

Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Before: Acting Justice HJ De Waal
Date of hearing: 22 November 2023
Date of judgment: 18 January 2024 (handed down electronically)

Case No: 8808 / 2020

**THE PETROLEUM OIL AND GAS CORPORATION
OF SOUTH AFRICA (SOC) LTD**

Applicant

and

**THE COMMISSIONER FOR THE SOUTH AFRICAN
REVENUE SERVICE**

First Respondent

THE MINISTER OF FINANCE

Second Respondent

JUDGMENT

DE WAAL AJ:

Introduction

- [1] The Applicant (“**PetroSA**”) is the licensee of a customs and excise manufacturing warehouse (known as a “**VM**”), which is situated at Mossel Bay. Manufactured fuel levy goods, as defined in the Customs and Excise Act 91 of 1964 (“**the Act**”), attract the payment of an excise duty and a fuel levy and a Road Accident Fund (“**RAF**”) levy. Schedule 6, Part 1F of the Act deals with the excise duty and Part 3 deals with the fuel and RAF levies.
- [2] Then there are also Rules adopted under s19A of the Act (“**the Rules**”). Relevant for present purposes are the Rules relating to customs and excise warehouses in which excisable or fuel levy goods are manufactured or stored and the Rules relating to the manufacture, payment of duty and controlled movement of fuel levy goods. The Rules numbered 19A are general Rules and those numbered 19A4 are specific Rules in respect of fuel levy goods.
- [3] The excise duty and the levies are payable to the First Respondent (“**SARS**”) when the fuel goods leave the VM.¹ They are then deemed to have been entered into the country for home consumption, even though they may be destined for exportation to neighbouring countries, such as Botswana, Lesotho, Namibia or Swaziland (“**BLNS countries**”) or other African countries. Exports to BLNS countries are referred to as “*removals*” and exports to other foreign countries are referred to as “*exports*”.
- [4] Once they leave the VM and the duty and levies are paid, the fuel goods become “*duty paid stock*”. However, in terms of s75(1)(d) read with Schedule 6 of the Act, a licensee is entitled to a refund of the excise duty and the fuel levies in respect of removed or

¹ Rule 19A4.02(a)(i).

exported goods provided that the statutory requirements are met. In terms of s77 of the Act, such a refund may be set-off in the licensee's monthly excise account (DA160 account).

- [5] The present matter is concerned with the question of whether PetroSA is entitled to a refund in respect of certain transactions concluded during a specific audit period, more particularly from May 2015 up to and including March 2017 ("**the audit period**"). It is common cause that the duties and levies were paid on the fuel goods and that the set-off was effected by PetroSA. The question is whether PetroSA was entitled to the set-off (effectively a refund of the duty and levies paid) on the basis that if the fuel goods were removed or exported and PetroSA complied with the legal requirements for the refund.

Factual background

- [6] The audit referred to above included a letter of engagement from SARS to PetroSA dated 17 May 2017; a SARS notice of intent to assess dated 16 August 2019; a response from PetroSA dated 29 November 2019; and a letter of demand from SARS dated 18 February 2020.
- [7] The letter of demand, which sets out the final position taken by SARS contained three findings adverse to PetroSA.
- [8] Finding 1 was that PetroSA underdeclared volumes removed from PetroSA's VM resulting in underpayments of duties and levies. Finding 1 was abandoned by SARS in its answering affidavit before this Court. Nothing more need to be said about this finding.

[9] Findings 2 and 3 are determinations in terms of s47(9)(a)(i)(bb)² of the Act to the effect that PetroSA is not entitled to the off-set because:

9.1. Export acquittal documentation was absent, inadequate or not provided in substantiation of the account set-off. This will be referred to as “*Finding 2*”.

9.2. Fuel had been exported from unlicensed facilities, i.e. the fuel was not removed or exported from a storage tank owned by or under control of a licensee of a VM or a special customs and excise storage warehouse (“SOS”). This will be referred to as “*Finding 3*”.

[10] The matter is complicated in that it involves some 10 000 transactions which took place during the audit period. PetroSA’s claim for a refund concerns a variety of transactions, namely:

10.1. Fuel goods transported by rail from the PetroSA’s VM to an unlicensed facility in Bloemfontein and from there removed to Botswana or Lesotho by road or by pipeline.

10.2. Fuel goods purchased by PetroSA from oil companies such as BP, Shell, Sasol and Chevron, which were uploaded and removed or exported to African

² Section 47(9)(a)(i) provides as follows:

“(9) (a) (i) The Commissioner may in writing determine-

- (aa) the tariff headings, tariff subheadings or tariff items or other items of any Schedule under which any imported goods, goods manufactured in the Republic or goods exported shall be classified; or
- (bb) whether goods so classified under such tariff headings, tariff subheadings, tariff items or other items of Schedule 3, 4, 5 or 6 may be used, manufactured, exported or otherwise disposed of or have been used, manufactured, exported or otherwise disposed of as provided in such tariff items or other items specified in any such Schedule.

The present matter is not concerned with the classification of goods (para (aa) above) but with whether the fuel goods had been exported as provided in the items (para (bb) above).

countries from unlicensed facilities, including from PetroSA's own facilities at Bloemfontein and Tzaneen; the pipeline network at Tarlton; and facilities at Waltloo and Alrode.

10.3. Fuel goods removed or exported through intermediary traders to the ultimate customer in another African country.

[11] Prior to engaging into the relevant transactions, PetroSA consulted with and provided its business model to SARS in 2012. SARS did not object to the business model at the time. The relevance of this will become clear later.

[12] PetroSA is appealing against the two determinations in terms of s47(9)(e) of the Act, which provides as follows:

“(e) 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.”

[13] In some tax matters such as the present one, a Court is required to decide an appeal on the merits, i.e. whether the determinations (Findings 2 and 3) are right or wrong. In the present matter this includes assessing whether the determinations are contrary to a practice generally prevailing during the audit period, as contemplated in s44(11A) of the Act, which practice was allegedly that fuel goods removed or exported from unlicensed facilities qualified for set-offs. It also includes assessing whether the determinations are based on a sound interpretation of the Act and whether PetroSA's business model was approved by SARS in a determination.

