

**REPUBLIC OF SOUTH AFRICA  
IN THE HIGH COURT OF SOUTH AFRICA,  
GAUTENG DIVISION, PRETORIA**

**CASE NO: 39598/20**

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES: YES/NO

REVISED

Date: 10 March 2023

IN THE MATTER BETWEEN:

**DANKIE OUPA DELWERY CC**

**APPLICANT**

**AND**

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

**RESPONDENT**

**JUDGMENT - LEAVE TO APPEAL**

**CEYLON AJ**

**A INTRODUCTION:**

[1] This is an application for leave to appeal against the judgment and order herein dated 06 September 2022. The application is opposed.

[2] The said order provides as follows:

*"[44] In the result, the following order is made:*

*(a) The application is dismissed with costs, including the costs consequent upon the employment of two counsel."*

[3] This application is premised on the grounds set out in the Notice to Appeal date 30 November 2022. The grounds raised by the Applicant are the following:

*"1. The Honourable Court erred in finding that the Applicant's recordkeeping was insufficient and that the Applicant's logbooks were not legally compliant. In this regard:*

*1.1 The Honourable Court erred in holding that paragraphs [37] and [39] of the judgment that statutory requirements relating to logbooks and recordkeeping are peremptory and not directory and strict compliance thereto is expected as indicated in Wiechers."*

*1.2 The Honourable Court erred in disregarding All pay Consolidated v Chief Executive Officer, SASSA 2014 (1) SA 604 (CC) paragraph [30], where it was held that the distinction between peremptory and directory provisions, no longer apply in South African law.*

*1.3 The Honourable Court erred in failing to apply the correct test, namely whether what the Applicant did constituted compliance with the statutory provisions viewed in the light of their purpose.*

*2. The Honourable Court erred in failing to find that the Respondent acted irregularly in failing to allow the Applicant the opportunity to prove that the fuel had been appropriately used within 30 days of the demand. In this regard:*

*2.1 The Honourable Court failed to consider the provisions of Section 75 (4A) (e) (i) of the Customs Act which provides that a user of distillate fuel who has failed to comply with the requirements relating to recordkeeping and logbook is entitled to show within 30 days of the date of any demand for payment, that the fuel has been used in accordance with the provisions of the*

*applicable item of Schedule 6 to the said Act.*

2. *2 The Honourable Court accordingly erred in failing to find, for example in paragraph*

*[36] of the judgment, that the aforementioned section afforded the Applicant the right to prove to the Commissioner that the fuel had been appropriately used within 30 days of the date of the demand.*

3. *The Honourable Court erred in failing to consider whether, having regard to the wide nature of the Applicant's statutory appeal in terms of Section 47 (9) (e) of the Act, the Applicant was entitled to attack the Commissioner's decisions on review grounds such as that the Commissioner acted irregularly in failing to acknowledge the Applicant's right in terms of Section 75 (4A) referred to above.*

4. *In the premises the Applicant contends that an appeal to the Full Court would have a reasonable prospect of success as intended in Section 17 (1) (2) (i) of the Superior Courts Act 10 of 2013."*

#### B. SUBMISSIONS OF THE PARTIES:

[4] The parties provided written submissions and Heads of Argument in accordance with the directives of this Court for which this Court is grateful. These submissions are briefly the following:

(l) Applicant's submissions:

(a) the test to be applied:

[5] According to the Applicant certain judgments suggested that the usage of the word "would" in section 17 (1) (a) (i) of the Superior Courts Act 10 of 2013 raised the bar of the test that now has to be applied to the merits of the proposed appeal before leave should be granted. The Applicant contends that in the Ramakatsa v ANC

decision, the SCA held that:

*,i, am mindful of the decisions at High Court level debating whether the use of the word "would" as opposed to "could" possibly means that the threshold for granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted the test of reasonable prospect of success postulates a dispassionate decision based on the facts and the law a Court of Appeal could reasonably arrive at a conclusion different to that of the trial court."* [unreported; case no: 724/2019 at par 10].

