CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 104/23

In the matter between:

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE First Applicant

CHAIRPERSON OF THE EXCISE APPEAL COMMITTEE Second Applicant

and

RICHARDS BAY COAL TERMINAL (PTY) LIMITED Respondent

Neutral citation:	*Commissioner for the South African Revenue Service and Another v Richards Bay Coal Terminal (Pty) Ltd* [2025] ZACC 3
Coram:	Maya CJ, Madlanga ADCJ, Kollapen J, Majiedt J, Mathopo J, Mhlantla J, Rogers J, Tolmay AJ and Tshiqi J
Judgment:	Kollapen J (unanimous)
Heard on:	5 August 2024
Decided on:	31 March 2025
Summary:	Customs and Excise Act 91 of 1964 — tariff determination — section 47(9)(e) — wide appeal — review in terms of Promotion of Administrative Justice Act 3 of 2000, section 33 of the Constitution, or alternatively, the principle of legality — rule 53 record — rule 30A application —— review jurisdiction — whether taxpayer confined to a wide appeal.

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, KwaZulu-Natal Division, Durban):

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The orders of the High Court and the Supreme Court of Appeal are set aside and substituted with the following:

   "(a) The application in terms of rule 30A is referred to the High Court for redetermination and, in doing so, the High Court is required to—

   (i) determine whether, regard being had to the existence of a wide appeal under section 47(9)(e) of the Customs and Excise Act 91 of 1964, the respondent has made out a case justifying the exercise of that Court's review jurisdiction.

   (ii) make an order arising from that determination and of the kind contained in [145] of this judgment."
4. The parties are ordered to pay their own costs in this Court, the Supreme Court of Appeal and the High Court.

JUDGMENT

KOLLAPEN J (Maya CJ, Madlanga ADCJ, Majiedt J, Mathopo J, Mhlantla J, Rogers J, Tolmay AJ and Tshiqi J concurring):

Introduction

[1] This is an application for leave to appeal against the judgment and order of the Supreme Court of Appeal, which dismissed an appeal by the applicants against a judgment of the High Court of South Africa, KwaZulu-Natal Division, Durban (High Court).

[2] This application arises in a challenge against a tariff determination in terms of the Customs and Excise Act[1] (CEA). In an interlocutory application under rule 30A[2] of the Uniform Rules of Court (Uniform Rules), the respondent, Richards Bay Coal Terminal (Pty) Limited (RBCT), sought to have the applicants, the Commissioner of the South African Revenue Service (Commissioner) and the Chairperson of the Excise Appeal Committee, comply with a rule 30A notice to furnish a record in terms of rule 53[3] or alternatively documents[4] constituting the record pursuant to rule 35(11).[5] I will refer to the applicants collectively as "SARS". RBCT is a coal export terminal owned by South Africa's major coal exporters.

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[1] 91 of 1964.

[2] Rule 30A headed "Non-compliance with Rules and Court Orders" states as follows:

> "(1) Where a party fails to comply with these rules or with a request made or notice given pursuant thereto, or with an order or direction made by a court or in a judicial case management process referred to in rule 37A, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days from the date of delivery of such notification, to apply for an order–
>
> (a) that such rule, notice, request, order or direction be complied with; or
>
> (b) that the claim or defence be struck out.
>
> (2) Where a party fails to comply within the period of 10 days contemplated in subrule (1), application may on notice be made to the court and the court may make such order thereon as it deems fit."

[3] Rule 53 is headed "Reviews" and its main purpose is to regulate and facilitate review applications. It allows a party to obtain the record of proceedings underlying the impugned administrative action so as to assist that party in prosecuting their review application. Rule 53(1) is discussed later in this judgment.

[4] RBCT sought, amongst others, correspondence, memoranda, advice, recommendations, evaluations and internal deliberations as part of the record.

[5] Rule 35 is headed "Discovery, Inspection and Production of Documents". Rule 35(11) empowers the court to order the production of documents upon request of a party and which are in the control of the counterparty. The documents may relate to any matter in the proceeding, and when produced, the court may deal with the documents in any way it deems appropriate. Rule 35(11) is discussed later in this judgment.

[3] SARS refused to comply on the basis that they did not consider RBCT's challenge to the tariff determination a review, but rather, an appeal under section 47(9)(e) of the CEA. Section 47(9)(e) states:

> "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."[6]

[4] The dispute at the heart of this matter is whether SARS must be compelled to produce the rule 53 record. To resolve that dispute, this Court must determine whether, in a challenge to a tariff determination in terms of the CEA, a taxpayer is limited to a so called "wide appeal" under section 47(9)(e) of the CEA; and, if not, whether the taxpayer can, in the alternative or separately, challenge the tariff determination by way of a judicial review. If a taxpayer can challenge the tariff determination by way of a judicial review in these circumstances, this Court must determine how a court deals with these different modalities of relief that a taxpayer may invoke.

Factual background

[5] In a budget speech in 2001, the then Minister of Finance, Mr Trevor Manuel, announced the introduction of a diesel fuel concession scheme that applied to sectors of the economy where diesel fuel was used off-road. It entailed a refund of the fuel levy and the Road Accident Fund levy. This was to ensure that entities that utilise rail to haul freight do not subsidise those entities who utilise road haulage to do so.

[6] RBCT's core business is to receive coal from mines, stockpile it, and then load the coal onto vessels for export. Coal is hauled by Transnet Freight Rail (TFR) to a private siding on RBCT's premises in rail wagons. These wagons are then coupled to

[6] The determination referred to in the section is one made regarding the payment of customs and excise duty and rate of duty payable on goods in terms of the CEA. The determination under section 47(9) is one made by the Commissioner, in writing, regarding the tariff headings, subheadings or items under which goods will be classified, the use of such goods in accordance with the Schedules to the CEA, and related matters.

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. TFR collects the empty wagons. RBCT took advantage of the aforementioned diesel fuel concession scheme and successfully claimed refunds on the diesel fuel used by its locomotives within its internal rail network.

[7] The main application relates to the decisions taken as part of an audit, and later in an administrative appeal, that SARS was entitled to recover the diesel rebates that had been claimed and retained by RBCT. SARS informed RBCT of its intention to conduct an audit in a letter dated 15 August 2017. On 5 October 2017, SARS' audit team then informed RBCT of its prima facie view that RBCT had claimed refunds for a "non-qualifying activity" under Note 6 to Part 3 of Schedule 6 of the CEA. According to SARS, Note 6(b)(iv) and Note 6(o) allow for diesel refunds to be claimed on locomotives "used for hauling rail freight", which must mean, in their view, that there must be hauling of rail freight by the user or taxpayer. On this basis, SARS found that:

> "As per the information noted at our meeting and per the Service Level Agreement with the TFR, it was ascertained that the taxpayer does not conduct qualifying rail freight activity, *as they do not conduct any 'real' hauling of freight, but merely operate as a materials hauling agent*." (Emphasis added.)

[8] As a consequence, SARS notified RBCT of its intention to disallow the refunds claimed for the March 2013 to August 2017 audit period. SARS also informed RBCT that it might demand payment of interest on any amount of fuel levy or Road Accident Fund levy which SARS was recovering, as it was in excess of the amount due or had not been duly refundable to RBCT in terms of section 75(1A)(f) of the CEA and the provisions of the Value-Added Tax Act[7] (VAT Act).

[7] 89 of 1991.

[9] In a letter dated 15 November 2017, RBCT made representations to SARS' audit team on why SARS' view that RBCT was a mere "materials hauling agent", and was not involved in "real" haulage, was incorrect. RBCT contended that if the coal was left at the arrivals yard, its export would not be possible. It was necessary to take the coal into its facility to complete the supply chain. Hence, RBCT argues, whilst RBCT is conducting an aspect of materials handling, haulage of the coal is an integral aspect of RBCT's activities. Therefore, a freight activity is taking place. RBCT further contended that the route it completed within its internal network did not result in any duplication of any part of the route undertaken by TFR and could, therefore, not be considered as non-value adding. Had TFR brought trains directly to the tandem tippler, the entire process would be deemed haulage of freight and be eligible for the diesel fuel rebate. In this case, there is a freight leg being performed by RBCT and this should not change the nature of the function.

[10] The determination in dispute here relates to a decision taken by SARS on 4 December 2017, when it issued a letter of demand stating that RBCT failed to comply with the diesel refund provisions under section 75 of the CEA, and that RBCT's use of diesel did not fall within the class set out in Note 6(b)(iv) read with Note 6(o) of Part 3 of Schedule 6 of the CEA. It demanded that RBCT repay an amount of R7 126 934.63, plus interest. SARS' decision constituted a tariff determination and was thus subject to an appeal in terms of section 47(9)(e) of the CEA (the determination).

[11] RBCT filed a request for reasons to which SARS responded on 23 April 2018. On 6 June 2018, RBCT lodged an internal appeal against the decision in terms of section 77 of the CEA. As part of its appeal, RBCT alleged that SARS had informed it of a "secret" policy directive from the National Treasury (Treasury) which RBCT claims motivated a change of position from SARS. The internal appeal was rejected by the Excise Appeal Committee on 7 February 2019 without reasons and a request for reasons on 14 March 2019 met with no response.

Litigation history

High Court

[12] On 26 November 2019, RBCT brought an application in the High Court seeking the following relief:

(a) that the following decisions are declared unconstitutional and unlawful:

(i) the decision taken by the Excise Appeal Committee on 7 February 2019, sitting as an Internal Administrative Appeal Committee of SARS, rejecting RBCT's appeal and confirming the determination issued by SARS on 4 December 2017; and

(ii) SARS' decision of 4 December 2017 to issue the determination referred to above;

(b) alternatively, that the decisions referred to above be reviewed and set aside.

[13] In its founding affidavit, RBCT relied on:

(a) its right of appeal in terms of section 47(9)(e) of the CEA, insofar as the determination constitutes an incorrect determination by SARS of the relevant rebate item under Schedule 6;

(b) its right of review under section 33 of the Constitution read with the Promotion of Administrative Justice Act[8] (PAJA); and

(c) its right to review the impugned decision on the grounds of legality, if the decisions were not administrative action.

[14] RBCT therefore sought to challenge the determination through the pathway of a statutory appeal (section 47(9)(e)) and through two alternative pathways of judicial review (PAJA review and legality review).

[15] The grounds of appeal advanced by RBCT were that: (a) SARS had misdirected itself on the law insofar as its rail haulage was a qualifying activity under the diesel

[8] 3 of 2000.

rebate scheme on its interpretation of "rail freight" and "hauling rail freight"; and (b) SARS had misdirected itself on the facts by incorrectly interpreting a service level agreement between RBCT and TFR, and incorrectly characterising RBCT's freight hauling operation as an "incidental material handling" operation.

[16] The grounds of review advanced by RBCT included the following:

(a) section 6(2)(a)(i) of PAJA and/or the principle of legality, in that SARS was not empowered to depart from its prior decision to permit RBCT to participate in the diesel rebate scheme by refusing to allow rebates in respect of the very activity for which registration had been permitted;

(b) section 6(2)(d) of PAJA and/or the principle of legality, in that the decision was materially influenced by an error of law regarding RBCT's role in the haulage operation;

(c) section 6(2)(d) of PAJA and/or the principle of legality, in that the decision was materially influenced by errors of fact regarding the nature of RBCT's activities in the haulage operation;

(d) section 6(2)(e)(iii) of PAJA and/or the principle of legality, in that irrelevant considerations, including an improper interpretation of the service level agreement, were taken into account in SARS' determination that RBCT's conduct was merely "incidental material handling";

(e) section 6(2)(e)(iii) of PAJA and/or the principle of legality, in that SARS failed to consider a purposive and constitutionally compliant interpretation of the CEA and its Schedules;

(f) section 6(2)(f)(ii) of PAJA and/or the principle of legality, in that SARS' interpretation and ultimate decision were irrational and arbitrary; and

(g) section 6(2)(i) of PAJA and/or the principle of legality, in that the determination was otherwise unconstitutional or unlawful.

[17] The review grounds advanced by RBCT in the alternative, and also in substance, challenged the correctness of the determination. RBCT admitted in its

founding affidavit that "[t]o a large extent, the grounds of review overlap with the grounds of appeal".

[18] On 24 January 2020, SARS informed RBCT that it did not consider the matter a review but instead a "wide" appeal under section 47(9)(e) of the CEA and refused to deliver the record. This prompted RBCT to serve a rule 30A notice demanding SARS' compliance with rule 53, alternatively rule 35(11). SARS persisted in its refusal, and in response, RBCT launched an interlocutory application to obtain the record.

[19] Before the High Court, the issue was whether the appeal remedy provided in section 47(9)(e) of the CEA ousts the remedy of review. It is common cause that section 47(9)(e) of the CEA provides for an appeal in the wide sense, namely a complete rehearing of the matter, as opposed to a review or appeal in the strict sense. The High Court held that a review of a tariff determination is competent.[9] It relied on *BCE*[10] which, as the High Court understood it, held that litigants are not confined to a section 47(9)(e) appeal because there is no explicit ouster of other remedies under the CEA. Therefore, all other usual avenues of relief remain, including review rights. As in *BCE*, the High Court relied on *Madrassa Anjuman Islamia*[11] where the principle was formulated in this way:

> "If it be clear from the language of a statute that the Legislature, in creating an obligation, has confined the party 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."[12]

[9] *Richards Bay Coal Terminal (Pty) Ltd v Commissioner for the South African Revenue Service*, unreported judgment of the High Court of South Africa, KwaZulu-Natal Division, Durban, Case No D10030/2019 (12 August 2021) (High Court judgment).

[10] *BCE Food Service Equipment (Pty) Ltd v Commissioner for the South African Revenue Service* unreported judgment of the High Court of South Africa, Gauteng Division, Johannesburg, Case No 27898/2015 (12 September 2015).

[11] *Madrassa Anjuman Islamia v Johannesburg Municipality* 1917 AD 718.

[12] Id at 727.

[20] The High Court held that the exclusion of its review jurisdiction would have to be express or at least necessarily implied. This could not be lightly inferred. Section 47(9)(e) of the CEA does not contain any language to this effect, nor could such a construction be placed on the provision. The High Court relied upon the distinction drawn in *BCE* between *BCE* itself on the one hand, and *Pahad Shipping*[13] and *Levi Strauss*[14] on the other, holding that the latter matters did not deal with instances where review proceedings had been instituted and the principles enunciated there were therefore not directly applicable in this context.