[14] Apart from the appeal on the merits, PetroSA submits that:

- 14.1. In its answering papers in the appeal, SARS raised a number of new grounds on which it claims that PetroSA was not entitled to the set-off, namely that the fuel had not been removed or exported (including that the records of home affairs do not support the claim of exportation); that PetroSA was not the true exporter (the intermediaries were); and that PetroSA did not make use of a licensed remover of goods in bond (“**ROG**”) for the removals.
- 14.2. SARS may not introduce new and different justifications for the determinations in its answering papers. These new justifications must be struck out on the basis that they are irrelevant (they did not form the basis of the determination) and vexatious (they contain allegations of fraud which do not appear in the letter of demand).
- 14.3. Finding 2, at least the part which found that the acquittal documents pertaining to some of the intermediaries were non-compliant was made in a procedurally unfair matter. This part of Finding 2 was not made in the letter of intent and PetroSA was not given an opportunity to deal therewith. PetroSA has instituted a review in respect of this part under the Promotion of Administrative Justice Act 3 of 2000 (“**PAJA**”) on the basis of procedural unfairness. This is the PAJA review.
- 14.4. The determinations and/or the Rules are irrational. This is the constitutional review.

[15] In Case No 21471, PetroSA successfully applied to the Gauteng Division of the High Court, Pretoria for the suspension of payment, pending the outcome of the present appeal.³ The Judgment, per Makhubele J, reserved the costs of that application for adjudication in the present matter.

[16] In what follows, I deal with the nature of the appeal and the strike-out and thereafter with the merits and the PAJA and constitutional reviews. Before that it is necessary to dispose of two other interlocutories (other than the strike-out).

Interlocutory applications

[17] Firstly, leave was sought by PetroSA for the admission of a supplementary founding affidavit, on the grounds set out in said affidavit dated 31 July 2020. The introduction of this affidavit was not opposed by SARS and its contents were dealt with in the answering affidavit. Leave for its admission is granted, with the costs occasioned by the application to be costs in the cause.

[18] Secondly, little more than a month before the hearing, on 18 October 2023, PetroSA brought an application for the admission of a further affidavit containing evidence regarding the licensing of Tarlton as an SOS. The application is opposed by SARS on grounds set out in affidavits filed on 19 November 2023 (the day before the hearing). If granted, SARS seeks a proper and adequate opportunity to deal with the further evidence. In other words, a postponement will be required. At the outset of the hearing, counsel for PetroSA, Mr JP Vorster SC, who appeared with Ms HJ Snyman, indicated that his client was not proceeding with this application. In the circumstances nothing

³ The full citation is Petroleum Oil and Gas Corporation of South Africa (SOC) Ltd vs The Commissioner for the South African Revenue Service Case No: 21471 / 2020. I shall refer to this Judgment as the Gauteng Suspension Judgment.

further need to be said about it, save that SARS is entitled to the costs occasioned by opposing this application.

The nature of the appeal and the strike-out

[19] It is common cause that the appeal is a wide appeal, involving a complete rehearing and determination of the merits.

[20] PetroSA however contends that this does not mean that the scope of the appeal can extend beyond the correctness of the determinations made by SARS. In other words, PetroSA contends that it remains an “*appeal*” against what was determined by SARS and that the nature of the determinations accordingly limit the scope of the appeal. SARS is not entitled to make new determinations in its answering affidavits. The appeal is not a “*tabula rasa*”, as counsel for PetroSA called it.

[21] In this regard, counsel of PetroSA referred me to the following *dictum* in **Commissioner SARS v Levi Strauss SA (Pty) Ltd** [2021] 2 All SA 645 (SCA); 2021 (4) SA 76 (SCA) (7 April 2021):

“[26] I do not think this argument is open to SARS on these papers. An appeal under s49(7)(b) of the Act is an appeal against the determination. While it is an appeal in the wide sense, involving a complete re-hearing and determination of the merits, it remains an appeal against what was determined in the determination and nothing more. It is open to SARS to defend its determination on any legitimate ground, but it is not an opportunity for it to make a wholly different determination, albeit one with similar effect.” (my underlining)

[22] With respect, it is not entirely clear what the SCA meant with the statement that it was open to SARS to defend its determination on “*any legitimate ground*”. Would it

include, as was contended by Mr J Peter SC who appeared for SARS, that SARS could rely on an entirely new basis for the determination that PetroSA was not entitled to the set-offs? Not so, in my view. I say so for the following reasons:

- 22.1. Firstly, the SCA in Levi Strauss held that the appeal remains an appeal against what was determined in the determination and “*nothing more*”. What is “*determined*” is not simply the outcome of whether the taxpayer is entitled or not to the set-off, but the basis for that outcome, i.e. the reasoning. That is “*what*” is determined by SARS.
- 22.2. Secondly, the Full Bench of this Division put matters beyond doubt when it held in Tunica Trading 59 (Proprietary) Limited v Commissioner, South African Revenue Service [2022] ZAWCHC 52; [2022] 4 All SA 571 (WCC); 85 SATC 185 (21 April 2022) at para [89] that: “*In its judgment at page 13 line 10, the court a quo said the following: It was the discovery of the non-compliance and widespread fraud that triggered the auditing of all claims including this one*”. *In refusing the appeal the court clearly considered factors far wider than those which formed the basis of the September 2015 decision.* *In fact, it considered the process launched by SARS as an audit and it then sought to determine for itself whether all the regulatory provisions had been met. This approach was clearly impermissible. The existence of a wide appeal does not mean that an appellate authority may extend the enquiry beyond the ambit of the decision which is being appealed. The rehearing must be related to the limited issue of whether the party appealing should have been successful.*” It is the “*basis*” of the determination which is appealed against, not just the outcome.

- 22.3. Thirdly, Tunica Trading refers to the SCA decision of Groenewald NO and Others v M5 Developments (Cape) (Pty) Ltd 2010 (5) SA 82 (SCA) at paras 24 –25 where the SCA held that the appellant’s reasons define the ambit of the appeal, the sole issue being whether the *appellant should succeed for the reasons it has advanced*.
- 22.4. Fourthly, the appeal is decided on motion by a Court. It would be unworkable if the respondent can introduce a new basis or justification for the determination in its answering papers. How would the appellant know about such a new justification of the determination so as to enable it to deal with same in the founding affidavit? Surely it cannot be fair to allow a respondent to introduce a new justification in the answering affidavit and then non-suit the appellant on that basis that it then seeks to make out a case in reply?
- 22.5. Finally, what would be the purpose of the initial investigation by SARS if the Court is required to reassess liability entirely? I do not believe that the legislature had in mind two totally separate and independent processes. In my view the initial investigation must form the basis of the determination and the appeal. The Court is ill-equipped in motion proceedings to assess the matter entirely afresh years down the line. Take the present matter as an example: it is now seven years after the (beginning) of the audit period. As pointed out by counsel for PetroSA, how can it now be expected to obtain and produce records from third parties such as affidavits from truck drivers to counter an entirely new basis for the determination?

