CONSTITUTIONAL COURT OF SOUTH AFRICA

Commissioner for the South African Revenue Service v Richards Bay Coal Terminal (Pty) Ltd

CCT 104/23

Date of hearing: 5 August 2024
Date of judgment: 31 March 2025

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 31 March 2025, the Constitutional Court handed down judgment in an application for leave to appeal against a judgment of the Supreme Court of Appeal. The applicants in this matter were the Commissioner of the South African Revenue Service and the Chairperson of the Excise Appeal Committee (collectively referred to as SARS). The respondent was Richards Bay Coal Terminal (Pty) Limited (RBCT). The Supreme Court of Appeal dismissed an appeal by brought by SARS against an order by the KwaZulu-Natal Division of the High Court of South Africa in Durban.

RBCT operates a coal export terminal. It receives coal from mines, stockpiles them, and then loads the coal onto vessels for export. In terms of Note 6(b)(iv) and Note 6(o) to Part 3 of Schedule 6 of the Customs and Excise Act 91 of 1964, businesses are entitled to claim diesel refunds on locomotives used for hauling rail freight. The coal received by RBCT was hauled by Transnet Freight Rail to a private siding on RBCT's business premises. The coal was then placed in rail wagons which were placed together with diesel locomotives that RBCT owned, and was then pulled to tandem tipplers which would offload the coal onto conveyer belts. RBCT successfully claimed refunds for the diesel it had used for the haulage of the coal within its internal rail network.

Following an audit, SARS had informed RBCT that it had claimed refunds for a non-qualifying activity because it was not conducting any "real" hauling of freight within its internal rail network, but rather, that it was acting as a materials hauling agent. SARS said it would be disallowing the refunds paid to RBCT and would be demanding repayment with interest. RBCT disputed SARS' finding because, in its view, the supply chain would be incomplete without its haulage of the coal within its internal network. Its position was

that its role was necessary to enable the coal to reach the export yard and that freight activity was taking place.

On 4 December 2017, SARS issued a letter of demand noting that RBCT failed to comply with the diesel refund provisions under section 75 of the CEA and that the refunds it claimed did not fall within the classes set out in Note 6(b)(iv) and Note 6(o) to Part 3 of Schedule 6 of the CEA. SARS demanded that RBCT repay R7 126 934 plus interest (tariff determination).

Having failed to obtain reasons from SARS, and having failed in an internal appeal afforded to it by section 77 of the CEA, RBCT brought an application in the High Court seeking relief in terms of section 47(9)(e) of the CEA which allows a party to challenge a tariff determination made under the CEA (wide appeal). It also sought review relief, in terms of section 33 of the Constitution read with the Promotion of Administrative Justice Act 3 of 2000, and second, in terms of the principle of legality. RBCT also requested a record of the decision in terms of rules 53 and 35(11) of the Uniform Rules of Court. SARS refused to produce the record, saying that judicial review did not apply to this dispute, which had to be resolved by the wide appeal. RBCT then served a Rule 30A notice demanding that SARS comply with the rule 53 or 35(11) notices. SARS refused. RBCT then launched an interlocutory application before the High Court.

The High Court held that the appeal contemplated in section 47(9)(e) is an appeal in the wide sense, which consists of a complete rehearing of the matter, and a court is not limited to the evidence which was before the first instance decision-maker. It held, however, that litigants who seek to challenge a tariff determination under the CEA are not limited to the section 47(9)(e) appeal. This is because section 47(9)(e) or the CEA does not include an express ouster of the High Court's jurisdiction to entertain a review challenge against the same determination. The High Court ordered SARS to produce the rule 53 record. Aggrieved, SARS applied for leave to appeal to the Supreme Court of Appeal which was granted by the High Court.

The Supreme Court of Appeal understood the issue before it as whether an aggrieved taxpayer seeking to challenge a tariff determination in terms of the CEA was confined to the wide appeal under section 47(9)(e). It held that the right of review remained intact because the PAJA was not ordinary legislation. Thus, the High Court's review jurisdiction was not ousted. It held that PAJA gave expression to the constitutional right to just administrative action. It thus could not be excluded by implication. Regarding the rule 53 record, the Supreme Court of Appeal held that SARS was obliged to produce it, since its production was a necessary concomitant of the right to just administrative action, and important to advance the values of accountability and transparency. It held that a litigant could not meaningfully prosecute a review if it didn't have access to the record. It thus dismissed SARS' appeal with costs.