(b) first ground of appeal: decision regarding recordkeeping:

[6] The details regarding this ground has also been raised in the Applicant's Notice of Appeal. In its written submissions the Applicant relies on the All Pay decision to indicate that the distinction between peremptory and directory provisions no longer find application in our law and that this Court applied the incorrect test, and further failed to consider the purpose of the recordkeeping provisions as it had been enjoined by the Constitution Court to do.

[7] The Applicant went on to suggest that the purpose of the recordkeeping provisions in the Note is to ensure that the miner who claims the refund keeps cogent records which proves that the diesel fuel was indeed used for primary production in mining as defined in the notes.

[8] A further contention of the Applicant is that this Court erred in failing to consider the example of the minimum logbook requirements displayed on the SARS website, which example the Applicant submits, was incorporated in the definition of "logbooks" and which must be taken into account in determining the minimum logbook requirements as legislated.

[9] The Applicant contended that the example above contains basic information such as "ploughing" as the specific legible activity which has been performed. The Applicant further argued that the records of usage it provided to the Respondent

prior to the demand describe the type of activity with sufficient detail, namely "delwery", which is translated as "digging" in English and which is comparable to the use of the description of "ploughing" as appears in the example on the website in relation to farming.

[10] The Applicant further submitted ha these records of usage describe the litres used in respect of each and every piece of equipment and which equipment could be identified in more detail on the asset register which was also provided.

[11] It is in light of the above, that the Applicant submits that it has reasonable prospect that a Court of Appeal could uphold the appeal.

[12] According to the Applicant, it appears that this Court accepted the Respondent's contention that the logbooks (Annexures "FA5" and "FA6") were only provided at the internal appeal, but it is clear from the sequence of events stated in the founding affidavit that these were provided to the Respondent in response to the Notice of Intention to Access of 27 March 2018, thus before the demand of 11 May 2018.

(c) second ground of Appeal: relevance of section 75 (4A) (e) (i) of the Customs Act:

[13] This point was already raised in the Notice of Appeal as set out above. The Applicant takes issue with this Court's finding that where the recordkeeping and logbooks are not compliant, this is dispositive of the application and that there is no need to deal with any other issue raised in the application. This finding, the Applicant argues, was erroneous, to the effect that it (Applicant) was not allowed to prove that the fuel was, appropriately used after the audit, which finding was further irreconcilable with section 75 (4A) (e) (i) of the Act, which specifically caters for the fact that a person who has received the refund and who is later found not to have complied with the recordkeeping requirements is entitled, within 30 days after the demand and thus after the audit, prove that the fuel has indeed been used appropriately.

[14] In view of the above, the Applicant submitted that there are good prospects that a Court of Appeal would come to a different conclusion to that of this Court.

(d) third ground of appeal: failure to consider the attack on the Commissioner's decisions on review grounds:

[15] The Applicant rely on the decision of the SCA in Emergency Medical Supplies and Training CC v HPSCA [2013] 4 All SA 1 (SCA)] and contends that in a wide statutory appeal, such as the present, the court must consider the review grounds which have been raised by the Applicant/Appellant, which is submitted, this Court did not do. In view of this, so the Applicant submits, there are good prospects that a Court of Appeal will find that the Applicant's alternative attack on the Commissioner's decision on review grounds, on the basis that the Commissioner acted irregularly in failing to acknowledge the Applicant's rights expressly afforded to the Applicant by said section 75 (4A) (e) (i) of the Customs Act.

(e) Appropriate Court of Appeal:

[16] According to the Applicant it would be appropriate that leave to appeal be granted to the Full Court of this division as the matter does not invoke any complex or new issues of law, and that costs of the Application for leave to appeal be costs in the appeal.

(II) The Respondent's Submissions:

(a) Legislative Provisions, Analysis and Overview:

[17] The Respondent opposes the application for leave to appeal on the basis that the appeal does not have any reasonable prospects of success and there is no other compelling reason why the appeal should be heard.

