to entertain the appeal.

17.3 Third, I demonstrate that it is in the interests of justice that the appeal be heard, having regard to conflicting judgments on the specific issue at stake; the importance of the matter to SARS, the fiscus, and the administration of justice; and the prospects of success.

17.4 Fourth, I elaborate further on the prospects of success by addressing the merits of the appeal, and explaining where the High Court and SCA erred.

FACTUAL BACKGROUND

18 This matter came before the High Court as an application to compel production of the record in terms of Uniform Rule 53.

19 In accordance with this Court's judgment in *Standard Bank*,[3] SARS adopted the view that before it could be compelled to produce a Rule 53 record, it was necessary to determine the question of the High Court's jurisdiction to entertain the review.

20 This means that while RBCT has filed its founding papers in the main proceedings, SARS has not yet delivered the Rule 53 record, and has not yet filed its answering affidavit in the main proceedings. The general factual

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3 Competition Commission v Standard Bank; Competition Commission v Waco Africa (Pty) Ltd and Others [2020] ZACC 2; 2020 (4) BCLR 429 (CC)

background thus appears from RBCT's founding affidavit in the main application, but cannot at this stage be accepted as common cause.

21 Subject to this caveat, the factual background is as follows.

22 RBCT operates a coal export terminal. In 2009, it registered for the diesel fuel levy refund scheme, as contemplated in Part 3 of Schedule 6 of the CEA. It claimed rebates in terms of this scheme for the period 2009 to 2017.

23 On 22 April 2015, SARS launched an investigation into RBCT's compliance with the scheme, to establish whether the use of diesel was contrary to the provisions of the CEA.

24 On 15 August 2017, SARS sent RBCT an audit engagement letter, and on 5 October 2017 it sent RBCT a Notice of Intention to Assess, informing RBCT of the status and *prima facie* findings of the inspection. In particular, SARS's *prima facie* view was that RBCT had claimed refunds of "*non-qualifying activity*" in the amount of more than R7 million for the period March 2013 to August 2017.

25 RBCT was granted 14 days within which to respond to the Notice, which it did on 15 November 2017.

26 On 4 December 2017, SARS issued a Letter of Demand to RBCT in respect of its alleged non-compliance with the diesel refund provisions under section 75 of the Customs Act read with Part 3 of Schedule 6. SARS therefore demanded repayment of R7 126 934.63, plus interest.

27 On 9 February 2018, RBCT filed a request for reasons, and SARS responded on 23 April 2018.

28 On 6 June 2018, RBCT lodged an internal appeal in terms of section 77 of the CEA. SARS issued its appeal decision on 7 February 2019, rejecting RBCT's appeal.

29 After engagements with SARS regarding the reasons for dismissing the appeal, as well as alternative dispute resolution, RBCT applied to the High Court on 26 November 2019, under Uniform Rule 53, relying on:

29.1 the statutory appeal under section 47(9)(e) of the CEA; and

29.2 its right of review under section 33 of the Constitution, read with the Promotion of Administrative Justice Act 3 of 2000 ("**PAJA**").

30 On 24 January 2020, SARS informed RBCT that it did not consider the matter a review, but instead an appeal under section 47(9)(e). It indicated that it would therefore not be delivering the record.

31 On 30 January 2020, RBCT served a Rule 30A notice on SARS calling on it to comply with Rule 53. In the alternative, it relied on Rule 35(11) to obtain the record of SARS' decision. When SARS did not comply with the notice, RBCT launched the present application on 11 March 2020.

32 The matter was heard by the Durban High Court on 3 March 2021. The High Court (per Topping AJ) held that, notwithstanding the wide nature of the appeal under section 47(9)(e), the Court retained review jurisdiction, and it accordingly directed SARS to provide the record of its determination within 10 days of its order.

33 The High Court granted leave to appeal to the SCA. Its leave to appeal judgment is attached marked "**LM3**".

34 The SCA dismissed the appeal. It held that PAJA is legislation enacted pursuant to section 33 of the Constitution;[4] that all decision-makers who enjoy statutory authority to make administrative decisions must do so in a manner consistent with PAJA;[5] that the correctness of a decision – which a wide appeal ensures – in no way negates the right of a person adversely affected by administrative action to a lawful and fair decision;[6] and that SARS' interpretation conflates the remedy to vindicate the constitutional right to just administrative action and the remedy to rectify a decision on its merits.[7]

JURISDICTION

35 This Court's jurisdiction is provided for in section 167(3) to (7) of the Constitution. Section 167(3) provides:

> *"The Constitutional Court—*
>
> *(a) is the highest court of the Republic; and*
>
> *(b) may decide—*
>
> *(i) constitutional matters; and*
>
> *(ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court; and*
>
> (c) *makes the final decision whether a matter is within its jurisdiction."*

4 SCA Judgment para 19.
5 Id.
6 SCA Judgment para 21.
7 SCA Judgment para 23.

36 It is well-established that in determining whether a matter raises a constitutional issue, the question is whether the Court is asked to consider constitutional rights or values.

37 This matter raises numerous constitutional issues.:

38 The matter is essentially one of statutory interpretation,[8] a task to be undertaken in terms of section 39(2) of the Constitution, taking into account the spirit, purport and objects of the Bill of Rights;

39 The matter directly involves the right to just administrative action in section 33 of the Constitution, in that:

39.1 in advancing its interpretation of section 47(9)(e), RBCT relies expressly on the right to just administrative action in section 33 of the Constitution;

39.2 in advancing its interpretation of section 47(9)(e), SARS contends that the right to just administrative action is protected by means of a wide appeal;

39.3 both the High Court and SCA relied on the right to just administrative action in concluding that a taxpayer is entitled to review tariff determinations;

40 In any event, the matter involves the exercise of public power by SARS, and accordingly implicates the rule of law in section 1 of the Constitution.

41 In addition, and in any event, this application falls squarely within the Court's jurisdiction as an arguable point of law of general public importance, which ought to be considered.

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8 See SCA judgment para 11.

42 It concerns a pure question of law, namely whether a party seeking to challenge a tariff determination under the CEA is confined to the remedy of a wide appeal under section 47(9)(e) of the CEA, or may do so by way of review;

43 This question has significant implications far beyond the narrow dispute between the parties, and will determine the availability of review proceedings in respect of all future challenges to tariff determinations;

44 It is a question that implicates the administration of justice, given that, on SARS's argument, interpreting the provision to allow both an appeal and a review will:

44.1 negatively affect its ability to make tariff determinations in an efficient manner, and thereby negatively affect the efficiency of trade into South Africa and the revenue for the fiscus associated therewith; and

44.2 result in an immense waste of judicial resources.

INTERESTS OF JUSTICE

45 I am advised that it is well established that whether this Court grants leave to appeal turns also on what is in the interests of justice.

46 The "*interests of justice*" are determined with reference to a range of factors, including the circumstances of the parties, the nature of the rights involved, and the prospects of success. I respectfully submit that it is in the interests of justice that this Court determine this matter, for three reasons:

46.1 first, the question that arises in this case has been considered squarely on a number of occasions, giving rise to conflicting judgments;

46.2 second, the question in this case is of vital importance to SARS, taxpayers, and the administration of justice generally, and accordingly warrants the attention of this Court; and

46.3 third, the appeal has strong prospects of success.

47 I address each of these in turn below.

Conflicting judgments

48 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 CEA has been considered on three other occasions.

49 **First,** In *Distell Limited*,[9] a Full Court was called upon to determine whether, either under section 47(9)(e) of the CEA or the common law, alternatively PAJA, certain tariff determinations made by the Commissioner could be impugned.[10] In other words, the Full Court considered squarely whether the tariff determination could be impugned on appeal or by way of review.

49.1 Regarding the availability of a review, the Court held as follows:[11]

> "With regard to the applicability, or not, of PAJA:
>
> (a) The wording of the Act is trenchant and that the prescribed remedy of an aggrieved party against a tariff determination, irrespective of whether it is founded on the Commissioner's alleged wrong interpretation of the relevant statutory provisions (i.e. the first step in the classification process), or his incorrect application of the said provisions to the facts (i.e. the second and third

9 Distell Limited v The Commissioner for the South African Revenue Services 2009 JDR 0337 (GNP).
10 Para 5.
11 Para 35 (our emphasis).

steps of the classification process)), is an appeal in terms of section 47(9)(e) of the Act.

(b) Because the Act governs both the procedural and substantive prescripts and requirements of an aggrieved party's rights and remedies and because an appeal in terms of section 47(9)(e) is an appeal "in the wide sense" i.e. a complete rehearing of the whole issue, there is simply no need to resort to the corresponding provisions of PAJA.

49.2 The Full Court thus 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 PAJA for purposes of a review.

49.3 *Distell* went on further appeal to the SCA.[12] Although the appeal was upheld, it was decided solely on the basis of the grounds of appeal under section 47(9)(e). In a minority judgment, Harms JA found that the Full Court's discussion of the application of PAJA had not been raised by the parties.[13] But the majority of the SCA clearly did not agree, and thus did not concur in Harms DP's minority judgment.

49.4 In the present matter, the SCA held that SARS' reliance on Distell was misplaced, because the SCA in that case did not give any consideration to whether a review is ousted by the appeal provisions of the CEA.[14] I respectfully submit that the SCA in the present matter erred, and that the majority in *Distell,* by not signing onto the separate concurrence, specifically left the Full Court's reasoning on the non-reviewability of tariff

12 Distell Limited v The Commissioner for the South African Revenue Services 2010 JDR 1024 (SCA).
13 Para 74.
14 SCA judgment para 14.

determinations unscathed. But in any event, there is, at a minimum, a Full Court decision that supports SARS' interpretation of section 47(9)(e).