[21] The High Court concluded that its review jurisdiction was not excluded and ordered SARS to comply with rule 53(1)(b) within ten days. Since SARS conceded that if the High Court were to conclude that it had jurisdiction to hear the review it would be obliged to produce the record, the High Court did not consider whether production of the record and the documents sought by RBCT could be compelled pursuant to the provisions of rule 35(11).

[22] The High Court granted SARS leave to appeal against its judgment and order to the Supreme Court of Appeal.

Supreme Court of Appeal

[23] The Supreme Court of Appeal observed that this Court's judgment in *Standard Bank*[15] assisted it in two respects. First, an order compelling a respondent in a review to deliver the record of its decision in terms of rule 53 was appealable. Second, the court could only order the production of the record of a decision under rule 53 after it had determined that it had jurisdiction in the review.[16]

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[13] *Pahad Shipping CC v Commissioner for the South African Revenue Service* [2009] ZASCA 172; [2010] 2 All SA 246 (SCA).

[14] *Levi Strauss SA (Pty) Ltd v Commissioner for the South African Revenue Service*, unreported judgment of the High Court of South Africa, Gauteng Division, Pretoria, Case No 20923/2015 (2 May 2017).

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

[16] Id at paras 118-19.

[24] The Supreme Court of Appeal said that the notice of motion did not necessarily conduce to clarity insofar as the review was advanced in the alternative to the appeal. Thus, if the appeal were to succeed, the High Court might notionally simply not get to the review. RBCT thus opened the door to a fractional disposal of issues and the piecemeal hearing of appeals. The Court, however, proceeded to express a view on the availability of a review given the discordant High Court judgments on the issue, the interests of the litigants before it and future litigants, and the public interest in the Court expressing a view on the point raised.

[25] It said that the appeal before it turned on the issue of whether an aggrieved taxpayer seeking to challenge a tariff determination in terms of the CEA was confined to the remedy of an appeal under section 47(9)(e) of the CEA. Considering *Tikly*,[17] the Supreme Court of Appeal held that SARS' contention (that RBCT is confined to the remedy of a wide appeal) was essentially a question of statutory construction. It framed the issue before it as: "does the fact that the CEA creates a tailor-made remedy, necessarily exclude a taxpayer's right of review?"[18]

[26] It considered SARS' reliance on *Distell HC*.[19] There, the High Court held that since "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".[20] It held that SARS' reliance on this holding was misplaced because the holding was made in a context where neither party sought judicial review relief. It held further that when *Distell HC* was taken on appeal in *Distell SCA*,[21] the dispute was about the correctness of the tariff classification on the

[17] *Tikly v Johannes N.O.* 1963 (2) SA 588 (T) at 590G-591A.

[18] *Commissioner for the South African Revenue Service v Richards Bay Coal Terminal (Pty) Ltd* [2023] ZASCA 39 at para 11 (Supreme Court of Appeal judgment).

[19] *Distell Ltd v Commissioner for the South African Revenue Service*, unreported judgment of the High Court of South Africa, Gauteng Division, Pretoria, Case No A.1274/06.

[20] Id at para 35.

[21] *Distell Ltd v Commissioner for the South African Revenue Service* [2010] ZASCA 103; [2011] 1 All SA 225 (SCA).

merits. Therefore, it found that the High Court and the Supreme Court of Appeal in *Distell* did not give, nor were they required to give, any consideration to whether a review was ousted by the appeal provisions in the CEA.

[27] The Supreme Court of Appeal considered the dictum in *BCE*, where the High Court held that there was no indication in the CEA that the provisions of PAJA had been ousted and that an aggrieved taxpayer is limited to the appeal procedure provided for in the CEA.[22] It noted that in *BCE*, the applicant elected not to pursue any rights of appeal that it may have had under section 47(9)(e) of the CEA, preferring instead to confine itself to a review of SARS' decision. It further made reference to what this Court said in *Metcash*[23] in relation to sections 33 and 33A of the VAT Act, namely that "[t]he Act creates a tailor-made mechanism for redressing complaints about the Commissioner's decisions, but leaves intact all other avenues of relief".[24]

[28] It also considered the decision of the High Court in *Cell C*,[25] where the High Court concluded that while it had jurisdiction to hear a review of a tariff determination, there was no need for a review when a wide appeal was available. The High Court in *Cell C* dismissed Cell C's rule 30A application to compel the production of the rule 53 record, holding:

> "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 fact of the matter is that the CEA does not require the Commissioner to keep a record or give reasons, as was said in

[22] *BCE* above n 10 at para 7.

[23] *Metcash Trading Ltd v Commissioner for the South African Revenue Service* [2000] ZACC 21; 2001 (1) SA 1109 (CC); 2001 (1) BCLR 1 (CC).

[24] Id at para 33.

[25] *Cell C (Pty) Ltd v Commissioner for the South African Revenue Service* 2022 (4) SA 183 (GP).

> *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."[26]

[29] The Supreme Court of Appeal held that the conclusion reached by the High Court in *Cell C* cannot be supported. Citing *Zondi*,[27] it held[28] that PAJA was not ordinary legislation and that consideration must first be given to whether the provisions of an Act that authorise administrative action can be read in a manner that is consistent with the Constitution.[29]

[30] It relied on this Court's judgment in *Metcash,* which held that the mere fact that a taxpayer has a statutory appeal against a decision of SARS does not preclude such taxpayer from instituting a review against that decision. It further underscored the importance of discovery as a means of uncovering the truth, and emphasised that disclosure of records is important to ensure openness and accountability.[30]

[31] The Supreme Court of Appeal held that SARS' stance was misconceived. A review sought to vindicate the right to administrative action. SARS' view undermined the principle that administrative bodies should be held accountable for their actions. It held that disclosure of the record is essential to give effect to the right afforded to litigants by section 34 of the Constitution. It further held that the reasoning and information on which the determination was made, of which only SARS is aware, and SARS' refusal to provide such reasons, were core issues which arose in this matter. It asked how RBCT could meaningfully raise grounds resembling grounds of review without the benefit of the record.

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[26] Id at para 36.

[27] *Zondi v MEC for Traditional and Local Government Affairs* [2004] ZACC 19; 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC).

[28] Supreme Court of Appeal judgment above n 18 at para 19.

[29] *Zondi* above n 27 at paras 101-2.

[30] *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8; 2018 (4) SA 1 (CC); 2018 (7) BCLR 763 (CC) at paras 64-8 and 77.

[32] The Supreme Court of Appeal held that it was unclear why SARS refused to disclose the record and that the prejudice to RBCT was self-evident. It concluded that the appeal must fail and dismissed it with costs.

Submissions in this Court

SARS' submissions

Jurisdiction and leave to appeal

[33] SARS submits that the matter engages this Court's constitutional and general jurisdiction. It submits that the three constitutional issues at play are: (a) the interpretation of section 47(9)(e) of the CEA in a manner that takes into account the spirit, purport and objects of the Bill of Rights, as required by section 39(2) of the Constitution; (b) RBCT's right to just administrative action under section 33 of the Constitution and how that right is affected by the application of section 47(9)(e); and (c) the exercise of public power by SARS which implicates the rule of law under section 1 of the Constitution.

[34] On this Court's general jurisdiction, SARS submits that a pure question of law is before us: whether a taxpayer seeking to challenge a tariff determination under the CEA is confined to the remedy of an appeal under section 47(9)(e), or whether such taxpayer may also challenge the tariff determination by way of judicial review. Moreover, this matter is of general public importance because it will impact the rights of all taxpayers who want to challenge a tariff determination and also has vast implications for the administration of justice, the efficiency of trade, revenue for the fiscus and judicial resources.

[35] SARS submits that it is in the interests of justice for this Court to grant leave to appeal for three main reasons. First, there is a need for clarity and finality on this issue as courts in four other matters[31] have considered it and have arrived at conflicting

[31] *Distell HC* above n 19; *BCE* above n 10; *Cell C* above n 25; High Court judgment above n 9; and Supreme Court of Appeal judgment above n 18.

decisions. Second, the issue extends beyond the interests of the parties in this case because it will determine the manner in which all future tariff determinations may be challenged. Third, the appeal has good prospects of success because of the divergent views expressed by the lower courts on this issue.

Merits

[36] Citing *Standard Bank*, SARS argues that the first issue to determine is whether the High Court had jurisdiction to entertain RBCT's review application. It contends that a party cannot be compelled to produce a rule 53 record when the review jurisdiction of the court is in dispute, as it argues it is in this matter. SARS concedes that it must provide the record if the review proceedings are competent, but maintains that they are not.

[37] SARS submits that this matter is primarily one of statutory interpretation. It contends that the institutional context and practical purpose of the CEA indicate that decisions subject to statutory appeal cannot also be subject to judicial review. Tariff determinations are made by SARS officials with constrained resources and limited capacity. The CEA caters for this by requiring self-reporting and self-assessment, deeming any amount due in terms of a tariff determination to be correct pending appeal and allowing for the later correction of a determination. Additionally, SARS submits that the provisions of Chapter XA dealing with internal administrative appeals are not obligatory, indicating that taxpayers are entitled to appeal directly to the High Court. SARS is not required to hear evidence, give reasons for its determination or keep any record of the proceedings. The circumstances surrounding the decision-making process therefore make the fresh determination in a wide appeal granted by section 47(9)(e) necessary to ensure that the determination is correct.

[38] SARS argues that section 47(9)(e), in allowing a de novo wide appeal, precludes a review for four reasons. First, as it was held in *Levi Strauss*,[32] it is a necessary

[32] *Levi Strauss* above n 14 at para 29.

consequence of the scheme of the CEA, due to the fact that tariff determinations are made on a quick, preliminary basis, subject to a de novo wide appeal with new evidence, where no deference to the decision-maker is required. It is a remedy "more potent" than a review, one in which any irregularities in the decision-making process can be corrected and where a court's wide appeal remedial powers include those available under a judicial review. A review would subvert this purpose of treating tariff determinations as provisional, allowing for the first instance decision to be set aside irrespective of its correctness. Recognising a cumulative right of review and right of statutory appeal may lead to absurdities in the litigation process, through parallel and lengthy litigation. In addition, SARS submits that Parliament chose to amend some sections of the CEA in 2003 to include reference to PAJA, but omitted to mention review in relation to section 47(9)(e).

[39] Second, following *Pahad Shipping*, SARS is not required to keep a record of its decisions, provide a hearing or provide reasons. This applies equally to a section 47(9)(e) appeal. A record cannot be produced if it need not be kept. Third, due to the ambit of the appeal, section 47(9)(e) cannot be interpreted as an "ouster" of the High Court's review jurisdiction in the sense of excluding a taxpayer from accessing administrative justice or an effective remedy. Section 47(9)(e) does not leave a taxpayer without an effective remedy. Instead, parties are given greater entitlements than they would have in an ordinary review. Fourth, it has been a principle of our law for over a century that where legislation grants an aggrieved party a particular remedy, that party is required to make use of that remedy before it turns to an alternative remedy that may be available.

[40] SARS also argues that the Supreme Court of Appeal incorrectly applied this Court's judgment in *Metcash*, where this Court said that 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. SARS argues that this was a misapplication of *Metcash* because the latter case dealt with a much narrower form of appeal under another piece of legislation (the VAT Act). The appeal in *Metcash*

was an internal (administrative) appeal and not an appeal "in the forensic sense", which is very different to the "wide appeal" in this case.

[41] Finally, SARS submits that RBCT's reliance on rule 35(11) is without merit. The record is not relevant to enable RBCT to advance its case and it may not be used as a means of obtaining discovery prior to each party filing their respective affidavits.

RBCT's submissions

Jurisdiction and leave to appeal

[42] RBCT does not directly make submissions on jurisdiction. However, it submits that this Court should refuse SARS' application for leave to appeal because it is not in the interests of justice to hear the appeal, and that SARS has no prospects of success.

[43] RBCT argues that SARS' case does not deal with the narrow question of entitlement to the rule 53 record, but is an attempt at bringing a "test case" to this Court in order to settle the law on this issue. But, so contends RBCT, the issue is much broader than the question that is necessary to resolve the dispute between the parties, and this Court need not decide the test case (availability of a review) in order to resolve the narrow question (production of the record), because the production of the rule 53 record does not depend on whether RBCT has a right of review or not. It is, so they suggest, simply a question of whether the High Court had review jurisdiction, and if it did, the record must be made available. In RBCT's view, this is where the matter should begin and end.

[44] RBCT also submits that, if SARS accepts that grounds of review can be advanced as grounds of appeal, RBCT must be entitled to a record to advance those grounds. A record is necessary to protect RBCT's right to a fair hearing. It suggests that SARS ought to deliver the record. If, at the end of the High Court hearing on the merits, there is still a dispute on review jurisdiction, SARS can then run its test case. Thus, it is not in the interests of justice to grant leave to appeal.

Merits

[45] RBCT submits that SARS' application is unmeritorious for five main reasons. RBCT bases its submissions on what was held by this Court in *Metcash* in relation to the rights of internal appeal and review under the VAT 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. Here, however, the Act provides its own special procedure for review of the Commissioner's challenged decisions by specialist tribunals. *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 it leaves intact all other avenues of relief."[33] (Emphasis added.)

[46] Regarding its first reason why the application lacks merit, RBCT argues that SARS' interpretation is constitutionally offensive and systemically problematic. It submits that without a right of review, taxpayers will lose the right to challenge SARS if it acts unfairly or irregularly when making tariff determinations. Not only will this be unjust, it will also create a system where SARS officials will be able to act with impunity.

[47] Second, it argues that SARS' submission that section 47(9)(e) extinguishes a taxpayer's right of judicial review does not accord with the rules of statutory interpretation and constitutional jurisprudence. SARS' position, RBCT argues, is in conflict with—

[33] *Metcash* above n 23 at para 33.