[23] In researching the issue I came across an unreported judgment of Moloti AJ *sub nom* Tholo Energy Services CC v Commissioner for the South African Revenue Service

[2023] ZAGPPHC 1590; 47405/2020 (3 February 2023), which I do not believe I was referred to by counsel. In this judgment, the learned Acting Judge held as follows:

“[51] ... since this appeal is a rehearing of the matter on the merits, the respondent was permitted and entitled to rely on additional grounds disallowing the refund of the Applicant. The additional grounds were legitimate and formed a nexus with the initial determination. The respondent did not provide a wholly different determination. The determination never changed. The determination was that the Applicant’s claim for a refund was refused.

[52] This was the final determination of 20 July 2017. The additional grounds relied upon by the respondent in his answering affidavit, did not mean that the respondent changed his determination of 20 July 2017. The character of an appeal being a hearing de novo, provided the respondent with an opportunity to provide additional grounds for refusing to grant a claim for refund. It was therefore permissible in law for the respondent in his answering affidavit to provide additional grounds of refusing the claim for refund. There is certainly nothing wrong with such an approach. The respondent, for the purposes of appeal, is not bound to solely rely on the reasons provided on his determination of 20 July 2017. There was therefore nothing unfair by the respondent in relying on the additional grounds.”

[24] To the extent that it is suggested in Tholo that the determination is simply that the refund is disallowed and that SARS, as a respondent in the appeal, may introduce any new basis for such a “*determination*” in the appeal proceedings before the Court, Tholo is inconsistent with Tunica Trading, to which I am bound. I in any event fully agree with the reasoning in Tunica Trading, and attempted to expand thereon above.

[25] Given this conclusion, the new justifications of the determination listed above and sought to be introduced in paragraphs 39, 40, 49.3 and 61 of the answering affidavit cannot be considered and are irrelevant. They fall to be struck out and there is no reason

why costs should not be awarded against SARS in respect of the strike out application. I should add that whilst the new justifications are largely contained in the challenged paragraphs they have spilled over to others as well, paragraph 60 of the SARS answering affidavit, for example. To the extent not struck out, the new justifications should simply be disregarded as irrelevant.

[26] In any event, although not necessary to decide, I doubt that there is merit in all of SARS' new allegations. PetroSA could only deal with these in its replying affidavit to which I must have regard in assessing the veracity of the new allegations. I will briefly deal with the new justifications below.

[27] Before I do so, I should at this point record that on 12 January 2024, when this judgment was nearly finalised, two judgments were handed down which appeared to me to be potentially relevant. They are BP Southern Africa (Pty) Ltd v Commissioner for the South African Revenue Service (801/2022) [2024] ZASCA 2 (12 January 2024) and BP Southern Africa (Pty) Ltd v Commissioner for the South African Revenue Service (2021/49805) [2024] ZAGPPHC 1 (12 January 2024). I invited further written submission regarding the relevance of the judgments. SARS submitted further submissions. I shall refer to the judgments as BP SCA and BP Gauteng, respectively.

[28] My views on the new justifications are as follows:

28.1. It is clear from the materials presented by PetroSA to SARS that the fuel goods were in fact exported. Sufficient evidence was submitted by way of affidavits,⁴

⁴ In BP Gauteng, the Court held that the best evidence of the fact that the fuel goods crossed the border would be an affidavit from a person who physically took the fuel across the border. In that case such an affidavit was not produced. In the present instance PetroSA's position is that, where necessary, acquittal of export entries was based on affidavits. The factual position is accordingly not the same as in BP Gauteng. SARS contended that

the attachments thereto,⁵ as well as the CN1 and CN2 forms. The latter according to SARS in a communication of September 2021, serve as definitive proof of exportation and are printed from SARS' own system.⁶ The dispute in the present matter has been about whether there was material compliance with mandatory criteria for claiming the refund / set-off and not whether there had in fact been removal or exportation of the fuel goods.

28.2. I also do not agree with the new allegation that PetroSA made fraudulent representations, for instance that it falsely represented that it exported the goods whereas in fact intermediaries took delivery at the depots and was responsible for the export from there. As stated above, as early as 16 May 2012, PetroSA disclosed its business model, including the involvement of the intermediaries and ask SARS whether the intended practice would be acceptable. In response and in a letter dated 6 August 2013, SARS

Petro SA did not obtain approval to submit affidavits as proof of export in the absence of the relevant original export documentation.

⁵ As an example, the following was provided in respect of Tswana Fuel transactions:

- Affidavit from Turners Shipping reflecting inter alia that the goods were delivered at the delivery destination.
- SAD 500
- SAD 502
- Customs release notification
- Road manifest
- Pro forma invoice
- CN 1 and CN2
- Signed delivery notes
- Assessment notice issued and endorsed by the Botswana Revenue Service
- SAD 500 endorsed by the Botswana Revenue Service
- Road delivery docket issued by Transnet Pipelines at Tarlton
- Valve Seal Summary.

⁶ In BP SCA, the following is stated:

"[8] When any fuel is transported by road for export purposes, the removal must be done by a licensed remover of goods in bond, unless the licensee or a licensed distributor carries the goods. After the exportation of the fuel, the exporter claims a refund based on all the documents relating to the movement of the fuel from South Africa to the foreign country. The final documents, the customs notification documents (CN1 and CN2), are referred to as acquittals."

indicated that PetroSA should make due clearance as the exporter. This was not based on technicalities. PetroSA retained title of the fuel goods until the trucks crossed the border and it was accordingly the exporter as defined in s1 of the Act. The Act contains a broad definition of the term “*exporter*”.⁷ PetroSA was clearly as exporter as defined because it was a party who was “*beneficially interested*”⁸ in any way whatever in any goods exported”. PetroSA had various terms of payment with its customers, some of which were on a credit basis so that it retained a beneficial interest in the goods at the time of export. Moreover, the INCOTERM (2010), which PetroSA agreed with its customers since 2014 was on a free carrier (“FCA”) basis in terms of which the seller carry out and pay for all export and transit clearance formalities. The seller (PetroSA) was therefore responsible for the export.

28.3. PetroSA disclosed that it was not using its own transport and obtain copies of the ROG licences at the time of exports. The name and registration number of the ROG was recorded in the road freight manifest. PetroSA contends that there is no reason to doubt that the transporters nominated were not in fact being utilised as the transporters for the consignments concerned.⁹ In my view,

⁷ In terms of the Act, “*exporter*” includes any person who, at the time of exportation-

- (a) owns any goods exported;
- (b) carries the risk of any goods exported;
- (c) represents that or acts as if he is the exporter or owner of any goods exported;
- (d) actually takes or attempts to take any goods from the Republic;
- (e) is beneficially interested in any way whatever in any goods exported;
- (f) acts on behalf of any person referred to in paragraph (a), (b), (c), (d) or (e), and, in relation to imported goods, includes the manufacturer, supplier or shipper of such goods or any person inside or outside the Republic representing or acting on behalf of such manufacturer, supplier or shipper.”