50 **Second**, in *BCE,*[15] the High Court (per Wepener J) 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). [16] Relying on *Metcash,*[17] Wepener J held that a party is not limited to the remedies created by legislation, and that taxpayers retain their common law remedy to review determinations.[18]

51 **Third**, more recently, the Pretoria High Court (per Tolmay J) in *Cell C*[19] concluded that it lacked jurisdiction to hear a review of a tariff determination, and, on that basis, dismissed Cell C's Rule 30A application to compel the Rule 53 record. The Court held that, on a proper interpretation, "*when one has access to the wide appeal remedy provided for in section 47(9)(e), the possibility of a review is excluded*".[20]

Importance of the matter

52 I have explained that the question in this appeal is one that has ramifications far beyond the two parties to the dispute. It will determine the manner in which all future tariff determinations may be challenged. That is both a reason why this Court's jurisdiction is engaged (i.e. it is a matter of public importance), and a

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15 BCE Food Service Equipment (Pty) Ltd v Commissioner for the South African Revenue Service [2017] ZAGPJHC 243 (12 September 2017).
16 Id para 7.
17 Metcash Trading Limited v Commissioner, South African Revenue Service & Another 2001(1) SA 1109 (CC)
18 Id paras 7-8.
19 Cell C (Pty) Ltd v The Commissioner for the South African Revenue Service [2022] ZAGPPHC 152 (11 March 2022)
20 Cell C para 33.

consideration which weighs heavily in favour of the leave to appeal being granted (i.e. it is in the interests of justice to hear the matter).

53 There is little doubt that, if the High Court and SCA decisions are confirmed, SARS can expect a slew of review applications challenging its determinations on a range of grounds unrelated to their correctness, such as the inadequacy of the hearing afforded to taxpayers or the alleged failure to take relevant considerations into account. SARS can also expect that challenges to its tariff determinations will remain in the courts for many years before they are finally resolved, as taxpayers will exhaust their right to a review, and then their right to an appeal, before a matter is finally determined.

54 The availability of a review – in addition to an appeal – is thus a matter of vital importance for SARS, for the fiscus, and for taxpayers.

55 SARS has explained that huge quantities of goods pass through South African ports every year. In the year ending March 2019, goods well in excess of R2 trillion passed through the ports of South Africa. This is obviously a critically important source of revenue collection for the fiscus. In the year ending 31 March 2019, the revenue collected by the Customs and Excise section of SARS amounted to more than R372 billion.

56 As I will explain, SARS contends that the purpose of the wide appeal under section 47(9)(e) is to allow tariff determinations – which are often quick decisions made by first-instance officials on the information available to them at the time – to be reconsidered as to their *correctness*.

57 To subject those decisions to review on procedural grounds – and not merely to appeal on correctness grounds – would undermine this statutory purpose and, most importantly, would prejudice the efficient movement of goods through our ports.

Prospects of success

58 I respectfully submit that the appeal has strong prospects of success.

59 This is apparent not only from the divergent views that our courts have previously taken to the question, but also from the merits of the appeal, to which I now turn.

MERITS OF THE APPEAL

The key question: review jurisdiction

60 Rule 53(1) of the Uniform Rules of Court applies only to reviews – that is, to "*proceedings to bring under review*" particular decisions or proceedings.

61 Section 47(9)(e) of the CEA provides:

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

62 The central question in the present matter is whether, in the light of the wide appeal in section 47(9)(e), the High Court also has jurisdiction to *review* SARS's tariff determinations in terms of Rule 53.

62.1 If the institution of review proceedings is competent, then SARS does not dispute that is obliged to produce the record of its decision under Uniform Rule 53.

62.2 However, if, as SARS contends, the High Court lacks review jurisdiction, then Rule 53 does not apply, and there is no basis upon which to compel SARS to produce the record.

63 This is the central and first question the Court must decide. That much was confirmed by this Court in *Standard Bank*,[21] where the majority held that the Competition Appeal Court acted irregularly by ordering the production of the record in circumstances where review jurisdiction was in dispute. Before compelling the production of the record, the Court ought to have "*first decided the question of jurisdiction on the founding papers before [it]*".[22]

64 *Standard Bank* applies squarely in the present case.

65 The SCA criticised SARS for failing to disclose the record of its decision, without prejudice to its rights to raise the jurisdiction point.[23] But that flies in the face of this Court's decision in *Standard Bank*. As the majority of this Court explained, among the reasons that jurisdiction must be decided first, is the fact that compliance with the Rule 53 order – that is, the provision of the record – cannot later be undone by a subsequent order that the Court in fact lacked jurisdiction.[24]

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21 Competition Commission v Standard Bank; Competition Commission v Wace Africa (Pty) Ltd and Others [2020] ZACC 2; 2020 (4) BCLR 429 (CC) paras 114-121 and 201-203.
22 Id paras 118 and 203
23 SCA Judgment para 28.
24 Id.

The preliminary nature of tariff determinations

66 In its answering affidavit in the compelling application, SARS detailed the factual and institutional context in which customs and excise tariff determinations take place, and which demonstrate the practical purpose of a section 47(9)(e) appeal.

67 I have already described the sheer volume of goods that pass through South Africa's ports, as well as the importance of these imports to the fiscus.

68 This revenue-collection imperative means that it is important that SARS officials ensure that goods have been properly declared and that the proper duty has been paid.

69 This places immense capacity constraints on SARS and its officials. Apart from sheer volume, the proper classification of products (in order to make tariff determinations) requires a significant amount of technical expertise, including expert evidence. As a matter of necessity, many of the thousands of officials inspecting containers and making first-instance decisions are ill-equipped to justify them technically and legally.

70 In addition, SARS needs to act with speed and expedition, so that the free movement of goods into and out of the country is not impeded. Efficient trade facilitation is required in terms of various international instruments that bind South Africa. This flows from South African's obligations to the World Trade Organisation.

71 SARS does not have the resources or capacity to examine all goods that enter or pass through the country. Approximately only 2% of all containers which enter

into South Africa are inspected. Nor does it have the resources or capacity to appoint experts every time it classifies a product.

72 The upshot of all of this is that, inevitably, first-instance officials are often called upon to make quick decisions on the information available to them at the time, despite the fact that those decisions might ultimately require technical and expert evidence. And the relevant officials cannot always await expert advice before a decision is made, because to do so would undermine their objective of ensuring the efficient movement of goods.

73 The CEA caters for these realities by allowing for the *correction* of the determination by the High Court by way of a wide appeal. In other words, while tariff determinations are often made at first-instance in a manner that time and resource constraints do not allow to be exacting, those determinations are not intended to be the final word.

74 This is precisely what Murphy J held In *Levi-Strauss*, where he recognised that the scheme of the CEA is such that tariff determinations are of a preliminary nature, undertaken with less rigour, and that the subsequent appeal therefore allows for a complete reconsideration on additional facts and grounds:[25]

> "The determinations are very much preliminary assessments done on a forensically less exacting basis, by which SARS, an interested party, puts forward its account of the liability owing to it by its customs debtor, the taxpayer. The determinations as noted in *Pahad Shipping* are not preceded by any hearing. The very object of the *de novo* appeal, as reiterated by the Constitutional Court in *Kham*, is to permit a first instance hearing before an independent and impartial tribunal at which it may seek reconsideration on additional facts and grounds."

25 Levi Strauss SA (Pty) Ltd v Commissioner for the South African Revenue Service [2017] ZAGPPHC 990 (2 May 2017) para 29.

The wide appeal to the High Court

75 It has been held in a number of cases – and is common cause in this case – that a section 47(9)(e) appeal is an appeal in the wide sense. As explained above, this means that it constitutes a complete rehearing of the matter.[26] It is not simply a review, or an appeal in the limited or strict sense. It is a fresh determination on the merits of the matter, in which additional evidence or information may be adduced.[27] The High Court and SCA in the present matter accepted this.

76 There are important differences between a wide appeal and a review.

76.1 The essential nature of a review is that it is not directed at correcting a decision on the merits, but is, instead, "*aimed at the maintenance of legality*".[28] Reviews are concerned with process; appeals with result. Put differently, whereas a review is concerned only with whether a decision is lawful; an appeal is concerned with whether it is correct.

76.2 In a wide appeal, a party is <u>not</u> constrained in respect of the grounds and arguments it may raise. Because it is a *de novo* reconsideration, parties are not even constrained by what they might have argued at first instance. The Court, in exercising its appeal power, will always be concerned with making the correct decision on the merits of the tariff determination. The Court essentially steps into the shoes of the Commissioner, and exercises what is akin to an original jurisdiction.

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26 Acti-Chem SA (Pty) Ltd v Commissioner for the South African Revenue Service [2019] ZAKZPHC 58 (15 August 2019) para 2; Distell v Commissioner for SARS [2012] ZASCA 88 (31 May 2012).

27 See Tikly and Others v Johannes NO and Others 1963 (2) 588 (T).

28 Pretoria Portland Cement Co Ltd and Another v Competition Commission and Others 2003 (2) SA 385 (SCA) para 35.

76.3 Thus, if an appellant raises grounds that resemble review grounds but that do not go to the merits – for example, that the administrator followed an unfair process, but a fair process would in any event have led to the same, ultimately correct result – then the Court will not, in the exercise of its wide appeal jurisdiction, make a new tariff determination. That is fundamental to the distinction between appeal and review.[29]

76.4 Most importantly for present purposes, the difference in nature between a wide appeal and a review has significant implications for the utility of a record and reasons.