(a) a person's right to institute proceedings in a court for the judicial review of administrative action;[34]

(b) the duty on courts to interpret legislation to give effect to the spirit, purport and objects of the Bill of Rights;[35]

(c) the duty on courts to declare invalid all administrative acts that are inconsistent with the right to just administrative action;[36]

(d) a taxpayer's right to appropriate relief for the violation of their right to just administrative action;[37]

(e) a taxpayer's right to have any dispute resolved by the application of law before a court;[38]

(f) the High Court's power to decide any matter not assigned to another court by an Act of Parliament;[39] and

(g) the presumption against the ousting of the High Court's jurisdiction.

[48] Third, and in response to SARS' argument that there is no need for review relief if a correct determination is made under section 47(9)(e), RBCT argues that a "correct answer on appeal" and a "just and equitable remedy on review" are different types of remedies. RBCT contends that a High Court on review has broader powers when vindicating the right to just administrative action. Fourth, RBCT argues that SARS' interpretation assumes that there can only be one correct answer on appeal and also fails to take into account the onus that operates in an appeal.

[49] Finally, RBCT deals with SARS' reliance on the three cases which it claims support its submission that section 47(9)(e) extinguishes the right of judicial review. RBCT submits that those cases were wrong for the same reasons that SARS' arguments

[34] In terms of section 6(1) of PAJA.

[35] In terms of section 39 of the Constitution.

[36] In terms of section 172(1)(a) of the Constitution.

[37] In terms of section 38 of the Constitution.

[38] In terms of section 34 of the Constitution.

[39] In terms of section 169 of the Constitution.

in this matter are wrong: they fail properly to consider the right to just administrative action and they are in conflict with the relevant constitutional and statutory principles. RBCT submits that *Distell HC* is unhelpful, because the Court made obiter statements on the availability of a right of judicial review in this context.

[50] It also contends that *Cell C* was wrong, because, while it appreciates that a High Court acting as a court of appeal may entertain any ground of review, it fails to recognise that the right to a record and reasons are fundamental to the right of review.[40] According to RBCT, it is therefore unsustainable to recognise the right of review while refusing the reviewing party's right to the record.

[51] Moreover, RBCT argues that *Glencore*[41] simply adopted the reasoning of *Cell C* and was therefore incorrect for the same reason. It argues further that since the Supreme Court of Appeal judgment in the present matter was handed down before *Glencore*, the High Court in *Glencore* was obliged to follow the Supreme Court of Appeal judgment, which it failed to do.

[52] At the hearing, counsel for RBCT argued that SARS' letter of demand dated 4 December 2017 contained three separate decisions, all of which ought to have been subjected to judicial review proceedings. These decisions were—

(a) SARS' determination that refunds on diesel were not properly claimed because RBCT's activities did not fall within the scope of the diesel rebate scheme (the first decision);

(b) SARS' determination that the effective date for repayment of diesel rebates should be March 2013 (the second decision); and

(c) SARS' decision to impose interest on the refunds reclaimed (the third decision).

[40] *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (6) SA 253 (CC); 2019 (9) BCLR 1113 (CC) at para 185.

[41] *Glencore Operations SA (Pty) Ltd v Commissioner for the South African Revenue Service*, unreported judgment of the High Court of South Africa, Gauteng Division, Pretoria, Case No 15988/2020 (17 July 2023) at paras 24-6.

[53] Given the order we intend to make, there is no need for this Court to make a determination on the nature and character of these three decisions. I also do not consider it necessary to determine whether our law distinguishes between discretionary and non-discretionary decisions. I also leave open the question as to whether this distinction would be of any practical assistance to the High Court when conducting an appropriateness assessment mentioned hereunder. We did not have the benefit of submissions by RBCT on this issue with reference to domestic authorities or foreign authorities beyond the two cases decided by the Supreme Court of Canada on 28 June 2024: *Dow Chemical*[42] and *Iris Technologies*,[43] which I refer to later.

Directions

[54] The Court issued directions on 17 July 2024, drawing the parties' attention to *Dow Chemical* and *Iris Technologies*. The parties were required to deal with the possible relevance of the cases at the hearing. SARS submitted a note in response to the directions issued.

Legal framework

The Constitution

[55] Section 33 of the Constitution provides in relevant part:

> "(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
>
> . . .
>
> (3) National legislation must be enacted to give effect to these rights, and must—
>
> (a) Provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal."

[56] Section 34 of the Constitution provides:

[42] *Dow Chemical Canada ULC v Canada* 2024 SCC 23.

[43] *Iris Technologies Inc v Canada* 2024 SCC 24.

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

Customs and Excise Act

[57] A taxpayer who seeks to challenge a tariff determination made under the CEA is entitled to challenge that decision by way of an appeal in terms of section 47(9)(e). As noted earlier in this judgment, it provides that an appeal against a tariff determination shall lie to the relevant division of the High Court having jurisdiction to hear appeals within the area in which the determination was made or the goods in question were entered for home consumption.

[58] Chapter XA of the CEA contains provisions on the resolution of disputes arising out of decisions made in terms of the Act. It contains three parts. Part A provides for an internal administrative appeal, Part B provides for alternative dispute resolution and Part C makes provision for the settlement of disputes. Section 77B(1), which is contained in Part A, provides as follows:

> "Any person who may institute judicial proceedings in respect of any decision by an officer may, before or as an alternative to instituting such proceedings, lodge an appeal—
>
> (a) to the Commissioner against a decision of an officer; or
>
> (b) to the appeal committee contemplated in this Part in respect of those matters and decisions of officers that the appeal committee is authorised by rule to consider and decide upon or make recommendations to the Commissioner."

PAJA

[59] PAJA is the national legislation enacted to give effect to the rights under section 33 of the Constitution. Section 6(1) states that "[a]ny person may institute proceedings in a court or a tribunal for the judicial review of an administrative action". Section 6(2) lists the circumstances that will activate the court's power to judicially

review administrative action.[44] These circumstances are commonly referred to as the "grounds" of review, being the grounds upon which a party may approach a court to challenge an administrative action. As discussed later in this judgment, the grounds of review set out in PAJA flow from the requirements of just administrative action set out

[44] Section 6(2) of PAJA states:

"A court or tribunal has the power to judicially review an administrative action if—

(a) the administrator who took it—

(i) was not authorised to do so by the empowering provision;

(ii) acted under a delegation of power which was not authorised by the empowering provision; or

(iii) was biased or reasonably suspected of bias;

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action was procedurally unfair;

(d) the action was materially influenced by an error of law;

(e) the action was taken—

(i) for a reason not authorised by the empowering provision;

(ii) for an ulterior purpose or motive;

(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;

(iv) because of the unauthorised or unwarranted dictates of another person or body;

(v) in bad faith; or

(vi) arbitrarily or capriciously;

(f) the action itself—

(i) contravenes a law or is not authorised by the empowering provision; or

(ii) is not rationally connected to—

(aa) the purpose for which it was taken;

(bb) the purpose of the empowering provision;

(cc) the information before the administrator; or

(dd) the reasons given for it by the administrator;

(g) the action concerned consists of a failure to take a decision;

(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or

(i) the action is otherwise unconstitutional or unlawful."

in section 33(1) of the Constitution: that administrative action must be "lawful, reasonable and procedurally fair".

Production of documents in civil proceedings

[60] There are two rules of the Uniform Rules which are commonly relied on for obtaining the production of documents in civil legal proceedings from another litigant. The first is rule 35 which provides for the discovery, inspection and production of documents. Its core purpose is to ensure that the parties involved in legal proceedings are apprised of all the documentary evidence necessary for resolving the dispute and thus to ensure the trial is conducted as efficiently as possible.[45] Our courts have held that discovery is unusual in application proceedings, and a court in motion proceedings should only grant an order under rule 35 in exceptional circumstances.[46]

[61] The second is rule 53. Its core purpose is to facilitate and regulate applications for review.[47] Rule 53(1) states:

> "Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairperson of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected—
>
> (a) calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside, and

[45] *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In re Masetlha v President of the Republic of South Africa* [2008] ZACC 6; 2008 (5) SA 31 (CC); 2008 (8) BCLR 771 (CC) at paras 41-2; *Bridon International GmbH v International Trade Administration Commission* [2012] ZASCA 82; 2013 (3) SA 197 (SCA) at paras 32-4; and *Owners of MV Banglar Mookh v Transnet Ltd* [2012] ZASCA 57; 2012 (4) SA 300 (SCA) at paras 56-8.

[46] *Liebman v David N.O.*, unreported judgment of the High Court of South Africa, Gauteng Division, Pretoria, Case No 62628/2021 (21 February 2023) at paras 10-14.

[47] *Mamadi v Premier of Limpopo Province* [2022] ZACC 26; 2023 (6) BCLR 733 (CC); 2024 (1) SA 1 (CC) at para 28; *Cape Town City v South African National Roads Authority* [2015] ZASCA 58; 2015 (3) SA 386 (SCA) at paras 35-6; and *Helen Suzman Foundation v Judicial Service Commission* [2016] ZASCA 161; 2017 (1) SA 367 (SCA) at para 13, overruled, but not on this point, in *Helen Suzman* above n 30 at paras 13-14.

> (b) calling upon the magistrate, presiding officer, chairperson or officer, as the case may be, to despatch, within 15 days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as the magistrate, presiding officer, chairperson or officer, as the case may be is by law required or desires to give or make, and to notify the applicant that such magistrate, presiding officer, chairperson or officer, as the case may be has done so."

[62] Rule 53(1)(b) is the basis upon which a party may request a record underlying the decision which is being challenged. Since rule 53 is concerned with review proceedings, it does not apply in appeal proceedings.

Issues for determination

[63] There are four issues to be determined in this appeal. First, whether this Court has jurisdiction to hear the appeal and whether leave to appeal should be granted. Second, if leave is granted, whether the review jurisdiction of the High Court under PAJA or the principle of legality is excluded as a matter of law due to the availability of a wide appeal under section 47(9)(e) of the CEA. In other words, whether section 47(9)(e) ousts the review jurisdiction of the High Court. Third, and if the review jurisdiction is not excluded, how the remedial scheme of the CEA relates to and interacts with that of PAJA and whether the wide appeal is a remedy of first resort. Fourth, if review jurisdiction is established, whether a High Court must still compel production of the record on the strength of *Standard Bank* in instances where the wide appeal ought to be relied on as a remedy of first resort, or when a court refuses to exercise its review jurisdiction. Put simply, does the principle in *Standard Bank* still hold if a court refuses to exercise its review jurisdiction?

Jurisdiction and leave to appeal

[64] Our constitutional jurisdiction is engaged in terms of section 167(3)(b)(i) of the Constitution. The basis of the orders in the High Court and Supreme Court of Appeal involves a consideration of a review under section 6 of PAJA, which gives effect to the right to just administrative action in section 33 of the Constitution. As this Court held

in *Walele*,[48] "the interpretation and application of the provisions of PAJA raise a constitutional issue".[49] In *Bato Star*[50] this Court stated:

> "The provisions of section 6 divulge a clear purpose to codify the grounds of judicial review of administrative action as defined in PAJA. The cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past. And the authority of PAJA to ground such causes of action rests squarely on the Constitution. It is not necessary to consider here causes of action for judicial review of administrative action that do not fall within the scope of PAJA. As PAJA gives effect to section 33 of the Constitution, matters relating to the interpretation and application of PAJA will of course be constitutional matters."[51] (Footnote omitted.)

[65] This matter also involves a consideration of legality review, which derives from the principle of legality, a principle inherent in the Constitution[52] and related to the rule of law in terms of section 1(c) of the Constitution.[53]

[66] Our general jurisdiction is engaged because an arguable point of law of general public importance is raised:[54] whether section 47(9)(e) of the CEA excludes the review power of the High Court. It is an issue that "transcend[s] the narrow interests of the litigants and implicate[s] the interest[s] of a significant part of the general public" because it will determine how aggrieved taxpayers who seek to challenge tariff determinations under the CEA must do so in the future.[55]

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[48] *Walele v City of Cape Town* [2008] ZACC 11; 2008 (6) SA 129 (CC); 2008 (11) BCLR 1067 (CC).

[49] Id at para 15.

[50] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC).

[51] Id at para 25.

[52] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17; 1998 (12) BCLR 1458 (CC); 1999 (1) SA 374 (CC) at paras 56-8.

[53] Id at para 57; *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2005 (6) BCLR 529 (CC); 2006 (3) SA 247 (CC) at para 49.

[54] *Paulsen v Slip Knot Investments 777 (Pty) Ltd* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) at paras 13-14.

[55] Id at paras 25-6.

[67] It is also in the interests of justice that we entertain the appeal, firstly, because the four discordant High Court judgments (*BCE, Distell HC, Cell C* and *Glencore*), as well as that of the Supreme Court of Appeal in this matter, require final resolution by this Court. Secondly, this matter plainly is of interest not only to SARS, but also to taxpayers and the public generally, involving as it does the adjudication of disputes entailing tariff determinations. The conflicting decisions of lower courts further indicate that there may be some prospects of success on appeal.[56] Leave to appeal should therefore be granted.

Ouster of the High Court's review jurisdiction

[68] The effect of section 6(2) of PAJA, insofar as it relates to the power of a High Court, is that it clothes a court with jurisdiction to undertake the judicial review of administrative action. This is a jurisdiction-assigning provision that is granted in wide and unrestricted terms. There is nothing in the language of section 47(9)(e) or any other provision of the CEA that supports the argument by SARS that the appeal in the CEA ousts the review jurisdiction of the High Court. The contention that the availability of the section 47(9)(e) appeal constitutes an ouster is simply not sustainable.

[69] There is a strong presumption in our law against the ouster of a court's jurisdiction.[57] An ouster clause, while not impermissible, will need to pass a formidable hurdle in order to pass constitutional muster, as its effect will invariably be a limitation of a number of rights, including the right to have access to courts, enshrined in section 34 of the Constitution. In disposing of the ouster argument the Supreme Court of Appeal said:

[56] Id at para 23.