⁸ The term “*beneficial interest*” has a wide meaning. See, in general regarding the term: **Independent Community Pharmacy Association v Clicks Group Ltd and Others** (CCT 11/22) [2023] ZACC 10; 2023 (6) BCLR 617 (CC) (28 March 2023).

⁹ The position was different in **BP Gauteng**, where at para 35 of the Judgement it was recorded that it was accepted in argument that BP had no idea whether the specimen consignment or indeed most of the assignments was removed from the Tarlton tank by a licenced removers of goods.

had this issue been properly raised it may have created problems for PetroSA.

~~But it shows how difficult it is to deal with matters not raised in the letter of~~
intent, but many years down the line in the answering affidavit. It ought to
have been raised during the audit process.

[29] I now turn to deal separately with Findings 2 and 3, as per the letters of intent and demand.

Finding 2

(i) The original determination as per the letter of intent and letter of demand

[30] The determination in the letter of intent followed by the letter of demand in respect of Finding 2 was that PetroSA did not submit a request for approval to the relevant excise office in order to submit affidavits as proof of export in the absence of the relevant original export documentation.

[31] The requirements to substantiate a set-off are contained in the Rules, more particularly in Rule 19A4.04(b)(ii)(ff). This Rule requires duly completed copies of forms SAD 500 and 502 to accompany the monthly account in support of set-off of the duty against the amount due and payable on that account, or an application for a refund of duty by the licensed distributor.

[32] It is a requirement to obtain proof of the export as prescribed in the Rules.

[33] However, Rule 19A4.04(e) makes provision for an affidavit to be provided in circumstances where a person cannot produce a document containing a statement or

declaration. Prior approval is not required for reliance on the Rule.¹⁰ The Rule merely requires the person, for purposes of acquittal, to furnish an affidavit regarding the circumstances in which the document was lost; a declaration to the effect that the goods were duly delivered at the destination in the prescribed bill of entry or other document under cover of which the goods were removed; and supporting documentary evidence as may be required by the Commissioner. This procedure was relied upon by PetroSA.

[34] In the letter of intent, SARS contended that, without supporting documentation, the case officers could not verify that the product was duly exported.

[35] PetroSA disputed this in the letter of response, indicating that the affidavits included copies of the export documents.

[36] In my view compliance, or at least material compliance, with the requirements of the Rules were proven by PetroSA. This was done through provision of affidavits; the SAD500 and SAD502 documents; the CN1 and CN2 documents; as well as the delivery notes which recorded that fuel had been delivered in the country of destination. The purpose of the requirement, which is to provide proof of removal or export, was achieved. In Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC), the Constitutional Court held as follows:

¹⁰ See, also, the Gauteng Suspension Judgment where the following is recorded at para 72:

“[72] The commissioner complained that the applicant did not seek approval to use affidavits. The applicant stated in the founding affidavit that there was no such requirement in the legislation to seek approval to submit an affidavit. The commissioner does not address this averment in the answering affidavit.”

“[30] Assessing the materiality of compliance with legal requirements in our administrative law is, fortunately, an exercise unencumbered by excessive formality. It was not always so. Formal distinctions were drawn between “mandatory” or “peremptory” provisions on the one hand and “directory” ones on the other, the former needing strict compliance on pain of non-validity, and the latter only substantial compliance or even non-compliance. That strict mechanical approach has been discarded. Although a number of factors need to be considered in this kind of enquiry, the central element is to link the question of compliance to the purpose of the provision.” (my underlining)

[37] In the present instance I am satisfied that there was material compliance with the requirements in the Rules and the purpose of the requirements (to provide proof of removal / export) was achieved.

(ii) The new determination in the letter of demand

[38] PetroSA contends that, in the letter of demand, SARS made further determinations in respect of Finding 2, which had not been foreshadowed in the letter of intent. This relates to the entities Masiquame (sic), World Marine, Seraj, AIP Botswana, Afrolink and Mount Mero and more particularly claims by SARS that in respect of these clients there were further deficiencies in the documentation, namely that:

38.1. dates as per the SAD500 (field18) differed from the declaration dates on the SAD 500;

38.2. numerous transactions did not have customs stamps on the export side;

38.3. for numerous transactions, the dates on the CN1 and CN2 are a few months apart; and

38.4. no commercial invoices were provided for various transactions.

[39] PetroSA contends that these determinations were made in a procedurally unfair manner and contrary to PAJA as it was never given an opportunity to deal with them in the letter of response. PetroSA also contends that some of these alleged shortcomings were formulated in an impermissibly vague manner.

[40] PetroSA nevertheless dealt with the alleged shortcomings in its founding affidavit. A review under PAJA based on procedural fairness and impermissible vagueness is only brought in the alternative.

[41] I do not believe that the shortcomings are material within the meaning of the term in Allpay. Certainly, given the following further evidence provided by PetroSA in the founding affidavit in the review, which were not pertinently disputed in the answering affidavits or at the hearing, the new alleged irregularities cannot be regarded as material:

41.1. The explanation for the differing dates on the SAD500 is that the one is the date of processing and the other the date of re-printing.

41.2. Modernisation of the acquittal system and the introduction of e-filing in 2013 meant that export documents are no longer stamped by SARS officials at the South African border.

41.3. The date on the CN1 is the assessment date and the one on the CN2 is the date of re-printing.

41.4. The commercial invoices were provided for transactions where this was queried

(iii) The review (brought in the alternative)

[42] My finding on the merits disposes of the need to decide the PAJA review, which was brought in the alternative. I should however add that, contrary to what was contended by counsel for SARS as the hearing of the matter, there can, in my view, be no doubt that a determination made by SARS amounts to administrative action as contemplated in PAJA.¹¹ It would theoretically be possible for an appeal and review to be brought simultaneously in respect of different aspects of the same determination.

[43] There is however a lot to be said for the approach adopted by PetroSA in this matter, which is to focus on dealing with the merits of new allegations in the letter of demand even if they are contended to be reviewable on the grounds of procedural unfairness. I say this because if the review were to be successful in the present instance (which I do not find to be the case) remittal would have resulted in an unnecessary waste of time and money. This is not a matter where the taxpayer was prejudiced by the new points taken in the letter of demand and they could have – and were – dealt with in the appeal along with the rest of the determinations. The position is different in respect of new justifications raised by SARS in its answering affidavit. I dealt with the prejudice caused thereby above.