76.5 Because a review is concerned ultimately with process and regularity, it is on the basis of the record and reasons that the lawfulness and rationality of the decision-maker's decision, and the process through which the decision was taken, is scrutinised.[30] Administrators are thus bound by the reasons they give at the time of their decision, and "*[a]ny further reasons are irrelevant*".[31]

76.6 A wide appeal is fundamentally different in both respects. In a wide appeal, the record is of little value. When exercising wide appellate power, a court or tribunal is not confined to the record, hears the matter *de novo*, and is placed in the same position as the first-instance decision maker, with the power to reconsider the first-instance decision. It hears the matter *de novo*,

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29 AllPay Consolidated Investment Holdings and Others v Chief Executive Officer of the South African Social Security Agency and Others 2014 (1) SA 604 (CC) paras 23 to 27.

30 Democratic Alliance v President of the Republic of South Africa in re: Democratic Alliance v President of the Republic of South Africa and Others 2017 (4) SA 253 (GP) paras 21ff.

31 PG Group Ltd and Others v National Energy Regulator of South Africa and Another [2018] ZASCA 56; 2018] 3 All SA 52 (SCA); 2018 (5) SA 150 (SCA) para 41.

and can hear any further evidence that is relevant.[32] There is, accordingly, little purpose served by a record or reasons in a wide appeal.

77 In interpreting section 47(9)(e), it is instructive to consider the analogous section 65(6)(a), which has been described as "*identical in wording*"[33] to section 47(9)(e), and in respect of which the same basic principles apply.

78 In *Pahad Shipping*, the SCA explained that, like a section 47(9)(e) appeal, the section 65(6)(a) appeal is an appeal in the wide sense. This is because the first instance decision-maker is not required to hear evidence, is not required to give any reasons for his determination, and is not required to keep any record of the proceedings.[34]

79 I respectfully submit that it can hardly be suggested that the Commissioner is required to *produce* a record in terms of Rule 53, in circumstances where the legislation does not even require him to *keep* a record.

The right to administrative justice is protected

80 A pivotal aspect of the SCA judgment in this case was that interpreting section 47(9)(e) of the CEA to exclude a review would undermine a taxpayer's right to just administrative action.[35]

81 However, I respectfully submit that a taxpayer's right to just administrative justice is amply protected in a wide appeal. That is because the wide appeal, given its

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32 Refugee Appeal Board and Others v Mukungubila 2019 (3) SA 141 (SCA); Road Accident Fund v Duma and Three Similar Cases 2013 (6) SA 9 (SCA) para 26.

33 Trend Finance (Pty) Ltd and another v Commissioner for the South African Revenue Service and Another [2005] 4 All SA 657 (C) para 26.

34 Pahad Shipping CC v Commissioner for the South African Revenue Services [2010] 2 All SA 246 (SCA) para 14.

35 SCA Judgment paras 19 to 23

amplitude as a complete rehearing with or without additional evidence, has the capacity to cure any defect which occurred at first instance.

82 This has been confirmed in a number of previous decisions, to which the SCA was alerted, but to which it did not refer.

82.1 In *Slagment*,[36] the Appellate Division considered the question "*whether it is possible for an appellate tribunal to correct an administrative decision which is impeachable on the grounds of unfairness*". The Court held that there was no reason why any unfairness at first instance could not be cured by a full and fair hearing on appeal.

82.2 In *Scenematic*,[37] the SCA considered the consequence of a procedurally fair appeal, in the event of it being found that the first-instance decision was irregular. Relying on *Slagment*, the Court held that a general rule requiring natural justice at first instance and on appeal is unjustified, and, on the facts, held that the wide appeal before the Minister cured any shortcoming in relation to the lawfulness of delegation at first instance.

83 Both *Slagment* and *Scenematic* relied on the English decisions of *Calvin v Carr*[38] and *Lloyd v McMahon*.[39] Notably, in *Lloyd v MacMahon*, every judge in the Court of Appeal, and every judge in the House of Lords, agreed that given the wide ambit of the appeal, the district court in that case had the power to address the procedural complaints of unfairness.

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36 Slagment (Pty) Ltd v Building Construction and Allied Workers Union and Others 1995 (1) SA 742 at 756D to 757A.

37 Minister of Environmental Affairs and Tourism v Scenematic Fourteen (Pty) Ltd [2005] 2 All SA 239 (SCA) paras 33 to 35.

38 Calvin v Carr and Others 2 All ER 440 (PC) at 447h.

39 Lloyd v McMahon 1987 (1) All ER 1118 (CA & HL).

84 In fact, the SCA has specifically held that by curing procedural defects at first instance, a wide appeal – far from undermining the right to administrative justice – gives effect to that right. In *Nichol*,[40] the SCA held as follows:

> The Appeal Board therefore conducts an appeal in the fullest sense – it is not restricted at all by the Registrar's decision and has the power to conduct a complete rehearing, reconsideration and fresh determination of the entire matter that was before the Registrar, with or without new evidence or information. This is not disputed by Nichol. It has also never been suggested that the Appeal Board has been tainted by any of the alleged procedural or substantive irregularities of which Nichol complains. I therefore cannot agree with the argument advanced by counsel for the appellants to the effect that the Appeal Board would be unable to give effect to their constitutional rights to fair administrative action and would not be able to 'make a declaration of invalidity' in respect of the impugned decisions of the Registrar, as opposed to 'simply setting aside' such decisions. As detailed in the previous paragraph, the powers of the Appeal Board are certainly extensive enough to afford Nichol the same relief (if justified) as that sought by him in the main application, namely an order 'reviewing and setting aside' the relevant decisions of the Registrar, in particular the issue of a certificate in terms of s 14(1)*(e)* of the PF Act in respect of the transfer of business from the Sage Schachat Fund to the Sage Group Fund."

85 Thus, in short, in a wide appeal such as that under section 47(9)(e), the High Court steps into the shoes of the Commissioner, and is able to redress procedural shortcomings at first instance.

Incorrect reliance on Metcash

86 Another pivotal aspect of the SCA decision was its reliance on this Court's decision in *Metcash*.[41] On the strength of *Metcash*, the SCA held that "*no warrant appears to exist for the conclusion that a taxpayer, who is dissatisfied with a*

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40 Nichol and Another v Registrar of Pension Funds and Others 2008 (1) SA 383 (SCA) para 22.

41 Metcash Trading Limited v Commissioner, South African Revenue Service & Another 2001(1) SA 1109 (CC)

determination by SARS, does not enjoy the right to review the determination in terms of PAJA."[42]

87 However, I respectfully submit that the SCA fundamentally misapplied *Metcash.*

88 *Metcash* involved, *inter alia*, the constitutionality of the VAT Act, which provides that upon assessment by SARS, and notwithstanding the noting of a statutory administrative appeal to the Special Court, a taxpayer is obliged to pay VAT, with possible adjustments and refunds being left for dispute later.[43]

89 This required the Court to consider what other remedies were available to the taxpayer, apart from the statutory appeal. In doing so, the Court emphasised that the internal appeal was an administrative, not judicial process:

> "The Commissioner is not a judicial officer — and assessments and concomitant decisions by the Commissioner are administrative, not judicial, actions; from which it follows that challenges to such actions before the Special Court or board are not appeals in the forensic sense of the word. They are proceedings in terms of a statutory mechanism specially created for the reconsideration of this particular category of administrative decisions — and appropriate corrective action — by a specialist tribunal."

90 The Court accordingly held that the creation of this special appeal procedure did not oust the High Court's common law review power in the ordinary course.[44]

91 But notably, in *Metcash,* there was no suggestion of a wide appeal to the High Court. The internal appeal was, the Court explained, not in fact an appeal in the forensic sense. And while this internal appeal could be followed, thereafter, by a

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42 SCA judgment para 25.
43 Id para 8.
44 Id para 33.

judicial appeal in terms of section 34, this was an appeal in the strict or ordinary sense.[45]

92 In other words, in *Metcash*, the effect of interpreting section 36 of the VAT Act to mean that an aggrieved party was deprived of a common law review, would mean that the party was, in the first instance, deprived of the ability to approach a court and, even after the internal appeal, was not entitled to a wide appeal.

93 Section 47(9)(e) is fundamentally different. Far from *depriving* an aggrieved party of judicial recourse, it means that every aggrieved party is entitled, as of right, to a judicial reconsideration of a tariff determination on the merits. Aggrieved parties are thus given far *greater* rights of recourse than they would have in an ordinary review.

No ouster of jurisdiction

94 For this reason, it is not correct to speak, as the SCA did, of the "ouster" of the High Court's review jurisdiction.[46]

95 The ordinary concern with ouster clauses is that they limit aggrieved parties' access to courts or their right to administrative justice, and leave them without an effective remedy.[47]

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45 The section 34 appeal was an appeal in terms of the now-repealed section 86A of the Income Tax Act 58 of 1962. The Appellate Division had by the time Metcash was decided confirmed that this was an ordinary appeal. See Commissioner for Inland Revenue v Da Costa 1985 (3) SA 768 (A) at 775B-F. See also Commissioner for the South African Revenue Service v Capstone 556 (Pty) Ltd [2016] 2 All SA 21 (SCA) para 19.

46 SCA judgment para 24.

47 Cf Liberty Life Association of Africa v Kachelhoffer NO and Others 2001 (3) SA 1094 (C) at 1106B; Lenz Township Co (Pty) Ltd v Lorentz NO en Andere 1961 (2) SA 450 (A); Minister of Law and Order and Others v Hurley and Another 1986 (3) SA 568 (A)

96 But the remedy of a wide appeal is a *more* potent remedy than a review, since the matter is decided on a correctness standard, and the wide ambit of the appeal embraces any potential grounds of review.

97 In other words, the remedy provided in section 47(9)(e) gives the court wider and more potent powers than it would have in a review, and affords the litigants greater procedural entitlements than they would otherwise have. There can accordingly be no prejudice to an aggrieved party, and no limitation to its right to access to courts or administrative justice, if it is obliged to pursue a wide appeal rather than a review. Questions of "ouster" simply do not arise.