[57] *Crompton Street Motors CC t/a Wallers Garage Service Station v Bright Idea Projects 66 (Pty) Ltd t/a All Fuels* [2021] ZACC 24; 2021 (11) BCLR 1203 (CC); 2022 (1) SA 317 (CC) at para 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 powers of a court of law is, in the absence of an express or clear implication to the contrary, not to be presumed. These principles continue to apply, now buttressed by the Constitution. Nothing in the CEA expressly ousts the jurisdiction of the High Court to review a tariff determination decision."[58]

[70] In *Metcash*, this Court dealt with a tailor-made appeal created in terms of the VAT Act to the Special Tax Court to enable aggrieved vendors to challenge the rejection by the Commissioner of objections to assessments and associated decisions.[59] It observed that even though the VAT Act created a tailor-made mechanism for addressing complaints, nowhere did it exclude the right of judicial review, and this remedy, as well as other avenues of relief, remained intact.[60] The underlying rationale in *Metcash* applies equally in the present case. While we are dealing here with the CEA, there is nothing in the CEA that excludes judicial review and it must remain a form of relief ordinarily open to an aggrieved taxpayer.

[71] SARS argues, on the strength of *BCE* and *Cell C*, the fact that a wide appeal may provide the taxpayer with a correct decision and is curative of procedural irregularities means that there is no need for the right of judicial review to be asserted as it would serve no purpose. This argument is only correct in part. That a wide appeal provides a correct decision or outcome will not always result in the vindication of a taxpayer's right to just administrative action.

[72] The distinction to be drawn between a fair process and the correct outcome is what this Court in *AllPay I* considered in the context of public procurement.[61] This Court held:

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[58] Supreme Court of Appeal judgment above n 18 at para 24.

[59] *Metcash* above n 23 at para 32-3.

[60] Id at para 33.

[61] *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) at para 24.

> "On the approach of the Supreme Court of Appeal, procedural requirements are not considered on their own merits, but instead through the lens of the final outcome. This conflates the different and separate questions of unlawfulness and remedy. If the process leading to the bid's success was compromised, it cannot be known with certainty what course the process might have taken had procedural requirements been properly observed."[62]

[73] The lesson to be drawn from *AllPay I* is that the lawfulness of the decision-making process itself holds inherent value, regardless of whether the decision arrived at was right or wrong on its merits. Indeed, this is the precise basis for the right to judicial review and why the nature of the enquiry is generally focused on the lawfulness of the decision rather than its correctness. It does not seem to be correct to say that, in all cases, a correct decision vindicates an unlawful decision-making process.

[74] A further reason why a correct decision does not necessarily negate the need of the right to judicial review, as the Supreme Court of Appeal correctly observed, is that the right of review gives effect to the values of accountability and openness in the decision-making process. These values are what the Constitution aspires to in its commitment to open and accountable government, and one should proceed with great caution in reading in limitations to the right to just administrative action (which is what judicial review gives effect to) in the absence of clear and unequivocal language by the lawmaker in support of a limitation or exclusion of the right.

[75] A court assumes jurisdiction when, as a matter of law, it has the power to decide or adjudicate a matter that comes before it.[63] And so, through section 6(2) of PAJA, Parliament assigned jurisdiction to the High Court to consider and adjudicate reviews brought under PAJA. This is a matter of law. A court must determine whether it has jurisdiction with reference to the law. However, a court has no discretion to say whether

[62] Id.

[63] *S v Mhlungu* [1995] ZACC 4; 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC) at para 71.

it does or does not have jurisdiction. It either has jurisdiction or it does not.[64] The effect of this conclusion is that, as a matter of law, both an appeal and a review are available to a taxpayer. They exist side by side, often with the same objective of reaching a proper outcome, although they embark on different paths to reach that result.

[76] But that is not the end of the matter. Having considered the two mechanisms as means to challenge a tariff determination under the CEA, I address the central question that arises: whether an aggrieved taxpayer enjoys unrestricted access to challenge a decision by choosing either or both remedies at its instance. This may seem a redundant question in view of the conclusion reached that the CEA does not oust the review jurisdiction of the High Court. The answer is more nuanced than simply a "yes" or a "no". The question requires a consideration of two issues. First, the distinction between a court's assumption of jurisdiction and its exercise of that jurisdiction. Second, a consideration of how our law deals with instances where a party has two distinct remedies available to it, where a court has jurisdiction over both remedies, and where a party seeks to invoke all the remedies available to it.

Interaction between the wide appeal and judicial review

[77] Returning to how the two remedies relate to each other, I conclude as follows. Our law requires litigants to rely, at least primarily and at first instance, on the remedy provided by Parliament more closely located within the regulatory scheme that has been designed to deal with the impugned determinations. This means that a court, in exercising its inherent powers, is entitled to refuse to exercise its jurisdiction to entertain the more general remedy on the basis that a specific remedy is available to the litigant, unless a court is convinced that the specific remedy will not avail the litigant in the particular circumstances. In the present context, this means that a court may refuse to exercise its review jurisdiction on the basis that the taxpayer ought to rely on the

[64] *Mhlongo v Mokoena N.O.* [2022] ZASCA 78; 2022 (6) SA 129 (SCA) at paras 19-20. Although there may be some uncertainty when answering the legal question whether a court has jurisdiction or not in cases when the law, or the jurisdiction-assigning provision itself, is not so clear. The distinction between when a court assumes jurisdiction and whether it will exercise its jurisdiction is discussed later in this judgment.

section 47(9)(e) appeal as the remedy, unless a case is made to justify the court's exercise of its review jurisdiction.

[78] I substantiate this by invoking principles which are underlined by the same golden thread: the separation of powers. It is defined in *South African Constitutional Law* as—

> "the division of constitutional powers, functions, and responsibilities between the legislative, executive, and judicial branches of government, and all other organs of state established by the Constitution. This division is subject to limitations on each branch of government to prevent the concentration of power in one branch or body of persons, so that each holds the other accountable, while maintaining comity between the branches."[65]

[79] In giving effect to this principle, section 173 of the Constitution provides that the superior courts have the inherent power to regulate their own processes taking into account the interests of justice.[66] Courts exercise this power through the prism of the Superior Courts Act,[67] but the power vests in these courts directly from the Constitution and the law.[68] A court may invoke section 173 directly in circumstances not regulated by the Superior Courts Act when it is in the interests of justice to do so.[69] This inherent power includes the power to refuse the exercise of its jurisdiction (assigned to it by the Legislature) in certain circumstances.

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[65] Brickhill et al "Constitutionalism" in Brickhill et al *South African Constitutional Law* (Juta, Cape Town 2024) at 19.

[66] Section 173 of the Constitution provides:

> "The Constitutional Court, the Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own processes, and to develop the common law, taking into account the interests of justice."

[67] 10 of 2013.

[68] *Phillips v National Director of Public Prosecutions* [2005] ZACC 15; 2006 (1) SA 505 (CC); 2006 (2) BCLR 274 (CC) at paras 47-52.

[69] Id at para 48.

[80] Courts are subject only to the Constitution and the law, which safeguard their independence. A tension arises when the Legislature has created a law that enables a party to litigate in a manner that is disruptive to the court's process, or in a manner that allows the party to pursue a particular remedy even though the Legislature has created a more appropriate one to deal with that party's grievance. A careful balance must be struck between these co-existing, and sometimes competing, consequences of the separation of powers.

[81] The following are two principles that resolve this tension and give guidance to how a court should deal with such matters. The first is the distinction between the assumption and exercise of jurisdiction. The second is the principle of subsidiarity. I rely on these principles as self-standing bases to justify the conclusion I reach. I also rely on them cumulatively to illustrate the golden thread on which I rely to justify my conclusion.

Assuming and exercising jurisdiction

[82] In *SAHRC*[70] this Court, in dealing with the jurisdiction of the High Court in foreclosure matters, referred to *Goldberg*[71] in restating the mandatory jurisdiction principle.[72] In *Goldberg* it was said:

> "On principle it seems to me that in general a Court is bound to entertain proceedings that fall within its jurisdiction . . . But apart from such cases and apart from the exercise of the Court's inherent jurisdiction to refuse to entertain proceedings which amount to an abuse of its process . . . I think that there is no power to refuse to hear a matter which is within the Court's jurisdiction."[73]

[70] *South African Human Rights Commission v Standard Bank of South Africa Ltd* [2022] ZACC 43; 2023 (3) SA 36 (CC); 2023 (3) BCLR 296 (CC).

[71] *Goldberg v Goldberg* 1938 WLD 83.

[72] *SAHRC* above n 70 at para 27.

[73] *Goldberg* above n 71 at 85.

[83] It also referred to *Agri Wire*, where the Supreme Court of Appeal held that "our courts are not entitled to decline to hear cases properly brought before them in the exercise of their jurisdiction".[74] This Court in *SAHRC* went further in distinguishing between the assumption of jurisdiction and its exercise, and in doing so said:

> "The assumption of jurisdiction should not be confused with the manner in which a court decides to exercise its jurisdiction. There is no discretionary power to decline the assumption of jurisdiction over a matter within the jurisdiction of a court. But how a court decides to exercise the jurisdiction it enjoys is a separate issue. That issue includes considerations as to whether in exceptional circumstances jurisdiction is not exercised by reason of, for example, abuse of process or the stay of proceedings pending some other form of dispute resolution, or on grounds of comity. In certain special circumstances, a South African court may take the view that considerations of comity dictate that a matter is best left for adjudication by a foreign court, which has a closer connection to the matter".[75]

[84] In support of the view that the mandatory principle referred to in *Goldberg* is not absolute, this Court referred to the following excerpt from *Goldberg*: "*in general* a court is bound to entertain proceedings that fall within its jurisdiction".[76] This Court reasoned that the words "in general" are an indication that there are exceptions to the general rule, pointing out that the right of the High Court not to hear a matter that constitutes an abuse of its processes is one such exception. In *SAHRC*, the discussion of the mandatory jurisdiction principle occurred against the backdrop of the right of access to court and how insistence on the mandatory jurisdiction principle could stand in the way of meaningful access to courts. This Court observed that in appropriate circumstances a High Court could refuse to entertain such a matter, even one falling within its jurisdiction. This power could be exercised where to do so will enable a litigant to meaningfully exercise their right of access to court, which would otherwise be difficult, if the matter was litigated in the High Court (as opposed to the Magistrates' Court).

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[74] *Agri Wire (Pty) Ltd v Commissioner of the Competition Commission* [2012] ZASCA 134; 2013 (5) SA 484 (SCA) at para 19.

[75] *SAHRC* above n 70 at para 29.

[76] *Goldberg* above n 71 at 85 (emphasis added).

[85] It thus becomes important to recognise at a conceptual level why a court that is assigned jurisdiction is entitled to decline to exercise it in certain circumstances. Those reasons lie in a mixture of policy considerations that seek to protect the integrity of the administration of justice, such as abuse of process, and practical matters relating to the proper, efficient and economical use of judicial resources and the right of access to courts. If the mandatory jurisdiction principle was regarded as absolute, courts would be obliged to consider and adjudicate all matters, even those whose consideration would stand in conflict with the interests of justice. Abuse of process and vexatious litigation are some examples that come to mind. It cannot be argued that in such instances the right of access to court must prevail, and courts have no discretion to regulate their own processes. Such a proposition would offend section 173 of the Constitution which empowers superior courts to regulate their own process, and also stands as a threat to the integrity and the proper functioning of the administration of justice.

[86] That said, a question remains whether the distinction between the assumption of jurisdiction and its exercise is relevant in these proceedings, and, if it is, to what extent and effect. The starting point in the discussion would be an acceptance that the mandatory jurisdiction principle would generally require a court to hear a review application that falls within its jurisdiction. That would be the effect of the jurisdiction-assigning provision that is section 6(2) of PAJA. However, there are circumstances where the exercise of the court's review jurisdiction can be deferred until certain procedural or substantive conditions are overcome. The court's power to defer the exercise of its jurisdiction in certain matters due to the non-fulfilment of the conditions in the common law arose from the courts' inherent jurisdiction recognised in our law since 1903.[77]

[77] *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111 at 115. The Court stated that the Court's review power did not call on any "special machinery created by the Legislature" but was "a right inherent in the Court".

[87] Unlike in the situation of an express ouster, there were instances under the common law where, despite its powers of judicial review, a court could suspend or defer the litigant's right to pursue their right of review until a remedy provided for in a statute was exhausted.[78] One such condition was the duty to exhaust internal remedies,[79] which was (and still is) recognised as a condition that a party should meet to convince the court that it ought to exercise its review jurisdiction.[80] The court's inherent power was so wide that it could exempt the party from pursuing either internal or domestic remedies

[78] Baxter *Administrative Law* (Juta, Cape Town 1984) at 720-1. This is, provided that certain criteria were met, including whether the remedy provided effective redress.

[79] In *Lenz Township Co (Pty) Ltd v Lorentz N.O.* 1961 (2) SA 450 (A) at 466G, the Appellate Division accepted that the party had a right to bring a review despite the party not exhausting the internal remedy. See also *Shames v South African Railways and Harbours* 1922 AD 228 at 235-6:

> "But the question still remains at what stage of the proceedings is it competent for an aggrieved servant to have recourse to a court of law. Is he entitled to do so at the initial stage, so soon as a penalty has been inflicted upon him, or only at the final stage when he has exhausted all the remedies which under the Act are open to him? This is a question which has not been dealt with in any of the decided cases, so far as I am aware, but I am clearly of opinion that it is only if the irregularity or illegality has been persisted in up to the final stage that it is competent to the servant to take legal proceedings."

[80] *Ross v Dramat* 1877 Buch 132; *Zweibock v Herbst* 1905 ORC 63. See *Jockey Club of South Africa v Feldman* 1942 AD 340 and *Crisp v SA Council of Amalgamated Engineering Union* 1930 AD 225 regarding the use of domestic statutory remedies prior to the court's exercise of its review jurisdiction. See also *Welkom Village Management Board v Leteno* 1958 (1) SA 490 (A) at 502D and 503B. In *Lawson v Cape Town Municipality* 1982 (4) SA 1 (C) at 6H-7A, the Court provided a number of factors to consider when considering whether, on the proper construction of a statute, judicial review is excluded or deferred:

> "Among these are: the subject matter of the statute (transport, trading licences, town planning and so on); the body or person who makes the initial decision and the bases on which it is to be made; the body or person who exercises appellate jurisdiction; the manner in which that jurisdiction is to be exercised, including the ambit of any 're-hearing' on appeal; the powers of the appellate tribunal, including its power to redress or 'cure' wrongs of a reviewable character; and whether the tribunal, its procedures and powers are suited to redress the particular wrong of which an applicant complains."

on various grounds.[81] Other conditions included mootness[82] and delay in bringing the review.[83]

[88] Since its introduction, PAJA too recognises that a court may defer the exercise of its jurisdiction until certain conditions are met, such as that the review is brought within a particular time,[84] or that internal remedies have not been exhausted.[85] Should the parties fail to comply with these conditions, they will not be ordinarily entitled to pursue their review – this is subject to certain exceptions. The point is that PAJA itself

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[81] In *Leteno* id at 502D-E and 503B-D the Court held:

> "Whenever domestic remedies are provided by the terms of a Statute, regulation, or conventional association, it is necessary to examine the relevant provisions in order to ascertain in how far, if at all, the ordinary jurisdiction of the Courts is thereby excluded or deferred.
>
> . . .
>
> It is, I think, clear from the context in which this statement appears that what the learned Judge intended to convey was that the mere existence of a domestic remedy did not conclude the question, since it is in each case necessary to consider all the circumstances in order to determine whether a necessary implication arises that the Courts' jurisdiction is either wholly excluded or, at least, deferred until the domestic remedies have been exhausted."