¹¹ Albeit taken in terms of a different empowering provision, the Full Bench confirmed in Tunica Trading that SARS determinations are administrative actions. The Court held as follows:

“[87] The decision by the court a quo that the February 2017 decision was a section 96 decision which did not constitute reviewable conduct, either in terms of PAJA or on the principle of legality was clearly incorrect. The February 2017 decision was quite clearly a decision in terms of section 77F of the Customs Act and was administrative action. The decision was taken by an organ of state exercising a public power in terms of legislation and had a direct, external legal effect which adversely affected Tunica’s rights. Similar decisions by the Commissioner were held by the Constitutional Court to constitute administrative action. It follows that the February 2017 decision is reviewable.”

[44] For these reasons the review need not be decided and it follows that there is no need to determine the application for exemption from the duty to exhaust an internal remedy either.

Finding 3

[45] The third finding, which applies to all the export entries in the Schedule A to the letter of demand was that the set-off was disallowed because the fuel goods were removed or exported from unlicensed facilities. In respect of this finding, PetroSA makes the following arguments (all in the alternative):

- 45.1. On a proper interpretation, the requirements of Rule 19A4.04(a)(ii) had been complied with.
- 45.2. SARS issued a determination in a letter dated 6 August 2013 on the issue which PetroSA complied with.
- 45.3. A practice generally prevailing has come into existence in terms of which refunds were allowed for removals from unlicensed warehouses, provided that it was duty paid stock.
- 45.4. On the interpretation advanced by SARS, the determinations and/or Rule 19A4.04(a)(ii) read with s75(1)(d) and the relevant rebate items and notes thereto are irrational, to the extent that they provide that refunds may not be set-off when fuel is removed from an unlicensed facility. [The Second Respondent (“**the Minister**”) was joined due to this challenge to the Rules. The Minister filed a notice of intention to oppose but no answering papers. The Minister was also not represented by counsel at the hearing.]

[46] I deal with Finding 3 by first providing a description of the applicable legal provisions and the parties' submissions and then deal with the four alternatives, albeit not in the same order as they are set out above.

(i) Legal provisions and the parties' submissions

[47] The refunds were disallowed on the basis that the fuel goods were removed / exported from unlicensed facilities. More particularly, the determination was that the requirements of Rule 19A4.04(a)(ii) had not been complied with. This Rule provides as follows:

“[ii] Where fuel levy goods are removed for any purpose specified in these rules requiring compliance with a customs and excise procedure either in respect of the removal, movement or receipt thereof, such goods may only be so removed from a storage tank owned by or under control of a licensee of a customs and excise manufacturing or special customs and excise storage warehouse.”

[48] PetroSA's advances two possible interpretations of the Rule in the alternative:

48.1. Firstly, PetroSA contends that Rule 19A4.04(a)(ii) does not require that the fuel be removed from a licensed facility but merely that it must be removed from duty-paid stock, as envisaged in Rule 19A4.04(i)¹² and that the (first) removal must be from a storage tank owned by or under the control of a licensee of a VM or licensee of a SOS. PetroSA argues that there are no further requirements and that, if this is so, the set-offs must be allowed because all of

¹²Rule 19A4.04(a)(i) provides as follows:

“Any fuel goods removed for any purpose by the licensee of a customs and excise warehouse must be removed from stocks which have been entered or are deemed to have been entered for home consumption in accordance with the provisions of these rules, hereafter referred to as duty paid stock.”

the initial removals were from duty paid stock, either from PetroSA's VM or the VM of other licensees.

48.2. Secondly, and in the alternative, PetroSA contends that even if the Rule envisages two or more removals, first from duty-paid stock and thereafter from any other facility until the fuel goods leave the country, there was compliance because the second and further removals were from storage tanks owned by or under control of a licensee. PetroSA argues that there is no requirement that the storage tanks themselves must be licensed. In this regard, PetroSA contends that it is the owner of the Bloemfontein and Tzaneen depots from which the removals took place; that the facilities at Waltloo, Alrode and IVS are under control of Total and Shell, both VM licensees; and that VMs are jointly in control of Tarlton and whilst there, the fuel is accounted for as stock of the relevant VM.¹³

¹³ PetroSA placed some reliance on the decision of the Full Bench in Tunica Trading. That case dealt with the issue of whether fuel goods exported by a licensed distributor in terms of s64F of the Act had been obtained from stocks of a licensee. In that matter, even though the fuel emanated from BP's VM it was supplied from a depot remote from BP's refinery, i.e. also not from a licensed facility. The Full Bench summarised the issue before it as follows (my underlining):

"[17] On 1 April 2015, SARS rejected the refund application on the ground that the fuel was not "purchased from the licensee of a Customs and Excise manufacturing warehouse" namely BPSA, but was instead purchased from what SARS termed "an intermediary" namely Masana, which had purchased it from the "licensed manufacturing warehouse". According to SARS, it was of the view that it was the "intention of the legislator" in the provision of Section 64F(1)(b) that the fuel must be acquired from the licensee of a customs and excise manufacturing warehouse. The wording in s64F clearly permits refunds of duties and levies in respect of fuel 'obtained' from 'stocks of a licensee of a customs and excise manufacturing warehouse', which are the large oil companies like BPSA and Shell and to deliver it for export which includes supplying fuel as stores for foreign-going ships.

[68] In my view, on a proper interpretation of the wording in s64F of the Customs Act, the requirement that a distributor must have obtained the fuel "from stocks of a licensee of a customs and excise manufacturing warehouse" cannot be interpreted to restrict the refund to cases where the fuel was purchased directly from such a licensee, but must include cases where the fuel is purchased from an intermediary like Masana, where the fuel is in fact from the stocks of such licensee, and obtained from those stocks even if not purchased directly. In fact, it is not in issue that at least from 2010 until October 2014, SARS itself had interpreted the Act and rules in such a manner that the refund would be made in these circumstances." (my underlining)

Whilst recognising that the purchase may be made through an intermediary, the Full Bench did not address the issue of whether the fuel goods must be removed from a licensed facility or whether, as contended by PetroSA, it

[49] SARS contends that both of these interpretations would undermine the legislative scheme because once in unlicensed premises the fuel goods leave the controlled environment and it may be mixed with imported fuel or replaced. If this happens there would be no way of proving the goods' provenance because there is no requirement for procedures to be adhered to enable such proof in respect of unlicensed facilities. It is contended further by SARS that Tarlton is owned and controlled by Transnet which is not a licensee and that it would be absurd to contend that the fuel stored there is under control of a licensee, such as PetroSA, BP and others.

[50] For the reasons set out in the next part dealing with the practice generally prevailing during the audit period, and in the conclusion, it is not necessary to or indeed appropriate to decide on the interpretation point.

(ii) Practice generally prevailing

[51] In the notice of motion PetroSA seeks a declaration, in terms of s21 of the Superior Courts Act 10 of 2013, to the effect that a practice generally prevailing, as envisaged in s44(11A) of the Act, had come into existence. This practice pertained to duties and levies set off by licensees on their DA 160 accounts in respect of fuel goods removed or exported from unlicensed storage facilities.