CONCLUSION

98 For the reasons set out above, I pray for the relief sought in the notice of application.

GREGORY 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~~ DURBAN on this the 21ST day of APRIL **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

KAMENI NAIDOO (LLB) UNISA
COMMISSIONER OF OATHS
PRACTISING ATTORNEY
9 BISHOP ROAD, DURBAN

Full Names in Print:

Designation:

Area:

"LM1"

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: D10030/2019

In the matter between:

RICHARDS BAY COAL TERMINAL (PTY) LTD Applicant

and

THE COMMISSIONER OF THE SOUTH AFRICAN REVENUE SERVICE First Respondent

THE CHAIRPERSON, EXCISE APPEAL COMMITTEE Second Respondent

ORDER

(a) The Respondents are directed, within 10 days of the service of this order, to comply with Rule 53 (1) (b) of the Uniform Rules of Court by dispatching to the Registrar and to the Applicant a complete record containing all documents and all electronic records (including correspondence, contracts, memoranda, advice, recommendations, evaluations, internal deliberations and the like) that relate to the decisions which are subject to the appeal and review application under case number D10030/2019, together with such reasons as the Respondents are by law required or desire to give or make.

(b) If the Respondents fail to comply with the order set out above, the Applicant is entitled to return to this Court, on the same papers duly supplemented as may be necessary, for further relief, including an order striking out the Respondents' opposition to the main application.

(c) The costs of this application are reserved for determination by the Court hearing the main application.

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date for the handing down of the judgment is deemed to be the 12th of August 2021.

JUDGMENT

TOPPING AJ

[1] This is an interlocutory application instituted pursuant to the provisions of Rule 30A of the Uniform Rules of Court. The Applicant ("RBCT") seeks an order that the First and Second Respondents ("SARS") be directed to comply with the provisions of Rule 53 (1) (b), read with Rule 35 (11) of the Uniform Rules of Court, by dispatching a complete record containing all documents and all electronic records (including correspondence, contracts, memoranda, advice, recommendations, evaluations, internal deliberations and the like) that relate to the decisions which are subject to appeal and review in the main application instituted by RBCT, together with such reasons as SARS are, by law required, or desire to give or make. RBCT seeks further relief that, should SARS not comply with the aforesaid order, it be given leave to make application for an order striking out SARS' opposition to the main application. In essence, production of the documents is sought either pursuant to the provisions of Rule 53 (1) (b), or alternatively, pursuant to the provisions of Rule 35 (11).

[2] In the main application, RBCT seeks to appeal, alternatively review of the decision taken by SARS' Internal Administrative Appeal Committee on the 7th of February 2019, wherein it rejected RBCT's appeal and confirmed a letter of demand which had been

issued by SARS on the 4th of December 2017,[1] and the decision taken by SARS on the 4th of December 2017 to issue the letter of demand itself.

[3] I am advised that, in 2001, the Minister of Finance announced the introduction of a diesel fuel concession scheme that applied to sectors where diesel fuel was used off-road. It entailed a refund of the fuel levy and the Road Accident Fund levy. It was to ensure that entities that utilise rail to haul freight do not subsidise those entities who utilise road haulage to do so. The scheme is regulated in section 75 (1A) and (1C), and item 670.04 Part 3 of Schedule 6, of the Customs and Excise Act, No. 91 of 1964 ("the Act").

[4] RBCT states in the main application that it operates a leading coal export terminal in Richards Bay, KwaZulu-Natal. Coal is hauled to a private siding upon RBCT's premises in rail wagons. These wagons are then coupled to RBCT owned diesel locomotives and hauled to "tandem tipplers", which discharge the coal from the wagons onto conveyor belts. The wagons are then returned to the siding by the same diesel locomotives. RBCT has taken advantage of the aforesaid scheme and has made claims for refunds on the diesel fuel used by its locomotives.

[5] The main application relates to the decisions taken as part of an audit, and later in an administrative appeal, that SARS was entitled to a refund of the diesel rebates that had been claimed by RBCT. The intention to conduct an audit was communicated to RBCT in a letter dated the 15th of August 2017. On the 5th of October 2017, SARS' audit team informed RBCT of its *prima facie* view that RBCT had claimed refunds for "non-qualifying activity". In a letter addressed on the 15th of November 2017, RBCT made representations to SARS' audit team as to why it contended that this view was incorrect. SARS then issued its letter of demand on the 4th of December 2017. RBCT requested reasons for the decision, which were supplied on the 23rd of April 2018. RBCT then lodged an internal appeal against the decision on the 6th of June 2018 and the Excise

[1] In which SARS issued a determination and demand for the repayment of fuel levy refunds claimed and received by RBCT by virtue of the provisions of sections 47 (9) (a), (10) and (11), read with section 44 (11) (a), of the Customs and Excise Act, No. 91 of 1964.

Appeal Committee delivered its decision on the 7th of February 2019, dismissing the appeal. Reasons for the decision were requested on the 14th of March 2019, but none have been provided.

[6] SARS have refused to produce the record or documents sought by RBCT. It contends that the impugned decisions are not reviewable by this Court, either under the provisions of the Promotion of Administrative Justice Act, No. 3 of 2000 ("PAJA"), or under the principle of legality. SARS further contends that the documentation cannot be sought pursuant to the provisions of Rule 35 (11), contending that only specified and identified documents can be sought under that Rule and not a category or genus as claimed by RBCT. It is further contended that the documents are, in any event, irrelevant to the main application.

[7] There is no dispute between the respective parties that I must, as a primary issue, determine whether this Court has jurisdiction to review SARS' tariff determination in terms of Rule 53. Reference was made to the case of *Competition Commission v Standard Bank; Competition Commission v Waco Africa (Pty) Ltd and Others*,[2] where the Constitutional Court confirmed the proposition that where the jurisdiction of a court before which a review application is brought is contested, a ruling on this issue must precede all other orders. The logic being that a court must be competent to make whatever orders it issues, and if it lacks authority to do so, such order constitutes a nullity.

[8] It is contended by SARS that a person aggrieved by a determination of the Commissioner, made in terms of the Act, is entitled to take that determination on appeal to the High Court in terms of the provisions of section 47 (9) (e) thereof. It is contended that such procedure encompasses a "wide appeal", which would entail a complete *de novo* hearing of the matter. It is therefore submitted that any review of such decision, which by its very nature would be restricted to procedural issues and the question of rationality, falls away. SARS has not contended that this Court does not have general review jurisdiction. Its argument is that, by virtue of the provisions of section 47 (9) (e), a

[2] [2020] ZACC 2 at paras 118 and 200.

review procedure as would otherwise be available, is not available to RBCT in the present instance. The contention is that RBCT is bound to utilise the appeal procedure prescribed in this section, and no other remedy. As is correctly pointed out by RBCT, the issue in this application is accordingly not whether this Court has review jurisdiction generally, but whether the appeal remedy provided by section 47 (9) (e) has ousted other remedies available to RBCT, such as those provided for in PAJA and from the legality principle in the Constitution.[3]

[9] There is no dispute that the procedure prescribed in section 47 (9) (e) is an appeal in the wide sense and constitutes a rehearing of the matter. As explained by SARS, this is not simply a review or appeal in the strictest sense. It is a fresh determination on the merits of the matter in which additional evidence or information may be adduced. It is submitted that it is trite that, when exercising wide appellate power, the court is not confined to the record and is placed in the same position as a court of first-instance, with the power to reconsider and, if necessary, replace the first-instance decision. It hears the matter *de novo* and can hear any further evidence that is relevant. SARS goes further to contend that the enquiry would also encompass elements that would otherwise form the basis of review proceedings.

[10] The provisions of section 47 (9) (e) were considered in the matter of *BCE Food Service Equipment (Pty) Ltd v Commissioner of the South African Revenue Service.*[4] BCE sought to review and set aside a determination by the Commissioner under the Act, pursuant to the provisions of PAJA. The argument presented by SARS in those proceedings was identical to the one presented in the current instance, namely "that the review proceedings were not available to the Applicant and that the Applicant's remedy was limited to one in terms of section 47 (9) (e), ie, an appeal as is provided in the section".[5] The Court found against SARS, stating the following:[6]

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[3] RBCT has correctly pointed out that this Court's jurisdiction to hear a legality review is not derived from the Customs and Excise Act, but has jurisdiction conferred upon it in terms of section 169 of the Constitution. As far as reviews instituted on the grounds enumerated in PAJA, this Court's jurisdiction is derived from section 6 (1) of that act.

[4] (27982/2015) [2017] ZAGPJHC 243 (12 September 2017).

[5] *Supra* at para 3.

[6] *Supra* at paras 7 and 8.

"[7] Section 47 bestows a right on a party, which right would not have existed but for the provisions of the section. There is no common law or other legislative provisions which an aggrieved party could employ in order to challenge a determination of the respondent, save of course for a common law review or the provisions of PAJA. There is no indication in the Customs and Excise Act that the provisions of PAJA have been ousted and that an aggrieved party is limited to the appeal procedure provided for in that Act. The test is whether the legislation obliges and restricts an aggrieved person to utilise the remedy provided for in that legislation.[7] No such construction can be placed on s 47 of the Customs and Excise Act and there is no language contained in the Act that leads to a conclusion that the legislature has confined a complainant to the particular statutory remedy. The decisions on which the respondent relied during argument [8] in support of the contention that a party may not utilise the provisions of PAJA, do not say that and it would have been surprising if they did deprive an aggrieved person of the rights afforded him or her in terms of PAJA and the Constitution.[9] Kriegler J said as follows:[10]

'It is important to have clarity about the effect of the mechanism created by ss 33 and ss 33A of the Act. Were it not for this special "appeal" procedure, the avenues for substantive redress available to vendors aggrieved by the rejection of their objections to assessments and decisions by the Commissioner would probably have been common-law judicial review as now buttressed by the right to just administrative action under s 33 of the Constitution, and as fleshed out in the Promotion of Administrative Justice Act.'