[18] The Respondent relies on section 17 (1) of the Superior Courts Act 10 of 2013 and The Mont Chevaux Trust v Tina Goosen and 18 Others decision [2014] JDR 2325 (LCC) at para 6] to argue that the test for the granting of leave to appeal is

that it would only be granted if a Court would come to a different conclusion.

[19] The Respondent argues that the test for leave to appeal is now more stringent since the enactment of said section 17 (1) referred to above, relying on S v Smith [(2012) (1) SACR 567 (SCA) at para 7]. The Respondent then submits that the Applicant's grounds of appeal, does not satisfy the test mentioned above.

[20] According to the Respondent, the grounds and arguments raised by the Applicant is unsustainable in view of the following:

*"10.1 The provisions of Note 6 read with rebate item 670.04 and section 75 are all peremptory and any user wanting to receive benefit of the rebate item must ensure strict compliance with the provisions.*

*10.2 The Applicant has failed to keep and submit the usage logbooks for each vehicle or machine into which diesel was dispensed and used, as required by Note 6 (q) (v) (dd) thus resulting in SARS being unable to determine the usage of the distillate fuel by same machines and vehicles.*

*10.3 The Applicant failed to demonstrate with sufficient particularity the usage of the distillate fuel particularly that the distillate was used for eligible purposes.*

*10.4 Neither the submitted logbooks nor the supplemented logbooks depict the usage of the distillate fuel and more importantly whether such usage is for eligible purposes.*

*10.5 The main application before the Court is an appeal de nova as such allowing the Applicant to provide information and documentary proof of its eligible usage of the fuel, which opportunity he Applicant failed to take."*

(b) The grounds for the application for leave to appeal:

[21] The Respondent contends that the grounds upon which the Applicant rely

in this application individually and collectively do not satisfy the threshold required in section 17 (1) (a) (i).

(i) The recordkeeping was insufficient and the logbooks not legally compliant

[22] According to the Applicant this Court was correct in its judgment to have, *inter alia*, found that there was no compliance with the provisions of the Note and the Act in relation to the required recordkeeping, certainly not at the time the audit was conducted and there not been compliance with rule 6 (q), for example the Applicant failed to keep and submit the necessary usage logbooks in respect of each machine and vehicle as provided for in Note 6 (q) (v) (dd), that the Applicant failed to show with sufficient particularity the usage of fuel for eligible purchases as is required, and further failed to demonstrate with sufficient particularity that the fuel has travelled the journey to the eventual use thereof for eligible purposes, as required by the principles laid down in the Canyon Resources v Commissioner for SARS [(68281/2016) 10 March 2022] decision.

[23] The Respondent argued that it is further important that the rationale of the Note is kept in mind that the logbooks are meant to demonstrate to the Commissioner that (i) the distillate fuel was purchased by the user, (ii) for use in mining activities on land and (iii) was utilised for qualifying mining activities for his/her own primary production.

[24] The Respondent went on to cite the Umbhaba Estates (Pty) Ltd v Commissioner for the SA Revenue Services decision to indicate the requirement of logbooks and recordkeeping for rebate purposes, in which the following was held:

*"The system adopted by the Plaintiff does not provide a full audit trail of the fuel used from purchased to use as is required. While the dispensing records exist they fall short of showing the usage to which the fuel was put."* [at para 85 thereof]

[25] The Respondent further rely on Maharaj v Rampersad [1964 (4) SA 638 (A) at 646C] to explain the concept of "substantial compliance" with the injunction.



The Respondent referred this Court further to Canyon Resources (Pty) supra to explain the injunction [at para 9.5 thereof]

[26] In light of the above, the Respondent went on to conclude that the requirement of recordkeeping has been considered as integral for a rebate claim and as such, strict compliance with same would be required, which, so the Respondent argues, the Applicant failed to demonstrate with sufficient particularity the usage of the distillate fuel, particularly that the distillate was used for eligible purchases.