[82] In *Director-General Department of Home Affairs v Mukhamadiva* [2013] ZACC 47; 2014 (3) BCLR 306 (CC) at para 40, this Court identified several relevant factors that could be considered when exercising its discretion to entertain a moot matter:

> "The fact that a matter may be moot in relation to the parties before the Court is not an absolute bar to the Court considering it. The Court retains discretion, and in exercising that discretion it must act according to what is required by the interests of justice. And what is required for the exercise of this discretion is that any order made by the Court has practical effect either on the parties or others. Other relevant factors that could be considered include: the nature and extent of the practical effect the order may have; the importance of the issue; and the fullness of the argument advanced. Another compelling factor could be the public importance of an otherwise moot issue."

[83] *Mhini v Coulter N.O.* 1936 EDL 85.

[84] *Department of Transport v Tasima (Pty) Ltd* [2016] ZACC 39; 2017 (1) BCLR 1 (CC); 2017 (2) SA 622 (CC) at para 160.

[85] Section 7(2) of PAJA states:

> "(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.
>
> (b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.
>
> (c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice."

regulates a party's right to judicial review, and a court can defer or refuse to exercise its jurisdiction if these requirements are not met. And so, even within the architecture of PAJA, there is recognition that the right of review may itself be subject to internal conditions before it can be considered by a court. Our law has accepted, as a viable outcome, that there are circumstances where a review complaint might never be adjudicated due to the resolution of the underlying dispute in another forum.[86] To the extent that a party is deprived of the right to just administrative action (as described by the Supreme Court of Appeal in this matter in relation to SARS' interpretation of section 47(9)(e)),[87] this takes place in the context of domestic, internal or extra-judicial remedies that may provide substantial redress.[88]

[89] The result would be that if an internal remedy addressed the merits of a dispute, the review complaint and the grounds on which it is advanced will be left largely unaddressed. In that event, one of the unintended consequences of such a legislative arrangement is that review grounds, even those carrying with them strong prospects and evidencing shortcomings in the decision-making process, will not be ventilated.[89] This

[86] Our law encourages such an outcome. The introduction of section 7(2) of PAJA has changed the position on internal remedies. The initial position in terms of the common law was that where internal remedies are provided for, the choice was that of the aggrieved party either to pursue those remedies first or to proceed straight to seek a review in court. The position under section 7(2) is that it is compulsory for an aggrieved party to exhaust internal remedies before approaching a court for review, unless such party is exempted from doing so. See *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others* [2013] ZACC 48; 2014 (3) BCLR 265 (CC); 2014 (5) SA 138 (CC) at para 115.

[87] Supreme Court of Appeal judgment above n 18 at para 23. This Court has said in *Koyabe v Minister for Home Affairs (Lawyers for Human Rights as Amicus Curiae)* [2009] ZACC 23; 2009 (12) BCLR 1192 (CC); 2010 (4) SA 327 (CC) at para 36 that:

> "[A]pproaching a court before the higher administrative body is given the opportunity to exhaust its own existing mechanisms undermines the autonomy of the administrative process. It renders the judicial process premature, effectively usurping the executive role and function. The scope of administrative action extends over a wide range of circumstances, and the crafting of specialist administrative procedures suited to the particular administrative action in question enhances procedural fairness as enshrined in our Constitution. Courts have often emphasised that what constitutes a 'fair' procedure will depend on the nature of the administrative action and circumstances of the particular case. Thus, the need to allow executive agencies to utilise their own fair procedures is crucial in administrative action."

[88] Hoexter and Penfold *Administrative Law in South Africa* 3 ed (Juta & Co Ltd, Cape Town 2021) at 744.

[89] *Koyabe* above n 87 at para 35 suggests that this avoidance of further litigation may be a benefit of the requirement of exhausting internal remedies:

> "Internal remedies are designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilise its own mechanisms, rectifying irregularities first, before

may well be a necessary and unavoidable consequence of putting in place a remedy such as an internal appeal, which is designed to remedy an unlawful decision in a cost-efficient and timely manner.

[90] While the remedy of an appeal in section 47(9)(e) is not an internal appeal of the kind described in *Reed*,[90] there are parallels between an internal remedy and an alternative remedy. An internal remedy is an alternative remedy and if Parliament has determined that, generally speaking, an internal remedy must be exhausted before a court exercises its review jurisdiction, what then of a dedicated alternative remedy?

[91] While both PAJA and the CEA are silent on the relationship between an alternative remedy and remedies available under PAJA, I take the view that the existence of such a remedy provided by Parliament must feature significantly in how a court exercises its review jurisdiction. After all, the CEA provides the legislative choice in addressing tariff determination disputes. In addition, when one has regard to the nature of a wide appeal, then it may achieve much more than an internal remedy. Its ability to correct and redetermine through a rehearing may be significantly more potent than what an internal remedy can achieve – by and large an appeal on the merits of a determination. It also can, as *Tantoush*[91] tells us, correct minor irregularities in process. There, the Court said:

> aggrieved parties resort to litigation. Although courts play a vital role in providing litigants with access to justice, the importance of more readily available and cost-effective internal remedies cannot be gainsaid."

[90] In *Reed v The Master of the High Court of South Africa* [2005] 2 All SA 429 (E) at paras 20-6 and 29, the Court weighs in on the characteristics of an "internal remedy", specifying that it "must be capable . . . of providing what the Constitution terms appropriate relief: it must be an effective remedy" and describing it thus:

> "[W]hen the term is used in administrative law, it is used to connote an administrative appeal – an appeal, usually on the merits, to an official or tribunal within the same administrative hierarchy as the initial decision-maker – or, less common, an internal review."

It also defines a distinctive feature of internal remedies as being extra-curial. The Court specifically provides section 35(10) of the Administration of Estates Act 66 of 1965 as an example of what is not an internal remedy because it "regulates recourse to a court for the purpose of reviewing decisions of the Master" and is thus "by definition external to the administration, is not domestic to the administrative hierarchy created by the Administration of Estates Act, and is curial in character".

[91] *Tantoush v Refugee Appeal Board* 2008 (1) SA 232 (T).

> "A wide appeal is one in which the appellate body may make its own enquiries and even gather its own evidence if necessary – *Tikly v Johannes N.O.* 1963 (2) SA 588 (T) at 592A-E. In both kinds of appeal the primary function is one of reconsideration of the merits of the decision in order to determine whether it was right or wrong, or perhaps vitiated by an irregularity to the extent that there has been a failure of justice. Where the appellate body is placed in exactly the same position as the original decision-maker it will be able to correct lesser irregularities and will enjoy a power of rehearing *de novo*."[92]

[92] That is further reason why the existence of a wide appeal must be a significant feature in influencing a court in how it exercises its review jurisdiction.

[93] In PAJA, Parliament has provided a basis for how a court is to exercise its jurisdiction in the defined circumstances of an internal remedy.[93] But that may not be the only circumstance. Even outside of PAJA, a review court will be entitled not to exercise its review jurisdiction when there is an abuse of process or where a litigant is vexatious.[94] This power is consistent with a court's inherent power.[95]

[94] Both a resort to a wide appeal as well as a right of review seek to assert the right of access to courts, which is embodied in section 34 of the Bill of Rights.[96] In either case its source would be a dissatisfaction with a tariff determination that will prompt the taxpayer to seek relief to challenge the determination, even though the reasons for that dissatisfaction may differ. The right of access to court must then facilitate the

[92] Id at para 90.

[93] Similarly, in terms of section 78 of the Promotion of Access to Information Act 2 of 2000 (PAIA), a party can apply to a court for appropriate relief in terms of section 82 only after exhausting the internal appeal procedure in section 74 and complaints procedure in section 77A of PAIA.

[94] *SAHRC* above n 70 at paras 27 and 29.

[95] Under section 173 of the Constitution.

[96] Section 34 of the Constitution, quoted above at [56].

resolution of that dispute. This Court has consistently emphasised the importance of that right in our constitutional democracy. In *Barkhuizen*[97] it said:

> "Our democratic order requires an orderly and fair resolution of disputes by courts or other independent and impartial tribunals. This is fundamental to the stability of an orderly society. It is indeed vital to a society that, like ours, is founded on the rule of law. Section 34 gives expression to this foundational value by guaranteeing to everyone the right to seek the assistance of a court."[98]

[95] In *Chief Lesapo*[99] this Court said:

> "The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self-help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self-help in particular, access to court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable."[100]

[96] At the same time, our courts have recognised that the right of access to court exists within a context where broad policy considerations as well as rules and procedures are necessary to properly regulate and give effect to the right. Some of those considerations may relate to the proper use of limited judicial resources, the need for efficiency in the administration of justice and in its dispute resolution mechanisms, and the recognition that the same conduct may at times give rise to multiple causes of action which are all capable of achieving the same end. The exercise of the right of access to court must then be considered and given effect to within this context. The right of access to courts does not contemplate that a litigant will at all times have access to all

[97] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC).

[98] Id at para 31.

[99] *Chief Lesapo v North West Agricultural Bank* [1999] ZACC 16; 1999 (12) BCLR 1420 (CC); 2000 (1) SA 409 (CC).

[100] Id at para 22.

available remedies and procedures. Rather it becomes incumbent on the respective arms of government, including the Judiciary, to properly manage and regulate those processes without, in the course of doing so, undermining or unjustifiably limiting the right of access to courts.

[97] In *Mukaddam*[101] this Court said:

> "Our Constitution guarantees everyone the right of access to courts which are independent of other arms of government. But the guarantee in section 34 of the Constitution does not include the choice of procedure or forum in which access to courts is to be exercised. This omission is in line with the recognition that courts have an inherent power to protect and regulate their own process in terms of section 173 of the Constitution."[102]

[98] On the same theme, in *Take and Save*[103] the Supreme Court of Appeal observed that:

> "a Judge is not simply a 'silent umpire'.[104] A Judge 'is not a mere umpire to answer the question "How's that?"' Lord Denning once said.[105] Fairness of court proceedings requires of the trier to be actively involved in the management of the trial, to control

[101] *Mukaddam v Pioneer Foods (Pty) Ltd* [2013] ZACC 23; 2013 (5) SA 89 (CC); 2013 (10) BCLR 1135 (CC).

[102] Id at para 28. Section 34, quoted above at [56], must be read with section 165 of the Constitution. Section 165 provides:

> "(1) Judicial authority of the Republic is vested in the courts.
>
> (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
>
> (3) No person or organ of state may interfere with the functioning of the courts.
>
> (4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
>
> (5) An order or decision issued by a court binds all persons whom and organs of state to which it applies."

[103] *Take and Save Trading CC v Standard Bank of SA Ltd* [2004] ZASCA 1; 2004 (4) SA 1 (SCA).

[104] *Greenfield Manufacturers (Temba) (Pty) Ltd v Royton Electrical Engineering (Pty) Ltd* 1976 (2) SA 565 (A) at 570E-F.

[105] *Jones v National Coal Board* [1957] 2 All ER 155 (CA) at 159B.

> the proceedings, to ensure that public and private resources are not wasted, to point out when evidence is irrelevant, and to refuse to listen to irrelevant evidence. A supine approach towards litigation by judicial officers is not justifiable either in terms of the fair trial requirement or in the context of resources."[106]

[99] Thus, the proper exercise by a court of its jurisdiction is far from a gatekeeping exercise. It is an exercise that has considerable implications for the administration of justice and its integrity as well as the interests of all those who seek to access our courts. How a court ultimately exercises its jurisdictional discretion may be influenced by a number of important considerations which I have referred to. In doing so, a court does not limit the exercise of the right to access to court, but has regard to these considerations to ensure that the right to access to court is fulfilled, mindful of the context of the case, the relief (or different forms of relief) that is sought and the effective use of judicial resources.

[100] It simply cannot be that a party has unlimited access to the judicial system, its resources, and at its own election.[107] If that were the case, courts would be expected to be supine and at the beck and call of litigating parties, whereas the approach adopted in *Mukaddam* and *Take and Save* brings together and balances the interest of the litigating parties and those of the broader administration of justice. It is a commendable approach with which I agree.

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[106] *Take and Save* above n 103 at para 3. In doing so, the Supreme Court of Appeal adopted what the Appellate Division held in *R v Hepworth* 1928 AD 265 at 277:

> "A judge is an administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done."

[107] The right to have a dispute decided in a fair public hearing before a court has little meaning without structural mechanisms allowing all to enjoy this right within the limits of public resources. Judicial case management ensures routine and structured control by a court over all or most of the cases in its registry through control of time limits for various interlocutory steps preparatory to trial, issues determined at trial, and time to be taken by a trial. Similarly, rules about the abuse of court process ensure that judicial resources are only allocated to good faith and deserving litigants. Without these measures, the efficient administration of justice would be hindered for all, at the expense of an individual matter flouting such measures.

[101] This distinction between the assumption and the exercise of jurisdiction is also recognised and applied in England, where the Court in *Glencore Energy*[108] captured it as follows:

> "In this case the High Court (and hence this court) has full jurisdiction to review the lawfulness of action by the Designated Officer and by HMRC. The question is whether the court should exercise its discretion to refuse to proceed to judicial review (as the judge did at the permission stage) or to grant relief under judicial review at a substantive hearing according to the established principle governing the exercise of its discretion where there is a suitable alternative remedy."[109]

[102] With that background, I proceed to deal with how the jurisdictional question in relation to the exercise by the Court of its jurisdiction should be considered in these proceedings.