[8] Indeed, Kriegler J was at pains to make it clear that an aggrieved party is not limited to the remedies created in the legislation:

'But, and this is crucial to an understanding of this aspect of the case, the Act nowhere excludes judicial review in the ordinary course. The Act creates a tailor-made mechanism for redressing complaints about the Commissioner's decisions but leaves intact all other avenues of relief'."

[11] I have been urged by SARS to find this decision to be wrong and decline to follow it. I am unable to do so. The general principle referred to in BCE, as formulated in *Madrassa Anjuman Islamia v Johannesburg Municipality*[11] is that "If it be clear from the language of a statute that the Legislature, in creating an obligation, has confined the party

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[7] With reference to *Madrassa Anjuman Islamia v Johannesburg Municipality* 1917 AD 718 at 727.
[8] Namely *Pahad Shipping CC v Commissioner, SARS* [2010] 2 All SA 246 (SCA) and *Levi Strauss SA (Pty) Ltd v The Commissioner for the South African Revenue Service* 20923/2015 – unreported judgment of Murphy J of the Gauteng Division, Pretoria.
[9] Commenting that these two cases did not deal with reviews but with what was permissible in an appeal under the Customs and Excise Act.
[10] The reference is to what was stated by Kriegler J in *Metcash Trading Ltd v Commissioner, South African Revenue Service and Another* 2001 (1) SA 1109 (CC) at para 33.
[11] Supra at 727.

complaining of its non-performance, or suffering from its breach, to a particular remedy, such party is restricted thereto and has no further legal remedy; otherwise the remedy provided by the statute will be cumulative." (my emphasis). The exclusion of this Court's jurisdiction would therefore have to be express, or at least necessarily implied. This cannot be lightly inferred. I agree with the observation made by the Court in BCE that "there is no language contained in the Act that leads to a conclusion that the legislature has confined a complainant to the particular statutory remedy". I have also not been referred to any provision specifically doing so. I also agree with the conclusion that no such construction can be placed on section 47 (9) (e) itself. I agree that these provisions provide for a right to a "wide appeal", which would not have existed but for the existence of these provisions, but I see no basis for a construction being placed on them which would confine an aggrieved party to that remedy alone and to exclude any other rights, such as the right of review. I also agree with the distinction drawn by the Court in BCE to the cases of *Pahad Shipping* and *Levi Strauss*,[12] which were also relied upon by SARS in these proceedings. These matters did not deal with instances where review proceedings had been instituted. The Court in both instances did not deal with the issue as to whether it was competent to bring a review application and whether the sole remedy available was an appeal.

[12] I therefore conclude that this Court's review jurisdiction has not been excluded in the present instance and that I am therefore entitled to grant an order directing compliance with the provisions of Rule 53 (1) (b). SARS has conceded, that should I conclude that this Court has jurisdiction to hear the review in the present instance, it is obliged to produce the record sought by RBCT. This being the case, there is no need for me to consider whether production of the record and documents sought by RBCT is competent pursuant to the provisions of Rule 35 (11) and I accordingly make no decision in this regard.

[13] As far as costs are concerned, I am of the view, bearing in mind that these proceedings are interlocutory, that the Court hearing the main application would be far

[12] Fn 8 and 9 *supra*.

better placed than I to make an appropriate order as to costs. The costs of this application ought therefore to be reserved.

[14] I accordingly make the following order:

(d) The Respondents are directed, within 10 days of the service of this order, to comply with Rule 53 (1) (b) of the Uniform Rules of Court by dispatching to the Registrar and to the Applicant a complete record containing all documents and all electronic records (including correspondence, contracts, memoranda, advice, recommendations, evaluations, internal deliberations and the like) that relate to the decisions which are subject to the appeal and review application under case number D10030/2019, together with such reasons as the Respondents are by law required or desire to give or make.

(e) If the Respondents fail to comply with the order set out above, the Applicant is entitled to return to this Court, on the same papers duly supplemented as may be necessary, for further relief, including an order striking out the Respondents' opposition to the main application.

(f) The costs of this application are reserved for determination by the Court hearing the main application.

TOPPING AJ

Case information

Date of hearing	:	3rd March 2021
Date Delivered	:	12th of August 2021

Appearances:

For the Applicant	:	Adv N Singh SC Adv S Pudifin-Jones
Instructed by	:	Shepstone and Wylie 24 Richefond Circle Ridgeside Office Park Umhlanga Rocks email: gvdm@wylie.co.za
For the 1st and 2nd Respondents	:	Adv J Pammenter SC Adv G Marcus SC Adv M Mbikwa
Instructed by	:	Linda Mazibuko and Associates 231/233 Matthews Meyiwa Rroad Morningside Durban email: linda@qinet.co.za

"LM2"

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 1299/2021

In the matter between:

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	**FIRST APPELLANT**
THE CHAIRPERSON, EXCISE APPEAL COMMITTEE	**SECOND APPELLANT**

and

RICHARDS BAY COAL TERMINAL (PTY) LTD	**RESPONDENT**

Neutral citation: *Commissioner for the South African Revenue Service and Another v Richards Bay Coal Terminal (Pty) Ltd* (Case no 1299/2021) [2023] ZASCA 39 (31 March 2023)

Coram: PONNAN ADP and MOCUMIE, GORVEN and GOOSEN JJA and UNTERHALTER AJA

Heard: 28 February 2023

Delivered: 31 March 2023

Summary: Customs and Excise Act 91 of 1964 – taxpayer not confined to the remedy of a wide appeal under s 47(9)*(e)* – can also review a tariff determination under the Promotion of Administrative Justice Act 3 of 2000, alternatively the principle of legality.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Durban (Topping AJ, sitting as court of first instance):

The appeal is dismissed with costs, including those of two counsel where so employed.

JUDGMENT

Ponnan ADP (Mocumie, Gorven and Goosen JJA and Unterhalter AJA concurring)

[1] This appeal turns on whether an aggrieved taxpayer, seeking to challenge a tariff determination in terms of the Customs and Excise Act 91 of 1964 (the CEA), is confined to the remedy of a wide appeal under s 47(9)*(e)* of the CEA. It arises from a challenge by the respondent, Richards Bay Coal Terminal (Pty) Ltd (RBCT), to a tariff determination by the first appellant, the Commissioner, South African Revenue Service (SARS). RBCT's challenge was two-pronged: It sought both to appeal the determination in terms of the statutory appeal provision in s 47(9)*(e)* of the CEA, as also, at the same time, to review it under the Promotion of Administrative Justice Act 3 of 2000 (PAJA), alternatively the principle of legality.

[2] As an incident of the review application, RBCT sought the record of the tariff determination in terms of Uniform rule 53. In the alternative, RBCT also sought the documents constituting the record under Uniform rule 35(11). SARS resisted production of the record on the basis that as the review was not competent, RBCT is consequently not entitled to the record.

[3] The factual backdrop, against which the issue arises for consideration (and which by and large is either common cause or undisputed), may be summarised as follows: In his 2001 budget speech, the then Minister of Finance, made the following announcement:

'In the 2000 budget, a diesel fuel concession was reintroduced for fishing and coastal shipping. Government committed itself to explore the possibility of extending this to other primary producers, contingent on developing an administrative regime to minimise the risk of fraud; and ensuring the concession is affordable within the broader fiscal framework. The bulk of diesel fuel used in farming, forestry and mining is used off road. Given this, and to encourage the international competitiveness of especially our farmers, foresters and miners, the following diesel fuel concessions are proposed:

- 25.6 cents a litre of the general fuel levy on qualifying consumption,
- The full 16.5 cents a litre Road Accident Fund levy on qualifying consumption.

Qualifying consumption will be 80 per cent of total consumption. Diesel concessions will be implemented on 4 July 2001 and will cost R417 million a year.'

[4] RBCT is one of the leading coal export terminals in the world. Its shareholders are South Africa's major coal exporters, with mines situated primarily in Mpumalanga and northern KwaZulu-Natal. Coal is sourced from these mines and transported to RBCT in Richards Bay, where it is stockpiled and loaded onto vessels for export. The administrative regime that was set up to implement the diesel rebate scheme was introduced by the Department of Finance in 2001, in the exercise of the powers provided for in s 75 of the CEA. In 2009, RBCT registered for the diesel fuel levy refund scheme. It thereafter claimed rebates for the period 2009 to 2017. On 22 April 2015, SARS launched an investigation into those claims. On 15 August 2017, SARS sent RBCT an audit engagement letter and, on 5 October 2017, it sent RBCT a Notice of Intention to Assess. SARS' *prima facie* view, as communicated to RBCT, was that the latter had claimed refunds for 'non-qualifying activity' in excess of R7 million for the period March 2013 to August 2017. RBCT was given 14 days within which to respond to the Notice, which it did on 15 November 2017.

[5] On 4 December 2017, SARS issued a letter of demand to RBCT under s 75 (read

with Part 3 of Schedule 6) of the CEA. SARS demanded repayment of R7 126 934.63, plus interest. 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 (the EAC), rejected RBCT's appeal. Following engagement between the parties concerning the reasons for the dismissal of the appeal, as well as the appropriateness of alternative dispute resolution, RBCT applied to the KwaZulu-Natal Division of the High Court, Durban (the high court) on 26 November 2019. It sought to appeal the decision of the EAC (which was cited as the second respondent in the application) and, if successful on that score, for the decision of the EAC to be substituted with one: (a) upholding RBCT's appeal to it, and, (b) setting aside SARS' letter of demand. In the alternative, RBCT sought to review and set aside both the EAC's decision to reject its appeal and SARS' decision to issue the letter of demand.