(ii) Opportunity provided to the Applicant to prove that the fuel had been appropriately used within 30 days of demand:

[27] The Respondent contends that this Court was correct in its finding that the Applicant, in its submission of the corrected logbooks that certain of such logbooks were still not submitted and others which were, did not contain the specified usage of the fuel in respect of a particular machine, vehicle or equipment as required, referring to paragraph [36] of the judgment.

[28] It is the Respondent's further submission that, despite the Applicant having had opportunity to submit corrected logbooks, it failed to comply, and if the matter is holistically considered, the Applicant had more than the 30 day period within which to correct its logbooks to ensure proper compliance.

[29] Furthermore, the Respondent submits this is an appeal de novo, thereby allowing the Applicant to submit documentation to satisfy the Court that the usage of the fuel was for eligible purposes and that it is entitled to the rebate, which the Applicant failed to do.

(iii) Reasonable prospects of success:

[30] According to the Respondent, there are no reasonable prospects of success for granting leave to appeal in this matter. The Respondent submits that this matter turns on the facts and those facts do not justify why leave to appeal

should be granted. In view of the aforementioned, the Respondent argues, the Applicant's reliance on section 17 (1) (a) (i) is misplaced.

[31] The Respondent, relying on said section 17 (1) (a) (i) and the Jai Hind EMCC CC t/a Emmerential Convenience Centre v Engine Petroleum Linked South Africa: In re: Engen Petroleum Ltd v Jai Hind EMCC CC t/a Emmescentia, advise this Court as to the test to applied in granting leave to appeal and indicate that the use of the word "would" in section 17 (1) (a) (i) impose a more stringent and rigorous threshold test than under the now repealed Superior Courts Act 59 and it indicated a measure of certainty that another court will differ. According to the Respondent the Applicant failed to persuade this Court on proper grounds that there are prospects of success on appeal and that those prospects are not remote but has a realistic chance of succeeding.

[32] The Respondent cited the decision of Minister of Justice and Constitutional Development v Southern Africa Litigation Centre [2016 (3) SA 317 (SCA) at 330C] to submit that the Applicant has not provided any substantive arguments, other than the bold allegations in the application for leave to appeal, for this Court to grant the application for leave to appeal.

(iv) The requirement of a physical address:

[33] The Respondent submits that this Court found that the meaning of address in the Notes to the Customs Act refers to the physical or postal address or both thereof, but this finding is not the subject of this application for leave to appeal.

[34] The Respondent refers this Court to Natal Joint Municipal Pension Fund v Endumeni Municipality [2012 (4) SA 593 (SCA), the word "address" in Note 6 (d), section 75 (1c) (a) (iii) of the said Act and the Commissioner for the SA Revenue Services v Langholm Farms (Pty) Ltd [(1354/2018) [2019] ZASCA 163 (29 November 2019) at para 18] to conclude that the only interpretation of the Note which is both logical and practical is that the invoices should contain the physical address of the mine.

[35] The Respondent went on to indicate that in light of their above submissions, the judgment of this Court is correct and therefore there are no prospects that another Court would come to a different conclusion. Accordingly, the Respondent prays that the application for leave to appeal should be dismissed with costs, including the costs of counsel.

### C. Legal Principles:

[36] Applications for leave to appeal are governed by section 17 of the Superior Courts Act 10 of 2013. Section 17 (1) provides as follows:

*"(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that:*

*(a) (i) the appeal would have reasonable prospect of success; or*

*(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;*

*(b) The decision sought to appeal does not fall within the ambit of section 16 (2) (a); and*

*(c) Where the decision sought to be appealed does not dispose of all the issues in case, the appeal would lead to a just and prompt resolution of the real issues between the parties."*