[103] Both parties have accepted that the appeal contemplated in section 47(9)(e) is an appeal in the wide sense. In *Tikly*, the Court distinguished between various kinds of statutory "appeals" as follows:

> "(i) an appeal in a 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 . . .
>
> (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."[110]

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[108] *R (Glencore Energy) v HMRC* [2017] EWCA Civ 1716; [2017] 4 WLR 213 (CA).

[109] Id at para 54.

[110] *Tikly* above n 17 at 590G-H.

[104] This formulation led to a development of the concept of a "wide appeal". A wide appeal is described as a remedy afforded to an aggrieved party who seeks to challenge the correctness of a decision without being confined to the facts relied on by the first instance decision-maker and the reasons underlying the decision. In a wide appeal, the empowering statute grants a court, tribunal or forum the power to rehear the matter entirely.[111] This means that the dispute is heard "afresh" or "from the beginning" or "anew" in the sense that the appellate body is not bound by the evidence, information or reasons which arose at the time the first instance decision was made.[112] In doing so, it may receive fresh evidence but can also decide the matter without fresh evidence. The appellate body is, in effect, in the same position as the first instance decision-maker.[113] A record of the preceding decision is accordingly not required. Baxter explains that the power to preside over a wide appeal will likely be granted to judges that are qualified and in as good a position as that of the original decision-maker to adjudicate the matter.[114] This understanding of a wide appeal has been confirmed and applied in numerous matters and in various legal contexts.[115]

[105] Judicial review is described as a remedy afforded to an aggrieved party who seeks to challenge the lawfulness of a decision. A review is concerned with the decision-making process and how the decision-maker came to the impugned decision.[116] The record and reasons are usually central to the determination of a

[111] Baxter above n 78 at 256.

[112] *Acti–Chem SA (Pty) Ltd v Commissioner for the South African Revenue Service* [2019] ZAKZPHC 58; 81 SATC 363 at para 2.

[113] *Kham v Electoral Commission* [2015] ZACC 37; 2016 (2) SA 338 (CC); 2016 (2) BCLR 157 (CC) at para 41; *Refugee Appeal Board v Mukungubila* [2018] ZASCA 191; 2019 (3) SA 141 (SCA) at para 34; and *Road Accident Fund v Duma and Three Similar Cases* [2012] ZASCA 169; 2013(6) SA 9 (SCA) at para 26.

[114] Baxter above n 78 at 258.

[115] *Wings Park Port Elizabeth (Pty) Ltd v MEC Environmental Affairs Eastern Cape* 2019 (2) SA 606 (ECG) at paras 30 and 46 and *Somali Association of South Africa v Refugee Appeal Board* [2021] ZASCA 124; 2022 (3) SA 166 (SCA) at para 25.

[116] *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration* [2006] ZASCA 175; 2007 (1) SA 576 (SCA) at para 31. The Supreme Court of Appeal judgment in *Rustenburg* was overturned on appeal to this Court, but not on this point.

review.[117] However, proceedings may be brought under review despite the fact that no record of the proceedings sought to be corrected or set aside were kept.[118]

[106] When consideration is given to both remedies, it follows that a taxpayer aggrieved with a tariff determination and who follows the route of an appeal in terms of section 47(9)(e) has the fullest opportunity to present its case on the merits. In so doing, the taxpayer can advance its claim with the object of obtaining a proper and correct tariff determination. The aim of section 47(9)(e) is to ensure that the hearing results in a correct tariff determination.

[107] If there were procedural shortcomings in the decision leading to the impugned tariff determination, the wide appeal is only "curative" to the extent that it can at least ensure that those deficiencies do not repeat themselves in the wide appeal, but it is not designed to look back at the decision-making process with a view to correcting such deficiencies as may have arisen.[119] In essence, the wide appeal freshly determines the applicable tariff which has a retrospective effect and the taxpayer no longer has to abide by the impugned decision. But a wide appeal is not curative to the extent that it always extinguishes the need for judicial review.

[108] If a taxpayer's complaint, in nature and in substance, is both about the correctness of the decision on the merits and the lawfulness of the decision-making process, the court will be called upon to decide whether to exercise its review jurisdiction. If it refuses to exercise its review jurisdiction, the court can deal with the matter as a wide appeal, notwithstanding the allegation of review grounds. If it decides to exercise its review jurisdiction, it will deal with the matter as a review. Below I deal with the consequences of this latter route.

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[117] *Democratic Alliance v President of the Republic of South Africa* 2017 (4) SA 253 (GP) at paras 23-6.

[118] *Secretary for the Interior v Scholtz* 1971 (1) SA 633 (C) at 637A-D.

[119] *Minister of Environmental Affairs and Tourism v Scenematic Fourteen (Pty) Ltd* [2005] ZASCA 11; 2005 (6) SA 182 (SCA) at paras 34-5.

[109] There may also be instances where a taxpayer may purport to advance a ground of review, but in substance be seeking to obtain a correct decision, and simply be clothing its challenge in PAJA language in order to obtain access to the record. It is in these instances where a court must refuse to exercise its review jurisdiction and require a party instead to pursue the section 47(9)(e) appeal as the remedy properly suited for the challenge. The manner in which a party pleads their case is important, just as the availability of the two remedies is in assisting a court to determine whether the exercise of its review jurisdiction is warranted.

[110] This difficult exercise requires a court to appreciate certain first principles. The right to challenge an administrative decision is enshrined in section 33 of the Constitution which is embodied in section 6 of PAJA. A review in the context of the CEA will invariably be triggered by dissatisfaction with a tariff determination and the aggrieved taxpayer may well, as in these proceedings, have to consider whether to bring an appeal or a review. This brings me to the question of the overlap in the grounds of review and appeal which RBCT claims may exist. It is important to consider briefly what it means for review and appeal grounds to "overlap" to the extent that a court may deal with multiple grounds advanced in the same case.

[111] A "ground" is a legal basis used to validate a claim.[120] This will have to be supported by factual material in support of the ground. For instance, where an error of law is pleaded, a litigant must not only plead facts which indicate that the decision was materially influenced by an error of law, but also indicate how those facts satisfy the requirements for "error of law" as a ground of review to activate the legal claim for judicial review.[121]

[120] The Merriam-Webster dictionary describes a ground as "the foundation or basis on which knowledge, belief, or conviction rests: a premise, reason, or collection of data upon which something (as a legal action or argument) relies for validity".

[121] As stated by this Court in *Bato Star* above n 50 at para 27, "[i]t must be emphasised that it is desirable for litigants who seek to review administrative action to identify clearly both the facts upon which they base their cause of action, and the legal basis for their cause of action."

[112] What grounds are necessary to activate an appeal? According to section 47(9)(e), it is where a taxpayer believes a decision is incorrect in law and seeks to appeal it. The taxpayer may conceivably use the same facts to support a ground of appeal as a ground of review. While there may then be an overlap in the factual material used to formulate the respective grounds of appeal and review, there is no overlap as a matter of law in the respective grounds of review and appeal.[122]

[113] What follows is that appeal and review are conceptually different remedies and, while they ultimately seek a "correct" result in a general sense, in substance they may focus on the same material to conduct distinct enquiries in reaching a determination. The nature of a wide appeal does not change the essential nature of a review and its focus, even though the wide appeal may cure a grievance which would form the subject matter of a review.[123]

[114] Some cases present material that may be so egregious and far-reaching that they impact on the very underpinnings and values of a just administrative action regime. These are the kind of cases where a court may find it appropriate to use its discretion to exercise its review jurisdiction. It may be important and necessary to address the issues in review proceedings as a failure to do so will undermine the integrity and effectiveness of the just administrative action framework. It may not be possible to draw bright lines in this regard, but conduct that evidences corruption or a deliberate disregard for the rule of law are some examples that come to mind. I provide some guiding considerations later in this judgment.

[115] What emerges is that not every reviewable irregularity would necessitate a resort to review relief, especially when there is a tailor-made remedy that can address the complaint of a wrong decision which may negate the need to persist with a challenge to

[122] As Hoexter and Penfold (above n 88 at 389) point out:

> "[T]he distinction between legality and merits, or process and substance, means that it is not the function of a court of review to ask whether the administrator was 'right' or 'wrong' in its conclusions, but only whether the conclusion was arrived at in an acceptable manner."

[123] *Niemiec v Constantia Insurance Co Ltd* (PA1/2021) [2021] ZAFST 30 at para 40.

an irregular process. But a review of the decision-making process in the face of a wide appeal may be warranted to ensure that serious shortcomings affecting its very functioning and underpinnings are addressed.

[116] Leaving aside for a moment the policy considerations that may influence the suitability of a wide appeal as opposed to a review, there are significant practical differences in what each remedy can likely achieve. A wide appeal as a de novo hearing is structured to determine the correctness of the determination. If the determination is found to be incorrect, a wide appeal court will substitute it with the correct determination which will, subject to possible further appeals, bring finality to the dispute. In that event there may be nothing left to review, as the Court observed in *BP Southern Africa*,[124] where it asked, in the context of a review and a wide appeal brought simultaneously against the same decision, "[o]nce that appeal has been determined, the question was what, if anything, was left of the review?"[125]

[117] On the other hand, if a review court finds a reviewable irregularity before considering an appeal, it must declare the decision unlawful and then generally set it aside and remit the matter to the decision-maker, as substitution is a power utilised only in exceptional circumstances.[126] In that event, the decision-maker will likely address the procedural shortcomings in the decision-making process but may arrive at the same determination. Unless there are strong reasons indicating serious departures from the standards of administrative justice of the kind I have discussed, a resort to a review may well constitute an unwise and uneconomical use of judicial resources. Of course, the "new" decision arrived at by SARS may then be the subject of a fresh review on different grounds or an appeal by way of section 47(9)(e).

[124] *BP Southern Africa (Pty) Ltd v Commissioner for the South African Revenue Service*, unreported judgment of the High Court of South Africa, Gauteng Division, Pretoria, Case No 2021/49805 (12 January 2024).

[125] Id at para 10.

[126] *National Energy Regulator of South Africa v PG Group (Pty) Ltd* [2019] ZACC 28; 2019 (10) BCLR 1185 (CC); 2020 (1) SA 450 (CC) at paras 89-90.

[118] Here the spectre of ongoing and circuitous litigation with its attendant drain on resources for all involved may loom large. Courts are not expected to be supine in the face of such undesirable outcomes where avoidance is possible. They are entitled to protect their processes. In the context of section 7 of PAIA, this Court in *PFE International*[127] endorsed the approach by the Supreme Court of Appeal where it held that allowing dual systems of accessing information would potentially be extremely disruptive to court proceedings and, as section 7 clearly states, a party cannot obtain information under PAIA where there are rules of civil procedure governing the production of that information.[128] In explaining its approach, the Supreme Court of Appeal stated:

> "This anomaly, that [a litigant] may be entitled to information the day before the commencement of proceedings but not the day thereafter, must be seen as a necessary consequence of the intention, on the part of the Legislature, to protect the process of the court. Once proceedings are instituted then the parties should be governed by the applicable rules of court."[129]

[119] While the present matter concerns two pathways to challenging a decision, and not two pathways to accessing information, and while section 7 of PAIA is much more express about the non-availability of the alternative pathway than section 47(9)(e) is about the availability of judicial review, the underlying principle still remains. A court must be entitled to protect its own processes when a duplication of pathways is available and the prosecution of both will become disruptive or undesirable.

[120] And so, back to the critical question: if absent an ouster, both remedies are in principle available to the taxpayer, would a taxpayer, unreservedly as a matter of right, be entitled to use both remedies? The response from the purists may be a resounding "yes", notwithstanding that the effect of the perceived overlap may be cumulative or

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[127] *PFE International v Industrial Development Corporation of South Africa Ltd* [2012] ZACC 21; 2013 (1) SA 1 (CC); 2013 (1) BCLR 55 (CC).

[128] *Industrial Development Corporation of South Africa Ltd v PFE International Inc (BVI)* [2011] ZASCA 245; 2012 (2) SA 269 (SCA) at para 10.

[129] Id at para 10.

duplicative court actions and the untenable consequence of setting aside a determination that is correct but arrived at through means that are reviewable. These are real consequences that may arise if the two remedies are allowed to be pursued alongside each other unchecked.

[121] The Supreme Court of Appeal properly emphasised in its judgment in this matter the role of a system of just administrative action in our constitutional democracy, but it did so in isolation, failing to consider in the context of these proceedings the interplay between the right of a wide appeal and the right of review. It did not consider the practical consequences of its judgment. It also did not consider the fact that a wide appeal may well be capable of addressing some process irregularities by reaching a correct conclusion on the merits following a fair hearing, which may, in part, address the taxpayer's grievance. It thus may be curative to that extent and may negate the need to pursue a review.

[122] Equally, the stance adopted in *Cell C* and similar cases – that the existence of a wide appeal does not oust the right of review, but that the need for the review to be asserted simply does not arise – may have the de facto effect of an ouster. That reasoning suggests that, irrespective of the seriousness of the defects in the decision-making process and its effect on a just administrative system, a review will never be warranted and a wide appeal, to the extent that it can result in a correct tariff determination, is the only remedial option for an aggrieved taxpayer. This approach ignores the cases, regarded as unusual or grave, where the interests of justice call for more than a correct determination, but require, as a matter of good governance and in fidelity to the values of the Constitution, that the defects in the decision-making process be identified, addressed and corrected.

[123] The answer lies somewhere in between those two propositions. It lies in recognising that, even though the right of review is not ousted by section 47(9)(e), a court may, as part of its discretion decide whether to exercise its review jurisdiction. In doing so, it will have regard to the availability of a tailor-made alternative remedy that

Parliament has created. The existence of a wide appeal alongside a right of review is precisely the scenario that would justify a court in using its powers to decide whether to exercise its review jurisdiction. It should do so in respect of instances where a taxpayer, armed with a right of wide appeal, seeks to challenge a tariff determination by way of a review.