[6] RBCT also sought the record of decision from SARS. On 24 January 2020, SARS informed RBCT that it did not consider the matter a review, but instead a 'wide' appeal under s 47(9)*(e)* and indicated that it would therefore not be delivering the record. In response, on 30 January 2020, RBCT served a Rule 30A notice on SARS calling on it to comply with Rule 53, alternatively with Rule 35(11). When SARS persisted in its refusal, RBCT launched the application, the subject of this appeal (the compelling application), on 11 March 2020. SARS took the view that if the high court lacks review jurisdiction, then Rule 53 does not apply and there would accordingly be no basis upon which to compel it to produce the record. In a judgment delivered on 12 August 2021, the high court (per Topping AJ) directed SARS to comply with Uniform rule 53(1)*(b)* within ten days, by dispatching to RBCT a complete record relating to the decisions that are subject to the appeal and review. The appeal by SARS against that order is before this Court with the leave of Topping AJ.

[7] Parenthetically, it is perhaps necessary to pass certain preliminary observations. First, in *Competition Commission of South Africa v Standard Bank*[1] (*Standard Bank*) the Constitutional Court held that an order compelling a respondent in a review to deliver the record of its decision in terms of Rule 53, is indeed appealable. Second, both the majority

[1] *Competition Commission of South Africa v Standard Bank of South Africa* [2020] ZACC 2; 2020 (4) BCLR 429 CC (*Standard Bank*).

and minority[2] in *Standard Bank* held that the court may only order the production of the record of a decision under Rule 53 after it has determined that it has jurisdiction in the review. The majority put it as follows:

'Therefore, [rule 53] enables an applicant to raise relevant grounds of review, and the court adjudicating the matter to properly perform its review function. However, for a court to perform this function, it must have the necessary authority. It is not prudent for a court whose authority to adjudicate a review application is challenged to proceed to enforce rule 53 and order that disclosure should be made, before the issue of jurisdiction is settled. The object of rule 53 may not be achieved in a court that lacks jurisdiction.

For these additional reasons, we agree with the first judgment [of Theron J] that Boqwana JA erred in ordering that the Commission should disclose its record of investigation before the question of jurisdiction was determined. Once carried out, and in the event that the Competition Appeal Court concluded that it has no jurisdiction, what is to be done in terms of the order cannot be undone.'[3]

[8] Third, the notice of motion in this matter did not necessarily conduce to clarity. The review was advanced in the alternative to the appeal. Thus, if the appeal (being the main relief that was sought) were to succeed, the high court may notionally simply not get to the review; much less, the compelling application that was incidental to the review. The approach favoured by RBCT thus opened the door to a fractional disposal of issues and the piecemeal hearing of appeals. However, as there are dissonant high court judgments and because the present – as well as future – litigants will likely benefit, there may well be a practical need, as also some public interest, in this Court expressing its view on the point raised.

[9] The dictum of Trollip J in *Tikly*,[4] is perhaps a useful starting point. He there pointed out that the word 'appeal' can have different connotations and explained that it could mean:

'(i) an appeal in the wide sense, that is, a complete re-hearing of, and fresh determination on the merits of the matter with or without additional evidence or information . . .;

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[2] Ibid paras 118-119.
[3] Ibid paras 202-203.
[4] *Tikly & Others v Johannes NO & Others* 1963 (2) SA 588 (T).

(ii) an appeal in the ordinary strict sense, that is, a re-hearing 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 was right or wrong . . .;

(iii) a review, that is, a limited re-hearing with or without additional evidence or information to determine, not whether the decision under appeal was correct or not, but whether the arbiters had exercised their powers and discretion honestly and properly . . .'.[5] (Footnotes omitted.)

[10] The thrust of SARS' case is that because a s 47(9)*(e)* appeal is an appeal in the wide sense as articulated by Trollip J in (i) above, a complete rehearing of the matter is envisaged. This means a *de novo* reconsideration of the tariff determination, with or without new evidence and information. Accordingly, so the argument proceeds, a party seeking to challenge a tariff determination is confined to the wide statutory appeal envisaged by s 47(9)*(e)*, to the exclusion of review proceedings. That provision reads:

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

[11] SARS' contention raises a question of statutory construction: Does the fact that the CEA creates a tailor-made remedy, necessarily exclude a taxpayer's right of review? The question has been considered by the high court on four separate occasions. In *Distell Limited*, a Full Court held:

'With regard to the applicability, or not, of PAJA:

(a) The wording of the Act is trenchant and that the prescribed remedy of an aggrieved party against a tariff determination, irrespective of whether it is founded on the Commissioner's alleged wrong interpretation of the relevant statutory provisions (i.e. the first step in the classification process), or his incorrect application of the said provisions to the facts (i.e. the second and third steps of the classification process)), is an appeal in terms of section 47(9)*(e)* of the Act.

(b) Because the Act governs both the procedural and substantive prescripts and requirements of an aggrieved party's rights and remedies and because an appeal in terms of section 47(9)*(e)* is an appeal "in the wide sense" i.e. a complete rehearing of the whole issue, there is simply no need to

[5] Ibid at 590F–591A.

resort to the corresponding provisions of PAJA.'[6]

[12] In that matter, before Seriti J in the court of first instance, Distell had relied on both the statutory appeal in terms of s 47(9)*(e)* and on a review in terms of PAJA in attacking the tariff determinations made by the Commissioner.[7] In dismissing Distell's application, Seriti J found that: (i) the proceedings attacking some of the tariff determinations were instituted too late, whether under PAJA or under the CEA; and (ii) the tariff determinations which could still be attacked, were correct on the merits. The matter then went on appeal to the Full Court where Ebersohn AJ, on behalf of that Court, observed: 'The only issue which falls to be decided in this appeal is the merits of the classification issue. . .' Somewhat confusingly, the learned Judge then referred to certain other issues that had to be decided, including whether two of the tariff determinations, which had been made as long ago as 1995 and 1996, may be impugned, whether under s 47(9) of the CEA, the common law or alternatively s 7(1) (read with s 9) of PAJA. Ebersohn AJ then considered and applied the principles relating to tariff classification and held that the Commissioner's determinations had been correct on the merits and dismissed the appeal. It is in this context that the quoted excerpts in the preceding paragraph from the Full Court judgment concluding with the words: 'there is simply no need to resort to the corresponding provisions of PAJA', must be read.

[13] On further appeal, this Court took the view that the relief sought by Distell in the courts below 'took the form of appeals in terms of s 47(9)*(e)*, or, as an alternative, applications to compel the Commissioner to correct determinations "made in error", as contemplated in s 47(9)*(d)(i)*, and . . . declaratory relief.'[8] This Court recorded that the appellants had refined the relief claimed without objection from the respondent before the Full Court and persisted with such refined relief in the appeal.[9] As the separate concurring judgment of Harms DP in this Court makes perfectly plain, Distell had neither sought any relief on review nor relied on PAJA before the Full Court. Harms DP had this to say:

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[6] *Distell Ltd & Others v Commissioner for SARS & Another* [2009] 23384 (GNP) para 35.
[7] *Distell Ltd & Others v Commissioner for SARS & Another* [2006] 18682 (GNP).
[8] *Distell v CSARS* [2010] ZASCA 103; [2011] 1 All SA 225 (SCA) para 4.
[9] Ibid para 20.

'The Full Court added a discussion of matter not raised by either party, namely, the application of [PAJA] to the case. In the course of this the issue, which ought to be a straightforward interpretation issue, became blurred.'[10]

[14] This Court applied the principles of tariff classification and concluded that the Commissioner's tariff determinations were wrong on the merits. It thus upheld the appeal (except in relation to the determinations in respect of which the appellants had not timeously instituted litigation). But, it did not (nor was it required to) give any consideration to whether a review is ousted by the appeal provisions in the CEA. It follows that SARS' reliance on *Distell* is misplaced.

[15] In the next matter, *BCE Food* Service *Equipment v Commissioner, South African Revenue Service* (*BCE*), the applicant elected not to pursue any rights that it may have had of appeal under s 47(9)*(e)* of the CEA, preferring instead to confine itself to review the decision of the respondent, SARS.[11] As here, SARS argued 'that the review proceedings were not available to the applicant and that the applicant's remedy was limited to one in terms of s 47(9)*(e)*, ie, an appeal as is provided for in the section'.[12] The high court (per Wepener J) held:

'Section 47 bestows a right on a party, which right would not have existed but for the provisions of the section. There is no common law or other legislative provisions which an aggrieved party could employ in order to challenge a determination of the respondent, save of course for a common law review or the provisions of PAJA. There is no indication in the Customs and Excise Act that the provisions of PAJA have been ousted and that an aggrieved party is limited to the appeal procedure provided for in that Act. The test is whether the legislation obliges and restricts an aggrieved person to utilise the remedy provided for in that legislation. No such construction can be placed on s 47 of the Customs and Excise Act and there is no language contained in the Act that leads to a conclusion that the legislature has confined a complainant to the particular statutory remedy. The decisions on which the respondent relied during argument in support of the contention that a party may not utilise the provisions of PAJA, do not say that and it would have

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[10] Ibid para 74.
[11] *BCE Food Service Equipment (Pty) Ltd v Commissioner for the South African Revenue Service* [2017] ZAGPJHC 243.
[12] Ibid para 3.

been surprising if they did deprive an aggrieved person of the rights afforded him or her in terms of PAJA and the Constitution.'[13]

[16] In finding against SARS on the point, Wepener J called in aid the dicta of Kriegler J in *Metcash v Commissioner, South African Revenue Service* (*Metcash*).[14] There, in an analogous context, Kriegler J stated:

'It is important to have clarity about the effect of the mechanism created by sections 33 and 33A of the Act. Were it not for this special "appeal" procedure, the avenues for substantive redress available to vendors aggrieved by the rejection of their objections to assessments and decisions by the Commissioner would probably have been common-law judicial review as now buttressed by the right to just administrative action under section 33 of the Constitution, and as fleshed out in the Promotion of Administrative Justice Act.