The primary issue before the Constitutional Court was whether the wide appeal excluded the review jurisdiction of the High Court. If the answer was no, what followed was the question of the relationship, if any, between a wide appeal and review as remedies that are

both available to a litigant seeking to challenge a tariff determination. If review jurisdiction is established, the issue was whether a court must still compel production of the rule 53 record given the existence of a wide appeal.

In the unanimous judgment penned by Kollapen J, the Constitutional Court held that its constitutional jurisdiction was engaged because the matter concerned a taxpayer's right to bring review proceedings, in terms of the PAJA and the principle of legality. It held further that the matter raised an arguable point of law of general public importance which ought to be considered. This is whether section 47(9)(e) of the CEA excluded the review jurisdiction of the High Court. The Court thus held that it was in the interests of justice that the Court grant leave to appeal, particularly given the various discordant judgments in the High Court and the Supreme Court of Appeal on the issue.

On whether section 47(9)(e) of the CEA effectively ousted the review jurisdiction of the High Court, the Court held that it did not. Since there is no express ouster, and given the constitutional significance of the right to just administrative action, both remedies must co-existed. On the interaction between the wide appeal and judicial review, the Court held that, while the right to pursue a wide appeal and the right of judicial review co-existed, a litigant ought to rely on the section 47(9)(e) wide appeal as a remedy of first resort when challenging a tariff determination made under the CEA. The litigant ought to do so before resorting to judicial review. This is because the legislature has chosen section 47(9)(e) as the dedicated mechanism to challenge a tariff determination under the CEA, and ordinarily, a challenge to the correctness of a tariff determination should lie in a wide appeal. That litigant is therefore only entitled to challenge a tariff determination by way of judicial review if the High Court determines that the review is the most appropriate mechanism to resolve the litigant's grievance. This would generally be so where the review complaint is so egregious that it ought to be ventilated in order to preserve the integrity of the just administrative action regime.

The effect of the judgment is that an aggrieved taxpayer does not have an unlimited and unhindered choice of remedy to challenge a tariff determination under the CEA. In making a determination as to whether to require a litigant to pursue the wide appeal, or to exercise its review jurisdiction, a High Court must take into account a range of factors. Ultimately, the High Court may allow a litigant to pursue its review if it is in the interests of justice to do so, provided that the litigant has made out a proper case for the High Court to do so. Thus, when considering whether to exercise its review jurisdiction, the High Court may either refuse to exercise its review jurisdiction and order that the dispute be adjudicated via a wide appeal, or, make an order directing that the dispute be adjudicated via a review. In the latter case, the wide appeal will be suspended pending the outcome of the review proceedings.

On the question of whether RBCT is entitled to access the rule 53 record, the Court affirmed the principle that once a court has review jurisdiction, the party bringing a review is entitled to the record. However, since the court must still decide whether to exercise its review jurisdiction, that court is entitled to suspend the production of the record until it has decided whether it will exercise its review jurisdiction. In this regard, the judgment draws

a distinction between the assignment of jurisdiction by law, and the High Court's exercise of that jurisdiction, pointing out that a court that is assigned jurisdiction is not always obliged to exercise it in certain circumstances. It is then only when the court decides to exercise its review jurisdiction that it will compel production of the record. The Court did not take a view on whether the documents RBCT sought under rule 35(11) should be produced because RBCT did not properly comply with that rule, and RBCT was thus, at that stage, not entitled to discovery under rule 35(11).

For the reasons stated above, the Court concluded that the High Court faced with the challenge brought by RBCT ought to decide whether to exercise its review jurisdiction or to adjudicate the dispute through a wide appeal. That determination would then inform whether to compel production of the record or documents relevant to the proceedings. The Constitutional Court therefore upheld SARS's appeal, ordered that the orders of the High Court and Supreme Court of Appeal be set aside, and ordered that the matter be remitted to the High Court. The parties were ordered to pay their own costs in the Constitutional Court, the Supreme Court of Appeal and in the High Court.