[37] The traditional test that was applied by the Courts in considering leave to appeal applications have been whether there is a reasonable prospect that another Court may come to a different conclusion to the one reached by the Court *a quo* [Commissioner of Inland Revenue v Tuck 1989 (4) SA 888 (T) at 8908]. With the enactment of section 17, the test obtained statutory force. In terms of section 17 (1) (a) (i). leave to appeal may now only be granted where the Judge or Judges concerned is of the view that the appeal would have a reasonable prospect of success, which made it clear that the threshold to grant leave to appeal has been

raised. In Mont Chevant Trust v Tina Goosen and 18 Others *supra*, at para 6, it was held that:

*"It is clear that the threshold or granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another Court might come at a different conclusion, see Van Heerden v Cronwright & Others 1985 (2) SA 342 (T) at 342H. The use of the word "would" in the new statute indicates a measure of certainty that another Court will differ from the Court whose judgment is sought to be appealed against." In Notshokuvu v S (2016) ZASCA 112 at para 2, it was indicated that an Appellant faces a "higher and stringent" threshold under the Superior Courts Act. Thus, in relation to said section 17, the test for leave to appeal is not whether another Court "may" come to a different conclusion, but "would" indeed come to a different conclusion.*

[38] With regard to the meaning of reasonable prospects of success, it was held in v Smith 2012 (1) SACR 567 (SCA) 570, at para 7, as follows:

*"What the test of reasonable prospects of success postulates is a dispassionate decision, based on the fact and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."*

[39] The Applicant referred this Court to the decision of Ramakatsa v ANG *supra*, wherein which it was held:

*"I am mindful of the decisions at High Court level debating whether he use of*

*the word "would" as opposed to "could" possible means that the threshold or granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted ... The test of reasonable prospect, of success postulates a dispassionate decision based on the facts and the law that a Court of Appeal could reasonably arrive at a conclusion different to that of the trial court."*

**[40]** In Van Zyl v Steyn [(83856/15) [2022] ZAGPPHC 302 (3 May 2022) the **Court** considered the decision of Ramakatsa, para 10, *supra* against the background of, *inter alia*, MEG for Health, Eastern Cape v Mkhitha and Another [2016 ZASCA 176 (25 November 2016) para 16-18], Notshokovu v S, *supra*, Van Wyk v S, Galela v S [(2014) ZASCA 152; 2015 (1) SACR 584 (SCA), para 14], Four Wheel Drive Accessory Distributors CC v Rattan No [2019\_ (3) SA 451 (SCA), para 34], Zuma v Office of the Public Protector and Others [2020) ZASCA 133 (30 October 2020), para 19], Nwafor v Minister of Home Affairs and Others [(2021) ZASCA 58 (12 May 2021) para 25] and Khatide v S [(2022) ZASCA 17 (14 February 2022) at para 4] and concluded that the Ramakatsa judgment did not lower the threshold as generally applied and that all courts must still determine if an appeal could have a reasonable prospect of success [at para 15 thereof].

#### D. CONCLUSION:

**[41]** Having read the papers, considered the submissions made by the legal representatives of the parties with the legal principles set out above, this Court is of the view that there are reasonable prospects that another Court would come to different conclusions to those in judgment herein.

#### E. ORDER:

**[42]** Accordingly, the following order is made:

- (i) The Applicant is granted leave to appeal to the Full Court of this division;

- (ii) Costs, including costs of counsel, to be costs in the appeal.

**B CEYLON**  
**Acting Judge of The High Court**  
**of South Africa**  
**Gauteng Division**  
**Pretoria**

**APPEARANCES:**

|                     |                                         |
|---------------------|-----------------------------------------|
| FOR THE APPLICANTS: | Adv JP Vorster, SC                      |
| INSTRUCTED BY:      | Couzyn Hertzog Horak, Pretoria          |
| FOR THE RESPONDENT: | Adv K Kollapen/Adv T Chavalala          |
| INSTRUCTED BY:      | Maponya Inc, Pretoria                   |
| Hearing date:       | none - matter adjudicated on the papers |
| Judgment date:      | 10 March 2023                           |