[52] As stated above, all the refunds set off by PetroSA during the audit period, involving thousands of transactions have been disallowed, mainly on the basis that the storage facilities from which the product was ultimately removed prior to export, was not a

suffices that it is duty-paid stock which is removed from a storage tank owned by or under the control of a licensee of a VM or a licensee of an SOS.

licensed warehouse in terms of the Act. This underlies the (initial) claim of SARS for repayment of refunds and related liabilities of over R1 billion.

[53] Section 44(11A) of the Act provides as follows:

“(11A) Notwithstanding anything to the contrary contained in this Act, there shall be no liability for any underpayment on any goods if the duty which should have been paid was, in accordance with the practice generally prevailing at the time of entry for home consumption, not paid or the full amount of duty which should have been paid at the time of entry for home consumption was, in accordance with such practice, not paid, unless the Commissioner is satisfied that the amount of duty which should have been paid was not paid, or that the full amount of duty was not paid due to fraud or misrepresentation or non-disclosure of material facts or any false declaration for purposes of this Act.”

[54] PetroSA contends that, on the assumption that SARS’ interpretation of Rule 19A4.04(a)(ii) is correct, that the duty which ought to have been paid was not paid as it had been refunded in accordance with the practice generally prevailing at the time.

[55] Section 44(11A) of the Act has been interpreted in CIR v SA Mutual Unit Trust Management Co Ltd 1990 (4) SA 529 (A). In that Judgment the approach to the section was relaxed somewhat in that the SCA held that personal knowledge and approval of the alleged practice by the Commissioner is not necessary. The approach to be followed is described at p.536E-I as follows (my underlining):

“It seems to me, with respect, that what was stated by Berman J, as set forth above, places insufficient emphasis upon what is actually done in the different offices of the Department of Inland Revenue in the assessment of taxpayers. I also am of the view that it may be misleading to suggest as a requisite personal knowledge and approval of the practice on the part of the Commissioner.

Although in terms of s 2(1) of the Act the Commissioner is the official responsible for carrying out the provisions of the Act, under s 3(1) the powers and duties thereby imposed upon him may be exercised or performed by him personally or by any officer engaged in carrying out the provisions of the Act ‘... under the control, direction or supervision of the Commissioner’. At all events, a practice ‘generally prevailing’ is one which is applied generally in the different offices of the Department in the assessment of taxpayers and in seeking to establish such a practice in regard to a particular aspect of tax assessment it would not be sufficient to show that the practice was applied in merely one or two offices. Moreover, the word ‘practice’, in this context, means ‘a habitual way or mode of acting’ (see The Oxford English Dictionary meaning 2.c); and consequently, in general, it would also not be sufficient to show that, in regard to an aspect of assessment, a certain attitude had been adopted by the assessors concerned only in some instances.”

[56] It is further well-established that the onus rests on the taxpayer to show on a preponderance of probability the existence of the practice generally prevailing at the time of assessment.¹⁴

[57] I shall revert to the details of the alleged practice further below. There is a preliminary issue which concerns the legal point taken by SARS that s44(11A) of the Act does not find application as the case is not concerned with *:underpayment or non-payment of duty*”, but with PetroSA’s claim for refunds. I do not believe that there is merit in this point. As pointed out by counsel for PetroSA:

57.1. The duty and levies which had been paid at source had been refunded to PetroSA by way of set-off in terms of s77 of the Act.

¹⁴ SA Mutual Unit Trust at p. 538D.

57.2. After SARS determined that PetroSA was not entitled to the refund, there was an underpayment or non-payment of the duty in the sense that the duty and levies which ought to have been paid was not paid, in accordance with the practice generally prevailing.

57.3. Section 76A(1) provides SARS with a right to obtain repayment of such a refund which was not payable in the first place. This is a claim for non-payment of the duty and levies.

[58] To this I should add that the legal point taken by SARS is somewhat difficult to understand, given that the determination in the letter of demand is that PetroSA is liable to pay the amount of R1 017 351 881.32. It is obvious that SARS alleges an underpayment or non-payment in that amount.

[59] I now turn to deal with the evidence regarding the alleged practice generally prevailing.

[60] In written submissions made after the hearing, at my invitation, PetroSA summarised the evidence in its papers on which it relies for the practice generally prevailing as follows:

60.1. PetroSA has been exporting fuel levy goods from *inter alia* Tarlton and Bloemfontein with the knowledge of the Commissioner by road since 1 November 2013.¹⁵

¹⁵ In the Gauteng Suspension Judgment the same version is recorded:

“[85] On whether even if the Commissioner was aware of it and permitted it to happen and now intends to stamp it out, Mr. Vorster argued that he entitled to stamp out practices that he no longer wishes to allow. The argument is that on the facts presented to this court, the practice has been prevailing since about 2012 and if the Commissioner wants to clean out the practice, he cannot do so retrospectively.”

60.2. SAD 500 and SAD 502 forms were not submitted by the VMs with their DA160 accounts but these forms were kept by the VMs.

60.3. PetroSA and other oil companies have been subjected to audits by officials from different SARS offices across the country, and to the best of PetroSA's knowledge, set-offs applied in respect of exports from unlicensed facilities were never disallowed until the 2018 letter of demand.

60.4. According to Turners Shipping Pty Ltd ("**Turners Shipping**"), during the period in which Turners Shipping acted as clearing agent for PetroSA there were never any issue raised by SARS in respect of set-off being applied by the VMs (PetroSA and the other oil companies), where the goods were exported or removed from Tarlton on the basis that Tarlton is an unlicensed facility.

60.5. The origin of the fuel was not monitored by Transnet at Tarlton.

60.6. The VMs applied set-off of the duties and levies on their monthly excise accounts in respect of fuel injected to Tarlton through the pipeline network, from where the fuel was exported or removed to BLNS countries. The fuel is sold duty free as the VM remains the exporter of record and the fuel is not destined for local consumption. The relevant VM then claims duties and levies back from SARS, by way of set-off on the monthly excise account.