Principle of subsidiarity

[124] The principle of subsidiarity has been recognised by this Court in *My Vote Counts*.[130] The majority of the Court concurred with the minority's exposition of the principle of subsidiarity.[131] This principle, put simply, speaks to—

> "a hierarchical ordering of institutions, of norms, of principles, or of *remedies,* and signifies that the central institution, or higher norm, should be invoked only where the more local institution, or concrete norm, or detailed principle or remedy, does not avail. The word has been given a range of meanings in our constitutional law. It is useful in considering the scope of subsidiarity, and Parliament's reliance on it – to have them all in mind."[132] (Emphasis added.)

[125] Applying this principle, the applicant in *My Vote Counts* was not entitled to circumvent PAIA and rely directly on section 32 of the Constitution.[133] This Court held that the applicant must first rely on or attack the constitutionality of the legislation enacted to give effect to its rights since:

> "Once legislation to fulfil a constitutional right exists, the Constitution's embodiment of that right is no longer the prime mechanism for its enforcement. The legislation is primary. The right in the Constitution plays only a subsidiary or supporting role."[134]

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[130] *My Vote Counts NPC v Speaker of the National Assembly* [2015] ZACC 31; 2015 (12) BCLR 1407 (CC); 2016 (1) SA 132 (CC).

[131] Id at para 121.

[132] Id at para 46.

[133] Id at paras 44-6.

[134] Id at para 53.

[126] This approach was also affirmed by this Court in *SANDU,*[135] though in the context of labour relations, where the Court disallowed reliance on provisions of section 23(5) of the Constitution to found a more encompassing duty to bargain. This Court held that "a litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard".[136]

[127] In *Motau,*[137] this Court recognised the more specific norms in the Companies Act 71 of 2008 to assess standards of procedural fairness.[138] Although this Court did not consider it necessary to decide whether the principle of legality or some other principle required the Minister of Defence and Military Veterans to act in a procedurally fair manner, it implicitly applied the principle of subsidiarity by preferring more specific norms in legislation over the more general principle of legality.[139]

[128] In *New Clicks,*[140] this Court held that "[l]egislation enacted by Parliament to give effect to a constitutional right ought not to be ignored".[141] This recognised Parliament's indispensable role in fulfilling constitutional rights and how "the courts and the legislature act in partnership to give life to constitutional rights".[142] The majority in *My Vote Counts* also concurred with this sentiment when this Court held that "comity

[135] *South African National Defence Union v Minister of Defence* [2007] ZACC 10; 2007 (5) SA 400 (CC); 2007 (8) BCLR 863 (CC).

[136] Id at para 51.

[137] *Minister of Defence and Military Veterans v Motau* [2014] ZACC 18, 2014 (5) SA 69 (CC); 2014 (8) BCLR 930 (CC).

[138] Id at para 80.

[139] Id at para 83.

[140] *Minister of Health v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign and Another as Amici Curiae)* [2005] ZACC 14; 2006 (1) BCLR 1 (CC); 2006 (2) SA 311 (CC).

[141] Id at para 437.

[142] *National Education Health and Allied Workers Union v University of Cape Town* [2002] ZACC 27; 2003 (2) BCLR 154 (CC); 2003 (3) SA 1 (CC) at para 14.

between the arms of government enjoins courts to respect the efforts of other arms of government in fulfilling constitutional rights".[143]

[129] The principle of subsidiarity plays a valuable role in our administrative law where several sources of law compete for application. At the apex of the continuum of available remedies lies the most general legal norm; in the context of judicial review this would be the principle of legality, that lies at the heart of our rule of law in section 1(c) of the Constitution. This is followed by the Bill of Rights, including the right to just administrative action in section 33 of the Constitution. The codification of the right to just administrative action in PAJA is a more specific embodiment of constitutional norms which applies only to administrative action and generally not to executive or legislative action. Finally, more specific provisions in legislation or subordinate legislation are the "most specific norms that set out standards of accountability demanded of a functionary in a particular situation, and that are appropriate to that specific exercise of power".[144]

[130] The principle requires that the more specific norm be preferred over the general norm when adjudicating a substantive dispute. So, in that sense, a litigant must rely on the more specific remedy when seeking relief from a court, and should then climb up the hierarchy of available remedies towards the general remedy only where the specific remedies are inappropriate or will not provide effective relief. This proviso illustrates that the subsidiarity principle is not absolute insofar as there may be circumstances where the more specific norm is inapplicable or inappropriate, and hence the more general norm must be applied.

[131] In this context, the appeal in section 47(9)(e) of the CEA should be preferred for two reasons. First, it is the specific remedy created by Parliament to ensure that a taxpayer aggrieved by a tariff determination obtains effective relief. It, therefore, must

[143] *My Vote Counts* above n 130 at para 160.

[144] See Murcott and Westhuizen "The Ebb and Flow of the Application of the Principle of Subsidiarity – Critical Reflections on *Motau* and *My Vote Counts*" (2015) *Constitutional Court Review* 43 at 44.

be considered the preferred mechanism of challenge, since provisions under the CEA constitute the law which is designed specifically to deal with the subject matter of tariff determinations. Only if a party can show that the more specific norm is not appropriate should it resort to a challenge under PAJA, which constitutes a more general norm in the continuum of available remedies.

[132] Second, the principle of comity between branches of government requires this Court to pay due regard to the remedy crafted by Parliament under the CEA. That is not to say that the mere presence of a statutory remedy created by Parliament always gives rise to a presumption that it takes preference over PAJA simply by virtue of the fact that it is a more specific norm or under the principle of comity. A court or tribunal must look at substance over form. It must be satisfied that the more specific norm or remedy is an effective one that adequately preserves a party's rights to bring a challenge against an administrative action.

[133] While section 47(9)(e) does not constitute an ouster clause in respect of other remedies, its existence as a tailor-made remedy designed specifically to address tariff determinations, as well as its ability to do so, must be a factor this Court considers when other remedies are asserted. It is not a consideration that is dispositive of the issue but one that must be given proper weight. As noted above, it recognises Parliament's role in crafting appropriate remedies in the context of a particular legislative scheme. One must respect the remedy chosen by Parliament to deal with disputes arising within a particular legislative context. Section 47(9)(e) was designed specifically as a remedy in response to disputes arising from customs and excise tariff determinations. Unless there are good reasons for departing from this remedy, a taxpayer must be required to rely on that remedy unless they show that specific circumstances exist which require them to invoke their right to judicial review.

The position in England

[134] English courts have also had to grapple with how the two remedies of an appeal and a review relate to and interact with each other in the context of taxation disputes.

The Court in *Glencore Energy*[145] also accepted and applied the distinction between the assumption of jurisdiction and its exercise. Moving beyond that, the Court, after describing review as a remedy of last resort, noted the circumstances when it would be willing to exercise its review jurisdiction.[146] It said:

> "In my view, the principle is based on the fact that judicial review in the High Court is ordinarily a remedy of last resort, to ensure that the rule of law is respected where no other procedure is suitable to achieve that objective. However, since it is a matter of discretion for the court, where it is clear that a public authority is acting in defiance of the rule of law the High Court will be prepared to exercise its jurisdiction then and there without waiting for some other remedial process to take its course."[147]

[135] The Court went further in describing what its stance was in how its review jurisdiction fell to be exercised in the face of an alternative remedy. It said:

> "Also, in considering what should be taken to qualify as a suitable alternative remedy, the court should have regard to the provision which Parliament has made to cater for the usual sort of case in terms of the procedures and remedies which have been established to deal with it. If Parliament has made it clear by its legislation that a particular sort of procedure or remedy is in its view appropriate to deal with a standard case, the court should be slow to conclude in its discretion that the public interest is so pressing that it ought to intervene to exercise its judicial review function along with or instead of that statutory procedure."[148]

[136] And, finally, that Court also addressed the question of the possible duplication in procedures and the proper use of judicial resources when it said:

> "Treating judicial review in ordinary circumstances as a remedy of last resort fulfils a number of objectives. It ensures the courts give priority to statutory procedures as laid down by Parliament, respecting Parliament's judgment about what procedures are

[145] *Glencore Energy* above n 108.

[146] Id at para 55.

[147] Id.

[148] Id.

> appropriate for particular contexts. It avoids expensive duplication of the effort which may be required if two sets of procedures are followed in relation to the same underlying subject matter. It minimises the potential for judicial review to be used to disrupt the smooth operation of statutory procedures which may be adequate to meet the justice of the case. It promotes proportionate allocation of judicial resources for dispute resolution and saves the High Court from undue pressure of work so that it remains available to provide speedy relief in other judicial review cases in fulfilment of its role as protector of the rule of law, where its intervention really is required."[149]

[137] This approach was recently confirmed by the United Kingdom's Supreme Court in its unanimous judgment in *McAleenon*:[150]

> "The forms of relief available in a claim for judicial review are discretionary (albeit the ambit of the discretion may in the event be very small or non-existent in the circumstances of a particular case). The availability of the judicial review procedure is likewise discretionary. A court may refuse to grant leave to apply for judicial review or refuse a remedy at the substantive hearing if a suitable alternative remedy exists but the claimant has failed to use it. As stated in *R (Glencore Energy UK Ltd) v Revenue and Customs Comrs* [2017] EWCA Civ 1716; [2017] 4 WLR 213, para 55, 'judicial review in the High Court is ordinarily a remedy of last resort, to ensure that the rule of law is respected where no other procedure is suitable to achieve that objective'. If other means of redress are conveniently and effectively available, they ought ordinarily to be used before resort to judicial review: *Kay v Lambeth London Borough Council* [2006] UKHL 10; [2006] 2 AC 465, para 30; *R (Watch Tower Bible & Tract Society of Britain) v Charity Commission* [2016] EWCA Civ 154; [2016] 1 WLR 2625, para 19.
>
> Where Parliament has enacted a statutory scheme for appeals in respect of certain decisions, an appeal will in ordinary circumstances be regarded as a suitable alternative remedy in relation to such decisions which ought to be pursued rather than having resort to judicial review: *Glencore Energy*, above, paras 55-58; *Watch Tower Bible & Tract Society*, above, para 19. Otherwise, use of judicial review would undermine the regime for challenging decisions which Parliament considers to be appropriate in that class of case. Therefore the Court of Appeal in *Alpha Resource Management* was correct to

[149] Id at para 56.

[150] *McAleenon, Re Application for Judicial Review (Northern Ireland)* [2024] UKSC 31; [2024] 3 WLR 803.

> hold that Alpha was precluded by the suitable alternative remedy principle from seeking judicial review of the abatement notice issued against it: Parliament had provided for a right of appeal in section 65(8) of the 2011 Act in respect of such a notice."[151]

[138] These remarks were made in the context of judicial review being a remedy of last resort, which is not exactly the position in our law. Here it may be said that judicial review is a remedy that a party can have resort to provided it has exhausted internal remedies where such remedies exist. It is certainly not a remedy of first resort when other remedies are available. Despite this distinction, the observations of the Courts in *Glencore* and *McAleenon* do not derive their force purely on account of judicial review being a remedy of last resort. They span a wide range of considerations, including the relationship between courts and Parliament, the proper use of judicial resources and the need to advance efficiency and avoid the duplication of procedures. These are themes that this judgment has also grappled with and that are relevant in our justice system.

Conclusion on the two principles

[139] It is for all these reasons that I am of the view that an aggrieved taxpayer does not have an unlimited and unhindered choice of remedy to challenge a tariff determination. I say so because to allow that would—

(a) run the risk of parallel or cumulative processes, through a wide appeal and a review, traversing the same factual and legal material;

(b) ignore the limited judicial resources that are available to be deployed in the administration of justice;

(c) disregard that a review is unlikely to result in a final determination and would usually require remission to SARS, unless a case is made out for exceptional circumstances to justify a substitution by the court; and

(d) ignore the principle of subsidiarity by not considering the hierarchical ordering of remedies where the general norm (PAJA) is to be invoked only when the local or specific norm (CEA) does not avail.

[151] Id at paras 50-1.

[140] The existence of a wide appeal alongside a right of review is precisely the scenario that would justify a court in using its powers to decide whether to exercise its review jurisdiction. It should do so in respect of instances where a litigant, armed with a right of wide appeal, seeks to challenge a tariff determination by way of review either in the same proceedings or in separate proceedings.

[141] In those instances, a taxpayer who seeks to invoke the review powers of the High Court, in a tariff determination dispute arising out of the CEA, would be required to advance a proper basis for doing so. This is not a restriction of a right but a practical common-sense approach that (a) the dispute is capable of resolution more effectively using another specifically created mechanism and (b) one does not claim to assert a review right simply because it is there. This is in fact what PAJA contemplates in its invocation to first have resort to internal remedies. A successful recourse to an internal remedy will mean that review grounds raised, irrespective of how serious they may be, will never be ventilated.

[142] It would be in the egregious cases where, even though a wide appeal will likely produce a correct tariff determination, it will leave unaddressed the serious nature of the matter being raised in the review. It is in these types of limited cases that a court is likely to exercise its discretion to entertain the review. The consequence of the review, if successful, would be to set aside the determination and remit it to SARS, or in some instances, substitute the determination. However, if unsuccessful in review, the taxpayer may still have a case on the correctness of the decision. Since this was not the subject of the review proceedings, and the decision that was challenged remains intact due to the taxpayer's failure to set it aside in the review, that case must still be available to the taxpayer to make in wide appeal proceedings.

[143] There are, therefore, at least three conceivable scenarios which may play out depending on how a taxpayer chooses to challenge a tariff determination by way of a review while armed with a right to pursue a wide appeal under section 47(9)(e):

(a) The taxpayer may institute a review and appeal in the same process,[152] in which case the court will first need to be persuaded to exercise its review jurisdiction. If it decides to do so, the record must be made available. The court may in such a case hear argument and give judgment on the review before dealing with the appeal. If the review is successful, the decision is set aside and the need for the appeal falls away. If the review is unsuccessful, the court may consider the appeal.

(b) The taxpayer may institute a review only, reserving its right to pursue an appeal at a later time. Similarly, the taxpayer will need to persuade the Court to exercise its review jurisdiction in the face of a possible appeal under section 47(9)(e). However, the failure to expressly reserve the right to pursue the appeal may not justify the inference that the taxpayer has waived its right to pursue the appeal.