. . .

But, and this is crucial to an understanding of this part of the case, the Act nowhere excludes judicial review in the ordinary course. The Act creates a tailor-made mechanism for redressing complaints about the Commissioner's decisions, but leaves intact all other avenues of relief'.[15]

[17] In the present matter, Topping AJ held that a review of a tariff determination is competent. The learned judge accepted that the s 47(9)*(e)* appeal is 'an appeal in the wide sense and constitutes a rehearing of the matter', in which 'additional evidence or information may be adduced' and that the high court 'is not confined to the record and is placed in the same position as a court of first-instance, with the power to reconsider and, if necessary, replace the first-instance decision.' Relying on *BCE,* Topping AJ concluded 'that [the] Court's review jurisdiction had not been excluded . . . and that [he was] therefore entitled to grant an order directing compliance with the provisions of Rule 53(1)(b)'.

[18] Most recently, in *Cell C (Pty) Ltd v Commissioner for the South African Revenue*

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[13] Ibid para 7.
[14] *Metcash Trading Limited v Commissioner, South African Revenue Service and Another* [2000] ZACC 21; 2001 (1) SA 1109 (CC).
[15] Ibid para 33.

Service, the Pretoria High Court (per Tolmay J) concluded that it lacked jurisdiction to hear a review of a tariff determination, and accordingly dismissed Cell C's Rule 30A application to compel the Rule 53 record on that basis.[16] Tolmay J stated: 'The *Distell* Full Court finding is not binding authority for the proposition that reliance on PAJA is excluded in terms of the CEA. It should nevertheless be said that, the remark that no need to resort to PAJA exists due to the nature of a wide appeal, is correct'.[17] The learned judge also considered the decision in *BCE* — by which it was bound unless it was clearly wrong — as well as the decision of Topping AJ in the present matter, which had followed *BCE.* Tolmay J concluded:

'It is clear from the above that the court's general review jurisdiction is not ousted, but in the light of the ambit of a wide appeal the need for a review falls away when such an appeal is available. The court can, as was illustrated above, exercise its own discretion and substitute its decision on all grounds with that of the Commissioner. To allow a wide appeal and a review in these circumstances will also result in the remedies to be cumulative and will lead to confusion. The vastly different legal principles applicable to a wide appeal and a review will result in a legally untenable situation. In doing so the purpose of treating the tariff determination being provisional and preliminary will be subverted. The fact of the matter is that the CEA does not require the Commissioner to keep a record or give reasons as was said in *Pahad.* Accordingly it would not be appropriate for a court to compel the Commissioner to provide a record where he is not legally required to keep one. In any event, in a wide appeal the applicant will be able to obtain access to all relevant documents by way of discovery in terms of Rule 35 of the Uniform Rules of Court.'[18]

[19] In my view, for the reasons that follow, the conclusion reached by Tolmay J in *Cell C* cannot be supported. In *Zondi,*[19] the Constitutional Court stated that PAJA is not ordinary legislation. It was enacted, pursuant to the provisions of s 33 of the Constitution, to give effect to the right to just administrative action. In applying PAJA, the Court held that all decision-makers, who enjoy authority to make administrative decisions by any statute must do so in a manner that is consistent with PAJA. Statutes that authorise administrative action must now be read together with PAJA. The Constitutional Court

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[16] *Cell C (Pty) Ltd v Commissioner for the South African Revenue Service* [2022] ZAGPPHC 152; 2022 (4) SA 183 (GP); 84 SATC 369.
[17] Ibid para 20.
[18] Ibid para 36.
[19] *Zondi v MEC for Traditional and Local Government Affairs and others* 2005 (3) SA 589 (CC).

indicated that the only exception to this rule would be the instance where, on a proper construction of the statute, its provisions are inconsistent with PAJA. However, it held that before inconsistency can be found, consideration must first be given to whether the provisions can possibly be read in a manner that is consistent with the Constitution.[20]

[20] SARS' argument appears not to take into account the clear wording of s 33 of the Constitution that everyone has the right to administrative action that is lawful, reasonable and procedurally fair or that all public power (which would include tariff determinations) is subject to constitutional control and must comply with the Constitution and the doctrine of legality.[21] As it was put in *Pharmaceutical Manufacturers*:

'Courts no longer have to claim space and push boundaries to find means of controlling public power. That control is vested in them under the Constitution which defines the role of the courts, their powers in relation to other arms of government, and the constraints subject to which public power has to be exercised.'[22]

[21] SARS argues that RBCT has no entitlement to the record of decision because all that matters is whether the ultimate decision is 'correct' and it does not really matter how it arrived at that decision. This argument misconstrues what is sought to be vindicated in a review, namely, the right to just administrative action.[23] 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[24] 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

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[20] Ibid paras 101–102. See also *Walele v City of Cape Town* 2008 (6) SA 129 (CC) para 51.
[21] See for example *Fedsure Life Assurance Limited and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999 (1) SA 374.
[22] *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) para 45.
[23] See for example *Commissioner South African Revenue Services v Pretoria East Motors (Pty) Ltd* [2014] ZASCA 91; [2014] 3 All SA 266 (SCA); 2014 (5) SA 231 (SCA) para 11.
[24] Section 195 of the Constitution establishes various principles applicable to all organs of state including that 'people's needs must be responded to' and that 'transparency must be fostered by providing the public with timely, accessible and accurate information'.

a litigant's rights under section 34 of the Constitution.[25]

[22] The audit conducted by SARS and the subsequent ruling by the EAC are quintessentially administrative action as defined in s 1 of PAJA. SARS does not contend otherwise. It follows that SARS was obliged to engage the taxpayer in an administratively fair manner.[26] Even if the determinations sought to be impugned by RBCT in these proceedings are not administrative action, they would fall under the exercise of public power that is subject to the rule of law and are reviewable under the principle of legality.[27]

[23] It follows that SARS' argument cannot be sustained. The fundamental flaw in SARS' argument is that it conflates the remedy to vindicate the constitutional right to just administrative action and the remedy to rectify a decision on its merits. The undeniable effect of SARS' argument is that it would deprive affected persons of the right to just administrative action and render its decisions immune from judicial review in terms of s 33 of the Constitution, PAJA and under the rule of law. Affording s 47(9)*(e)* of the CEA the construction advanced by SARS, would bring it into conflict with: (i) s 33 of the Constitution, which protects the right to just administrative action, and provides for a fundamental right to review administrative action by a court if it is not lawful, reasonable and procedurally fair; (ii) the rule of law and s 169 of the Constitution, which gives the high court the power to decide any violation of the principle of legality (save for certain specific exclusions that do not apply here); and, (iii) s 172 of the Constitution, which affords courts the power to make a declaratory order that the conduct complained of is inconsistent with the Constitution and invalid to the extent of such inconsistency and to make such an order that, in the circumstances, is just and equitable.

[24] Even in our pre-constitutional era, there was a strong presumption against the ouster or curtailment of a court's jurisdiction. It has been stated that the curtailment of the

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[25] *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* [2012] ZASCA 15; 2012 (3) SA 486 (SCA) para 37 (*DA v ANDPP*).
[26] *Commissioner South African Revenue Services v Pretoria East Motors (Pty) Ltd* fn 22 above.
[27] *Fedsure Life Assurance Limited and Others v Greater Johannesburg Transitional Metropolitan Council and Others* fn 20 above para 40.

powers of a court of law is, in the absence of an express or clear implication to the contrary, not to be presumed.[28] These principles continue to apply, now buttressed by the Constitution.[29] Nothing in the CEA expressly ousts the jurisdiction of the high court to review a tariff determination decision. SARS does not suggest that it does. In fact, there may well be certain indicators in the language of the CEA that point in the opposite direction. First, s 77B of the CEA headed 'Persons who may appeal' provides in subsection 1 that '[a]ny person who may institute judicial proceedings in respect of any decision . . . may, before or as an alternative to instituting such proceedings, lodge an appeal'. Thus recognising, so it seems, that affected taxpayers also have other remedies in addition to an appeal under s 47(9)*(e)*. Second, s 47(9)*(d)(i)(bb)* of the CEA affords to the Commissioner the power to 'amend any determination or to withdraw it and make a new determination if it was made in error or any condition or obligation on which it was issued is no longer fulfilled or on any other good cause shown including any relevant ground for review contemplated in section 6 of [PAJA]'. It would certainly be anomalous that the Commissioner can interfere with a decision on a PAJA ground, but a court cannot.

[25] In *Metcash*, the Constitutional Court made clear that the mere fact that a party has a statutory appeal against a decision of SARS does not preclude such party from instituting a review against that decision. There is nothing repugnant to our principles of justice in the notion that an affected person may enjoy both a right of appeal in the wide sense as well as a right of review. It is fallacious to treat the right of review as a hollow remedy, simply because a taxpayer is afforded a wide right of appeal. Had the CEA intended to remove the court's jurisdiction to review SARS' determinations, it could and, one suspects, would have said so expressly. Accordingly, no warrant appears to exist for the conclusion that a taxpayer, who is dissatisfied with a determination by SARS, does not enjoy the right to review the determination in terms of PAJA.