60.7. This practice has been ongoing for a considerable period and despite regular audits conducted by officials from various offices, SARS has never raised any concerns in respect of the set-offs so applied by the oil companies, until the

latter half of 2018, when it raised the alleged non-compliance in a letter to PetroSA:

[61] On the basis of this summary of the evidence, PetroSA contends that the practice which has developed is therefore the following:

61.1. Fuel was injected by the VMs to Tarlton through the pipeline network.

61.2. The origin of the fuel injected to Tarlton was not monitored.

61.3. The fuel which was sold for export (from Tarlton and other unlicensed facilities) was sold duty-free by the VMs.

61.4. The relevant VM was declared as the exporter of record on the export bill of entry.

55.1 The relevant VM claimed the duties and levies by way of set-off on their monthly excise accounts.

61.5. The SAD 500 and SAD 502 were not submitted with the DA160 excise account but copies were kept by the VMs.

[62] I should say that given my findings as set out above, the alleged practice can be narrowed down (as set out in the founding affidavit by PetroSA) to the following:

“During the audit period set-offs (refunds) were allowed in respect of fuel levy goods removed or exported to African countries from unlicensed facilities, provided that fuel levy goods were duty paid stock.”

[63] In a written response submitted after the hearing, again at my invitation, SARS contends as follows:

- 63.1. The legal test which PetroSA must satisfy is set out in SA Mutual Unit Trust (referred to above).
- 63.2. The elements of the practice alleged to have developed by PetroSA, referred to above, consist entirely of conduct on the part of PetroSA, and possibly other oil companies within the hearsay belief of PetroSA's deponent.
- 63.3. None of these elements are attributed to a practice applied in the different offices of SARS, either generally or at all.
- 63.4. The only references to SARS identify non-conduct on the part of SARS in not disallowing set-offs until the letter of demand, notwithstanding audits; not raising any issue in respect of set-off being applied where goods were exported from an unlicensed facility; and not raising any concerns in respect of set-offs until the latter half of 2018.
- 63.5. None the passages identify any direct evidence of a practice positively applied by SARS. At best for PetroSA, it seeks that the Court draw an inference that SARS applied a practice and this practice was applied generally in different offices of the SARS.
- 63.6. In order to draw the inference of a practice generally prevailing, it must be the only reasonably probable inference.

63.7. The observations that notwithstanding audits, the set-offs were not disallowed until they were disallowed and that no issues or concerns were raised, until they were raised in the latter half of 2018, do not lead to the only probable conclusion that SARS actually applied a practice in endorsing these refund claims. The observations are consistent with another reasonable and equally probable, if not more probable, inference that PetroSA, and the other oil companies, were fortunate to get away unimpeded for as long as they did, until it was noticed by the SARS whereafter the issues and concerns were raised and the refunds disallowed.

[64] I should emphasise, at this point, that the above constitutes summary of the submissions of the parties. In order to assess the matter, I need to analyse the evidence presented in the papers filed in more detail.

[65] In the papers, PretroSA's evidence about the practice generally prevailing starts by describing the context within which the matter should be assessed. That context is as follows:

65.1. There was an important development in the regulatory framework which underpins the argument for the practice generally prevailing. The development is the introduction of the duty-at-source ("DAS") regime which came into operation on 2 April 2003. Under DAS, excise duty, fuel levy and the RAF levy are payable when the fuel goods are released from the VM. It was recognised in the Explanatory Memorandum to the Act's amendment that this will have the effect of diminishing the number of licensed storage warehouses. Most oil companies still made use of storage facilities, as they were connected to the pipeline network but since the fuel leaving the VM was

duty-paid, it was no longer considered necessary to store fuel in a *licensed* facility.

65.2. Tarlton is owned and operated by Transnet SOC and has a storage capacity of some 30 million litres. Tarlton is mainly used for storage and distribution of fuel locally and to neighbouring African countries. Tarlton is central to the export and distribution of fuel (locally). It was specifically built for this purpose. Tarlton was deregistered as an SOS pursuant to the introduction of the DAS regime and it has only recently been licensed again as an SOS.

65.3. During the audit period, Total had unlicensed facilities at Waltloo and Alrode and PetroSA had unlicensed storage depots at Bloemfontein and Tzaneen.

65.4. Whilst unlicensed under the Act, the facilities were however licensed under the Petroleum Pipelines 60 of 2003 (“PPA”).

65.5. The reform was part of an attempt to facilitate exports into African countries and a competitive fuel market, as opposed to hindering it.

[66] I now turn to the more specific evidence of the practice generally prevailing during the audit period furnished by PetroSA in their papers:

66.1. Subsequent to the introduction of the DAS regime, SARS indicated at meetings, held *inter alia* in November 2006, with the South African Petroleum Industry Association, who represents the collective interests of the petroleum industry, that SARS was deregistering SOS warehouses.

- 66.2. In a Petroleum Products Taxation meeting held on 16 February 2007 with SARS, it was recorded that warehouses were closed down in 2003 when DAS was introduced.
- 66.3. In a further Petroleum Products Taxation meeting held on 18 May 2007, SARS informed the meeting that warehouses, licenced before 2 April 2003, should be deemed de-licenced.
- 66.4. In May 2012, PetroSA's clearing agent, Turners Shipping engaged with SARS concerning PetroSA's new business model and whether or not it complied with the legal framework at the time. It was *inter alia* stated that the duty will be paid in accordance with DAS requirements and that the product will be moved through Tarlton to Botswana. In its response, SARS did not mention that exports from Tarlton (or Tzaneen or Bloemfontein) will not be permitted.
- 66.5. PetroSA has thus been exporting fuel levy goods from unlicensed facilities at places like Tarlton, Tzaneen and Bloemfontein, with the knowledge of SARS from 2012.
- 66.6. From 2012 PetroSA has been audited by officials of different SARS offices across the country and set-offs for exports from unlicensed facilities were never disallowed (until the 2018 audit).
- 66.7. An affidavit of Mr Kumarasen Gopalan was presented by PetroSA. He is the National Petrochemical Manager of Turners Shipping. Mr Gopalan has been in the employ of Turners Shipping from 2005. The latter acts as clearing agent of many oil companies and has had an office at Tarlton from 2003. Turners

Shipping is doing clearing work for the majority of oil companies and it is the only clearing agent which renders clearing services from Tarlton. Turners Shipping's Mr Gopalan confirmed that different offices of SARS and different oil companies acted in accordance with the practice generally prevailing in that set-offs were permissible even if the export was from an unlicensed facility, such as Tarlton. Because of the different geographical areas in which the refineries were situated, audits were conducted by different offices of SARS over the years. These were regular audits conducted on various oil companies. SARS never raised any concerns in respect of set-offs on the basis that Tarlton was an unlicensed facility (until the disputed audit in 2018). Tarlton has been used for exports since 2003.

66.8. An affidavit of Mr Timothy Wynn La Fontaine was also filed. He is a retired SARS official with extensive knowledge of the fuel industry, including operations at Tarlton. He explains that after the introduction of DAS, licences of storage facilities were cancelled and all the product stored at Tarlton was duty paid. SARS officials from Durban, Alberton and Bellville Offices would perform excise audits and set-offs were allowed for exports from Tarlton, an unlicensed facility.