(c) The taxpayer may simply pursue an appeal, in which case, the appeal will proceed as usual and the right to review at a later time is lost, since a review must logically precede an appeal. This is so, because an appeal presupposes the existence of a lawful decision.[153]

[144] It may be unwise to attempt to provide a closed list of circumstances when a court is likely to so exercise its review jurisdiction, but I am attracted to the formulation in section 7(2)(c) of PAJA that a court may exempt compliance with an internal remedy if it is in the interests of justice to do so. I do not think that it is necessary to require a case for exceptional circumstances to be made. The interests of justice appear to be broad enough to house a range of circumstances in ultimately answering the question whether it should exercise its review jurisdiction. The following factors, none of them dispositive, either individually or cumulatively, will be useful for the court in the determination of what would be in the interests of justice:

[152] As was done by RBCT in this case.

[153] *Liberty Life Association of Africa v Kachelhoffer N.O.* 2001 (3) SA 1094 (C) at 1108F-G and 1110H-1111D; *Earthlife Africa (Cape Town) v Director General Department of Environmental Affairs and Tourism* 2005 (3) SA 156 (C) at paras 38-9; and *Visagie v Health Professions Council of South Africa*, unreported judgment of the High Court of South Africa, Gauteng Division, Pretoria, Case No 22547/2020 (26 July 2022) at para 16.

(a) On the pleadings and as a matter of substance, what is the true nature of the taxpayer's grievance – the incorrect tariff determination or the procedural or other defects in the decision-making process?

(b) Do the taxpayer's appeal and review cases overlap, what is the true nature of the overlap, and is a duplication of enquiries and resources likely if both remedies were to be ventilated?

(c) If there is overlap, will a wide appeal address the substance of the review grounds in addressing the complaint of an incorrect tariff determination?

(d) Are the factual and legal circumstances underlying the review grounds so egregious that they warrant, in the interests of justice, the exercise of the court's review jurisdiction (instead of its wide appeal jurisdiction) to address and correct the shortcomings in the decision-making process?

[145] These are but some of the factors a court will consider in deciding whether to exercise its review jurisdiction, and a party seeking to have the court do so will in its founding papers have to set out a proper basis for the court to do so, supported by the necessary evidence. A court in that situation, and after considering the case made out for the exercise of its jurisdiction, may either—

(a) make an order directing that the dispute will be adjudicated via a wide appeal only and refuse to exercise its review jurisdiction; or

(b) make an order directing that the dispute will be adjudicated via a review, and that the adjudication of the wide appeal will be deferred pending the determination of the review.

Submissions on the Canadian cases

[146] This judgment does not rely on *Dow Chemicals* and *Iris Technologies* in its conclusion as it is not necessary to do so, and since these cases were decided in a unique statutory context that is different from the CEA and PAJA. RBCT's reliance on the purported distinction between discretionary and non-discretionary determinations in our law only by reference to these two authorities without more cannot be sustained for present purposes.

[147] In *Iris Technologies*, the taxpayer claimed tax refunds under the Canadian Excise Tax Act[154] (ETA). The Minister undertook an audit and issued an assessment disallowing the input tax credits and assessed penalties. Section 302 of the ETA provides that an aggrieved taxpayer who is dissatisfied with an assessment may, after the exhaustion of an objection procedure, appeal to the Tax Court. In Canada, the Federal Court has exclusive jurisdiction to hear any application for judicial review under section 18(1) of the Federal Courts Act[155] (FCA). Section 18.5 of the FCA provides that if an Act of Parliament expressly provides for an appeal to, amongst others, the Tax Court, from a decision or order of a federal board, commission or other tribunal, that decision or order is not, to the extent that it can be so appealed, subject to judicial review, except in accordance with the Act, which in *Iris Technologies* is a reference to the ETA.

[148] The Supreme Court of Canada had to consider the relationship between section 302 of the ETA and section 18.5 of the FCA and consider whether the latter confined an aggrieved Canadian taxpayer to an appeal to the Tax Court. It was in this specific unique statutory context that the Supreme Court of Canada drew the distinction between discretionary and non-discretionary decisions to conclude that section 18.5 of the FCA did not in effect operate as a complete ouster of the Federal Court's jurisdiction to hear a review. The Supreme Court of Canada in *Dow Chemicals* also had to consider the impact of section 18.5 of the FCA in the context of a request for a downward transfer pricing adjustment under section 247(10) of Canada's Income Tax Act,[156] which it held was of a discretionary nature that was distinct from an assessment.[157]

[149] In the context of this dispute, there is no equivalent of section 18.5 of the FCA in PAJA. Therefore, RBCT's reliance on these two authorities to support the distinction

[154] RSC 1985 c E-15.

[155] RSC 1985 c F-7.

[156] RSC 1985 c 1 (5th Supp).

[157] *Dow Chemicals* above n 42 at paras 7 and 97-101.

between discretionary and non-discretionary decisions is not central to the core dispute in this case, and it is thus not necessary to deal with that in this judgment. There may well be something to be said about the discretionary nature of the decisions taken by SARS and how they will interact in the context where both a wide appeal and review are available. This is not an issue that is necessary to delve into in this judgment and I leave it open for adjudication in a more appropriate matter.

Must a court compel production of the record if it refuses, or is still to determine whether, to exercise its review jurisdiction?

[150] Having concluded that both remedies co-exist, but that a court can refuse to exercise its review jurisdiction if the wide appeal is the more appropriate mechanism in the circumstances, what is left is the question of the rule 53 record. I am guided by this Court's decision in *Standard Bank*.[158] There, this Court was asked to decide whether the Competition Appeal Court, as a first instance court, could order the production of the rule 53 record when its jurisdiction to adjudicate the review was in dispute.[159] This Court held that the Competition Appeal Court could not do so, because to order production of the record without determining its jurisdiction would lead to an order that would become a nullity if the Competition Appeal Court found that it had no review jurisdiction.[160]

[151] This Court then proceeded to state the now trite principle, that once a party successfully establishes the jurisdiction of a court on the basis of its founding papers,[161] a party is entitled to a rule 53 record.[162] The importance of the rule 53 record to review

[158] *Standard Bank* above n 15.

[159] Id at para 112.

[160] Id at para 118.

[161] *Gcaba v Minister for Safety and Security* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC) at para 75.

[162] *Standard Bank* above n 15 at paras 120 and 202-3.

proceedings cannot be gainsaid. It not only benefits the party requesting the record, but also assists both the court and the respondent.[163] As this Court said in *Helen Suzman*:

> "The purpose of rule 53 is to 'facilitate and regulate applications for review'. The requirement in rule 53(1)(b) that the decision-maker file the record of decision is primarily intended to operate in favour of an applicant in review proceedings. It helps ensure that review proceedings are not launched in the dark. The record enables the applicant and the court fully and properly to assess the lawfulness of the decision-making process. It allows an applicant to interrogate the decision and, if necessary, to amend its notice of motion and supplement its grounds for review.
>
> Our courts have recognised that rule 53 plays a vital role in enabling a court to perform its constitutionally entrenched review function:
>
> > 'Without the record a court cannot perform its constitutionally entrenched review function, with the result that a litigant's right in terms of section 34 of the Constitution to have a justiciable dispute decided in a fair public hearing before a court with all the issues being ventilated, would be infringed.'"[164]

[152] I set out what occurred in *Standard Bank* to illustrate how it differs from the present matter. This brings me to the question, does the same principle apply if the court refuses to exercise its review jurisdiction? In the present matter, and given my conclusion regarding ouster, I have found that the High Court retains its review jurisdiction. It may then appear that, since judicial review is available to a taxpayer, the Court's review jurisdiction is not in dispute and that the taxpayer should be entitled to production of the record, on the authority of *Standard Bank* and *Helen Suzman*. However, my conclusion that a court may refuse to exercise its jurisdiction changes the answer to whether the taxpayer is still entitled to the record once a court's jurisdiction is established.

[163] *Helen Suzman* above n 30 at paras 13-15.

[164] Id at paras 13-14.

[153] The reasoning in *Standard Bank* is apposite in this regard. There, this Court held that the production of the record where the jurisdiction of the court was in dispute could result in an order that is a nullity. There are two policy bases behind preventing an order that results in a nullity. The first is that a court seeks to avoid making ineffective orders. The second is that it would be a waste of judicial resources for a court to engage in fruitless exercises such as ordering the production of a record when it is unclear that a review will ever proceed.[165] Here, if the court refuses to exercise its review jurisdiction, the production of the record will result in ordering the production of the record in a matter that will not be considered. So, the same policy bases apply here, because even if a court has the jurisdiction to make the order, it should not do so because the order will be ineffective if it ultimately decides not to exercise its jurisdiction to hear the review.

[154] Therefore, in my view, if a court has decided not to entertain a review, then the review will not be considered. Where review jurisdiction is not exercised, the right to a rule 53 record falls away.[166] This negates the need for the rule 53 record, since the purpose of the record is to assist a party in advancing its prosecution of the review and to assist a court in performing its constitutionally entrenched review function. Therefore, a party is not entitled to the production of a rule 53 record if a court has refused to exercise its review jurisdiction.

[155] A question necessarily arises from this conclusion: what if the court is asked to compel the production of the record at a time when it has not yet refused the review? The conclusion above indicates that the court will have to make a threshold determination on whether it will exercise its review jurisdiction before it compels the decision-maker to produce the record. If this narrow aspect becomes the subject of a dispute, this may have negative implications for the timelines set out in rule 53 itself.

[165] *Standard Bank* above n 15 at para 201.

[166] Id at para 203.

[156] Rule 53(1)(b) states that the applicant bringing a review shall call upon the decision-maker to dispatch the record within 15 days of receipt of the notice of motion. Rule 53(4) states that the applicant may amend, add to or vary their application within ten days after the record has been made available. In terms of rule 53(5)(a), the decision-maker must deliver their notice to oppose the review application within 15 days of receipt of the original or amended notice of motion. The decision-maker must then in terms of rule 53(5)(b), deliver its affidavits within 30 days after the ten-day period within which the applicant may amend, add or vary their application.

[157] The effect of the conclusion above is that, in the specific context where a taxpayer seeks to prosecute a review when a section 47(9)(e) appeal is available, a court must first determine the threshold question whether it will exercise its jurisdiction to entertain the review. The threshold enquiry obviously only applies if a litigant in this context seeks to prosecute a review or seeks to prosecute both a wide appeal and review concurrently or in the alternative. If a party seeks only to prosecute an appeal under section 47(9)(e), none of what I say here applies, since rule 53 would not be implicated in that scenario. This is a natural consequence of the distinction between wide appeal proceedings and review proceedings discussed extensively earlier in this judgment.

[158] When a party brings an application for proceedings which are subject to the threshold determination, the timelines contained in rule 53 will only apply once the court decides to exercise its review jurisdiction and the taxpayer has been granted leave to pursue the review application. This also means that, upon delivery of the rule 53 notice, the respondent would be placed on terms to produce the record, but those terms will only become effective once the court has made the threshold determination. Therefore, the timelines in rule 53 will become operative only once the threshold determination is made.

The reliance on rule 35(11)

[159] In its rule 30A application RBCT also relied on rule 35(11) as an alternative means by which to obtain production of the record, contending that, even if the

documents are found not be discoverable under rule 53(1)(b), they nevertheless fall to be discovered under rule 35(11). The documents to which reference is made are the record and not any separate or identifiable documents.

[160] SARS, in opposing the reliance by RBCT on rule 35(11), takes the view that under rule 35(11) a court could order the production of specific documents, and that a party seeking the same was required to specify the documents it sought, and to indicate how they related to an issue in the proceedings. It disputes that RBCT could simply make a blanket request as it did without addressing the question of relevance.

[161] The High Court, having made an order under rule 53(1)(b) for the production of the record, did not address the relief sought under rule 35(11). I do so, briefly, given the order we intend to make. The basis for the relief under rule 53(1)(b) and rule 35(11) is indeed different and it is not open to RBCT to seek the record under the guise of rule 35(11). If it takes the stance that rule 35(11) is an avenue of relief open to it then it must comply with the rule, bring the application at the opportune time, specify the documents it seeks and indicate why they are relevant. The High Court will then be in a position to make a proper determination under rule 35(11).

Conclusion

[162] Both the High Court and the Supreme Court of Appeal disposed of the matter on the basis that the High Court's review jurisdiction was not ousted, and that nothing stood in the way of RBCT seeking review relief together with the wide appeal. It was on this basis that those Courts found that RBCT was entitled to a record under rule 53.

[163] Given the contrary conclusion reached by this Court, it would have been incumbent upon the High Court to determine whether to exercise its review jurisdiction, and, in doing so, satisfy itself that RBCT had advanced sufficient reasons why they would have been entitled to proceed by way of review. The High Court would also have had an opportunity to determine which rule RBCT ought to rely on to obtain

documents from SARS flowing from its conclusion relating to the exercise of its review jurisdiction.

[164] The High Court did not undertake such an enquiry, largely because it laboured under the belief that it did not have discretion on how it could exercise its review jurisdiction.

[165] Under those circumstances, that determination must first be made by the High Court. This Court would not be in a position do so, largely because it has not had the benefit of argument or submissions on that issue. Under these circumstances it would be appropriate to set aside the orders of the High Court and the Supreme Court of Appeal and, in their place, make an order remitting the matter to the High Court to deal with in accordance with the principles set out in this judgment.

Costs

[166] Given that the parties have all achieved some measure of success in what is a novel issue, the appropriate order as to costs would be that the parties should be responsible for their own costs in this Court, the Supreme Court of Appeal and the High Court.

Order

[167] The following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The orders of the High Court and the Supreme Court of Appeal are set aside and substituted with the following:

   "(a) The application in terms of rule 30A is referred to the High Court for redetermination and, in doing so, the High Court is required to—

      (i) determine whether, regard being had to the existence of a wide appeal under section 47(9)(e) of the Customs and Excise Act

91 of 1964, the respondent has made out a case justifying the exercise of that Court's review jurisdiction.

(ii) make an order arising from that determination and of the kind contained in [145] of this judgment."

4. The parties are ordered to pay their own costs in this Court, the Supreme Court of Appeal and the High Court.

For the Applicants:	J Pammenter SC, G Marcus SC and M Mbikiwa instructed by Linda Mazibuko and Associates
For the Respondent:	M Chaskalson SC instructed by Shepstone and Wylie (the heads of argument having been prepared by M Chaskalson SC and S Pudifin-Jones)