[26] In the context of the duty to discover documents, it is well to remember Lord Denning's observation in *Riddick v Thomas Board Mills Ltd* that it is a tool for the

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[28] See *Nedbank Ltd v Mateman and Others; Nedbank Ltd v Stringer and Another* 2008 (4) SA 276 (T) at 280I–281I and the cases there cited.
[29] *De Lille v Speaker of the National Assembly* 1998 (3) SA 430 (C) para 40–41.

discovery of the truth.[30] In this matter, RBCT seeks disclosure of the record to ensure that it can fully access justice in a manner that is real, meaningful and not illusory. The reasoning and information on which the impugned decisions were made is a core issue in the case; of which, as things presently stand, only SARS is aware. There is a heightened need for the record where SARS has refused to provide any reasons. SARS cannot shield its own conduct from scrutiny by refusing to make disclosure of the details relevant to its conduct.[31] There is moreover a duty on public officials to take the court into their confidence and disclose all relevant information so that it is properly placed in an informed position to make a decision in the public interest to ensure good governance.

[27] In the matter of *Helen Suzman Foundation v Judicial Service Commission,* the applicant had sought to review a decision of an organ of state, the Judicial Service Commission (the JSC) and had sought disclosure of the record of decision.[32] The JSC refused to provide the applicant with the deliberations of the JSC that had preceded its decision. The Constitutional Court ordered the disclosure of those records. Madlanga J (for the majority) emphasised the importance of openness and accountability as well as the danger of illegalities being concealed from scrutiny, as well as the impact of non-disclosure on the fairness of the trial.[33]

[28] It remains to add that even on its own approach, namely that because the appeal under s 47(9)*(e)* is a wide appeal, RBCT can raise 'any ground, including grounds that resemble grounds of review', SARS can hardly resist production of the record. How, it must be asked, can RBCT meaningfully raise 'grounds that resemble grounds of review', without the benefit of the record. It is unclear why SARS refuses to disclose the documents. It could have disclosed the record without prejudice to its rights to raise the jurisdiction point, but elected not to. What discernible benefit SARS hoped to derive by adopting this course, remains unexplained. On the other hand, the prejudice to RBCT is plainly self-evident. There is no gainsaying that if a review application is launched in a forum that enjoys jurisdiction, then a party is entitled to the record even if their grounds of

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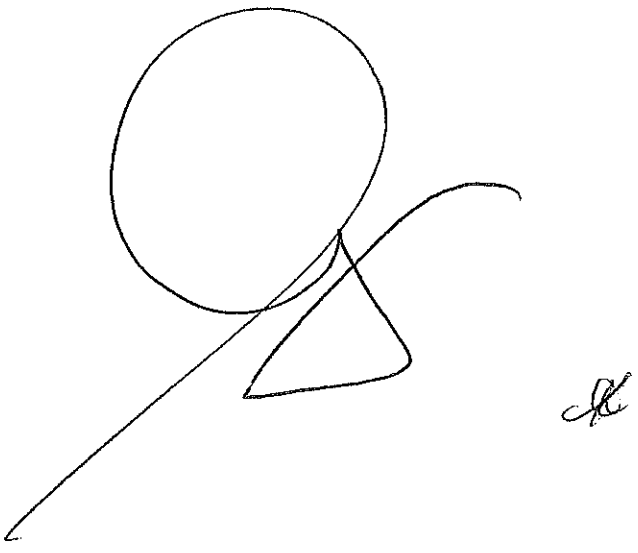
[30] *Riddick v Thames Board Mills Ltd* [1977] 3 All ER 677 (CA) at 687.
[31] *DA v Acting NDPP* 2012 (3) SA 486 (SCA) para 37.
[32] *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC) para 59.
[33] Ibid paras 64 - 68 and 77

review are meritless.[34] SARS accordingly accepts that if the institution of the review proceedings is competent (as we have found), then it does not dispute that it is obliged to produce the record of its decision under Uniform rule 53. This conclusion renders it unnecessary to consider RBCT's alternative case founded upon Rule 35.

[29] In the result, the appeal must fail and it is accordingly dismissed with costs, including those of two counsel where so employed.

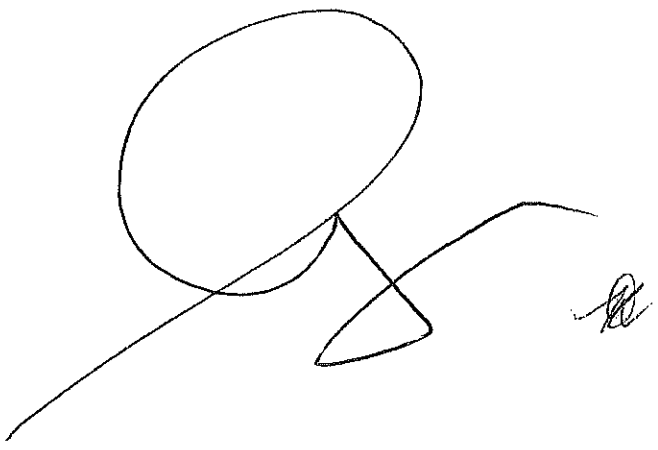
V M PONNAN
JUDGE OF APPEAL



[34] *Standard Bank* fn 1 above para 120.

APPEARANCES

For appellant:	C J Pammenter SC and G J Marcus SC and M Mbikiwa
Instructed by:	Linda Mazibuko and Associates, Durban Honey Attorneys, Bloemfontein
For respondent:	M Chaskalson SC
Instructed by:	Shepstone & Wylie, Durban Matsepes Inc, Bloemfontein



"LM3"

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: D10030/2019

In the matter between:

RICHARDS BAY COAL TERMINAL (PTY) LTD Applicant

and

THE COMMISSIONER OF THE SOUTH AFRICAN REVENUE SERVICE First Respondent

THE CHAIRPERSON, EXCISE APPEAL COMMITTEE Second Respondent

ORDER

(a) The First and Second Respondents are hereby granted leave to appeal to the Supreme Court of Appeal against the whole of the judgement and order handed down by Mr Acting Justice Topping on the 12th of August 2021.

(b) The costs of the Application for Leave to Appeal shall be costs in the cause of the appeal.

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date for the handing down of the judgment is deemed to be the 12th of November 2021.

JUDGMENT

TOPPING AJ

[1] This is an application for leave to appeal against a judgment and order handed down by me on the 12th of August 2021. In that application, Richards Bay Coal Terminal (Pty) Ltd (RBCT) was the Applicant and The Commissioner of the South African Revenue Service and The Chairperson, Excise Appeal Committee (SARS) were the Respondents. I found in favour of RBCT and directed SARS to comply with the provisions of Rule 53 (1) (b), read with Rule 35 (11) of the Uniform Rules of Court by dispatching a complete record of the proceedings forming the subject of that application. SARS now seeks leave to appeal both my judgment and order. The application was not opposed by RBCT, who filed a "Notice to Abide" on the 9th of September 2021.

[2] The grounds for appeal have been fully set out in the Notice of Application for Leave to Appeal and I shall not repeat them here, save to say that it is contended that I erred in finding that this court's review jurisdiction had not been excluded by the provisions of section 47 (9) (e) of the Customs and Excise Act, No. 91 of 1964 (the Act), erred in relying on the decision of *BCE Food Service Equipment (Pty) Ltd v Commissioner of the South African Revenue Service*,[1] erred in failing to interpret section 47 (9) (e) in conformity with the decision in *Pahad Shipping CC vs Commissioner, SARS*,[2] erred in failing to appreciate that, on a proper interpretation, the section excludes this court's review jurisdiction in relation to challenges to tariff determinations under the Act and that I ought to have followed the approach of the court in *Distell Limited v The Commissioner for the South African Revenue Services*.[3]

[3] Having considered the submissions made by counsel representing SARS, I am of the view that my judgment and order are appealable, that SARS has reasonable

[1] [2017] ZAGPJHC 343.
[2] [2010] 2 All SA 246 (SCA).
[3] 2009 JDR 0337 (GNP).

prospects of success on appeal and that the matter merits a determination by the Supreme Court of Appeal.

[4] I accordingly make the following order:

(c) The First and Second Respondents are hereby granted leave to appeal to the Supreme Court of Appeal against the whole of the judgement and order handed down by Mr Acting Justice Topping on the 12th of August 2021.

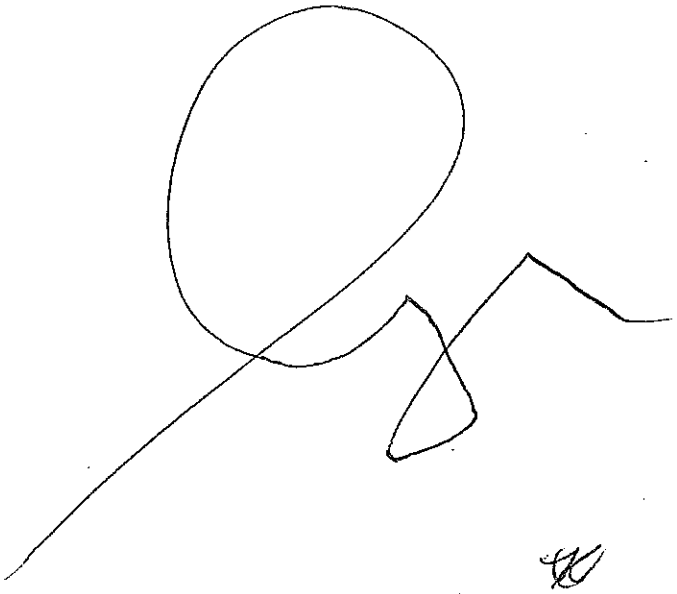
(d) The costs of the Application for Leave to Appeal shall be costs in the cause of the appeal.

TOPPING AJ

Case information

Date of hearing	:	12th of November 2021
Date Delivered	:	12th of November 2021

Appearances

No appearance for the Applicant

For the 1st and 2nd Respondents	:	Adv J Pammenter SC Adv M Mbikwa
Instructed by	:	Linda Mazibuko and Associates 231/233 Matthews Meyiwa Rroad Morningside Durban email: linda@qinet.co.za