[67] The above allegations are not challenged by SARS at a factual level at all. The detailed factual allegations regarding the alleged practice generally prevailing made by Messrs Gopalan and La Fontaine are left entirely uncontested. Apart from that, SARS has not provided evidence of a single instance of disallowing set-offs based on export from an unlicensed facility in the period 2003 (after DAS came into operation) to 2018. The inference must be drawn that it cannot come up any evidence contrary to the alleged

practice. In the answering affidavit it is merely stated that the contention about the practice generally prevailing is denied. A legal argument is raised to the effect that the present case is not concerned with non-payment or underpayment (which argument I dealt with above). The only relevant fact alleged by SARS on the issue of the practice in the answering affidavit is against it. It is namely stated that SARS accepts that Tarlton was an unlicensed facility. The knowledge that SARS had of the operations at Tarlton indeed appears clearly from the answering affidavit. The fact that Tarlton was operating unlicensed, to the knowledge of SARS and for a long period of time, is accordingly common cause.

[68] In my view, on the facts of the present matter, PetroSA has discharged the onus and proved that, during the audit period there was a practice generally prevailing to the effect that set-offs (refunds) were allowed in respect of fuel levy goods removed or exported to African countries from unlicensed facilities, provided that fuel levy goods were duty paid stock. I base this finding on the following:

68.1. The background and the fundamental changes brought about by the introduction of DAS and the resultant closing of licensed warehouses.

68.2. The evidence presented, particularly the uncontested evidence of Messrs Gopalan and La Fontaine, that the set-offs were allowed in respect of Tarlton, repeatedly and consistently by different offices of SARS over a long period of time (at least a decade) and this was done in audits of various oil companies.

68.3. The fact that SARS knew that Tarlton was unlicensed and that the origin of fuel at Tarlton was not monitored and could, (hypothetically) include both

imported and locally manufactured fuel. Given the importance of Tarlton for removals to Botswana,¹⁶ in particular, it is inconceivable that, unless there was a practice to the contrary, SARS would not raise the issue of disallowing set-offs in respect of an unlicensed facility in the many audits described by Mr Gopalan.

68.4. Then there is also the business plan of PetroSA which recorded the use of Tarlton. Again the fact that it was unlicensed was not raised by SARS.

[69] In my view it is not necessary to grant the declaratory relief in terms of the Superior Courts' Act in respect of the practice generally prevailing. In my view it suffices to uphold the appeal and to set aside the determination in the letter of demand on the basis there is no liability in terms of s44(11A) of the Act as during the audit period set-offs (refunds) were allowed in terms of the practice in respect of fuel levy goods removed

¹⁶ The Gauteng Suspension Judgment recorded the following, albeit under the heading "Applicant's Submissions:

"[45] It is also common cause that the Tarlton and Tzaneen storage facilities are not licenced in terms of the Customs Act. This fact has always been known to the Commissioner because before PetroSA consulted SARS before adopting the business module.

[46] Respondent's counsel in his heads of argument argues that there is insufficient evidence regarding the licensing arrangements. However, this is not disputed in the answering affidavit.

[47] The manner in which the applicant has conducted its business is consistent with Industry practice. This is not disputed in the answering affidavit. The practice of set-off was explained in the applicant's founding affidavit. It is the practice envisaged in Section 44(11A) of the Customs Act and it came into existence in the manner in which set-offs are applied and accepted by SARS of acquittal and or export documents in respect of fuel export from Tarlton.

[48] The Commissioner is precluded from claiming any of the amounts set out in Schedule A of the letter of demand because the exports and set-offs have been subjected to audits over many years by officials from various offices of SARS across the country. The audits were not only conducted on the applicant, but also other oil companies and until recently, SARS allowed the exports and set-offs to continue in the manner described above.

[49] The answering affidavit doesn't dispute the factual averments. The Commissioner only dispute the lawfulness of the practice but not the facts set out by the applicants. The counsel for the respondent argues (in the supplementary heads of argument) that there isn't sufficient evidence regarding the practice generally prevailing."

Given the Gauteng Suspension Judgment, SARS was alerted to its failure to contest the practice generally prevailing at a factual level. It nevertheless failed to do so in the appeal.

or exported to African countries from unlicensed facilities, provided that fuel levy goods were duty paid stock.

Other grounds on which Finding 3 is challenged

[70] My conclusion regarding the practice generally prevailing renders it unnecessary to decide:

70.1. The dispute about the interpretation of the Rule 19A4.04(a)(ii).

70.2. Whether SARS issued a determination in a letter dated 6 August 2013, approving PetroSA's *modus operandi* which PetroSA (allegedly) complied with.

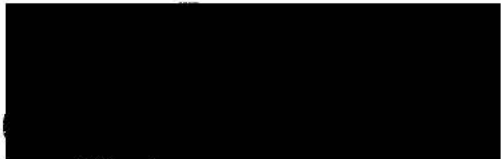
70.3. Whether the determination and/or Rule 19A4.04(a)(ii) read with s75(1)(d) of the Act and the relevant rebate items and notes thereto are irrational, to the extent that it provides that refunds may not be set-off when fuel is removed from an unlicensed facility.

[71] I should say that the interpretation of the Rule 19A4.04(a)(ii) could have far-reaching implications and given that it was common cause at the hearing that Tarlton had recently been licenced again as an SOS, the issue may not arise again. That is another reason for not engaging with this fundamental issue.

Orders

[72] In the result, I make the following orders:

- 72.1. Leave is granted for the admission of the Applicant's supplementary founding affidavit dated 31 July 2020, with costs to be costs in the cause.
- 72.2. The Applicant shall pay the First Respondent's costs occasioned by the opposition to the application brought by the Applicant on 18 October 2023 for the admission of a further evidence.
- 72.3. Paragraphs 39, 40, 49.3 and 61 of the First Respondent's answering affidavit are struck out.
- 72.4. The appeal is upheld and the determinations in the letter of demand from the First Respondent to the Applicant, dated 18 February 2020, are set aside.
- 72.5. Other than the costs in subparagraphs 1 and 2 above, the First Respondent shall pay the Applicant's costs in this Court, such costs to include the costs of two counsel.
- 72.6. The First Respondent shall pay the Applicant's costs in respect of the Petroleum Oil and Gas Corporation of South Africa (SOC) Ltd vs The Commissioner for the South African Revenue Service Case No: 21471 / 2020, such costs to include the costs of two counsel.



H J DE WAAL AJ
Acting Judge of the High Court
Cape Town
18 January 2024

APPEARANCES

Applicant's counsel: JP Vorster SC and HJ Snyman

Applicant's attorneys: Shepstone & Wylie Attorneys

First Respondent's counsel: J Peter SC

First Respondent's attorneys: MacRobert Attorneys