

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

CASE NO: 91960/2015

(1) REPORTABLE: **NO**

(2) OF INTEREST TO OTHER JUDGES: **NO**

(3) REVISED: **YES**

DATE: **27 JUNE 2023**

SIGNATURE

In the matter between:

ASSMANG PROPRIETARY LIMITED

Applicant

and

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

First Respondent

THE MINISTER OF JUSTICE

Second Respondent

THE MINISTER OF FINANCE

Third Respondent

JUDGMENT

NEUKIRCHER J:

[1] This application for leave to amend has a very long history: during November 2015 the applicant (Assmang) issued out process in this Division against the Commissioner of the South African Revenue Service (SARS) in which it sought (in the main) the following relief:

“[1] The determinations by the Commissioner that the diesel refunds claimed by Applicant under rebate item 670.04 provided for in the Customs and Excise Act, 1964 do not qualify for such refunds, be set

aside and substituted with an order that the diesel refunds, be set aside and substituted with an order that the diesel refunds claimed by Applicant qualify under rebate item 670.04.

[2] In the event of the Court finding that the Applicant is entitled to such diesel refunds:

[i] An order is sought that all diesel refunds claimed by the Applicant for the diesel refund periods since June 2011 and not refunded to the Applicant, be processed and paid out to the Applicant.

[ii] An order is sought entitling the Applicant to claim diesel refunds not claimed by the Applicant since SARS' letter of demand dated 4 July 2014 and that such claims be processed and paid out to the Applicant.

[3] An order that the Applicant is entitled to interest on the diesel refunds from the date that the claims for diesel refunds were submitted to SARS.

[4] In the event of the court refusing the relief sought above, an order setting aside the Applicant's liability for payment of a penalty..."

[2] The issues in that review application were fully ventilated and, in essence the relief pertains to four main issues:

- (i) firstly, this is a tariff appeal, the outcome of which determines whether or not the Applicant is entitled to certain diesel refunds;
- (ii) secondly, in the event that the court finds that the Applicant is entitled to the diesel refunds, an order is sought that all the diesel refunds claimed by the Applicant for the period subsequent to the period covered by SARS' letter of demand of 4 July 2014 be processed and paid out to the Applicant;

- (iii) thirdly, an order is sought that the Applicant is entitled to interest on the diesel refunds from the date that the claims for diesel refunds were submitted to SARS; and
- (iv) fourthly, in the event of the relief sought above be refused, Applicant seeks to have its liability for payment of a penalty set aside.

[3] During June 2019, the parties agreed to refer the issues arising from the review to oral evidence. That is set down for hearing during September 2023.

[4] On 23 September 2019 (ie three months later), Assmang served a Notice of Intention to Amend its Notice of Motion. On the same date, Assmang also filed a Supplementary Affidavit and Rule 16A Notice. The supplementary affidavit is filed in support of the constitutional issues raised by the Rule 16A notice and in support of the Rule 28 notice and to apply for condonation for the late notice of the Rule 16A, insofar as may be necessary.

[5] What the amendment seeks to do is to introduce a constitutional challenge to s 47(9)(c) and s 75(1A)(f) of the Customs and Excise Act 91 of 1964 (the Customs Act). Given the provisions of Rule 16A, a joinder application was launched and the Minister of Finance and Minister of Justice joined as parties to the main proceedings - this was not opposed and the order was granted on 18 March 2021.

[6] The amendment was opposed only by SARS and Assmang then launched the present application for leave to amend. The amendment sought¹ is the following:

“[1] The Applicant is granted leave to amend its notice of motion in the following respects:

[a] By deleting paragraph [3] and replacing it with a new paragraph [3] which reads as follows:

¹ As set out in the applicant's draft order dated 27 January 2023

“[3] Sections 47(9)(c) and 75 (1A)(f) of the Customs and Excise Act, 91 of 1964 are declared invalid for being inconsistent with the Constitution of the Republic of South Africa, Act 108 of 1996.”

[i] By inserting new paragraphs after paragraph [3], which reads as follows:

“[4] The declaration of invalidity is not retrospective.

[5] The order is suspended for a period of six months to afford the legislature an opportunity to cure the invalidity.

[6] During the period of suspension, sections 47(9)(c) and 75(1A)(f) of the Customs and Excise Act, 91 of 1964, will be deemed to read as follows; what is in bold being the reading-in:

[a] Section 47(9)(c) be struck out and deleted.

[b] Section 75(1A)(f):

"75(1A) Notwithstanding anything to the contrary contained in this Act or any other law –

*(f) The provisions of the Value-Added Tax Act, 1991 (Act No. 89 of 1991), shall mutatis mutandis apply in respect of any amount of fuel levy or Road Accident Fund levy which is being recovered as it is in excess of the amount due or is not duly refundable, **or is being refunded for being due to a user rebate item 670.04 of Schedule No 6 Part 3.**"*

[7] *the Applicant is entitled to interest at the prescribed legal rate on the diesel refunds from the date that the claims for diesel refunds were submitted to SARS. Where SARS applied set off against the Applicant's value-added tax refunds, the Applicant is entitled to interest from the date on which SARS applied set off."*

[7] SARS has objected to the amendment on four main grounds:

- (a) that the amendment is academic as it fails to simultaneously attack s 47(9)(b)(i) of the Act;
- (b) that it lacks averments to sustain a cause of action;
- (c) that it is, in any event, bad in law; and
- (d) it does not raise a triable issue.

[8] The main argument presented before me focused on the s 47(9)(b)(i) argument and the fact that the amendment does not raise a triable issue.

[9] Rules 28(1), (4) and (10) state:

"28(1) In the event of the Court refusing the relief sought about, an order setting aside the Applicant's liability for payment of a penalty...

(4) If an objection which complies with subrule (3) is delivered within the period referred to in subrule (2), the party wishing to amend may, within 10 days, lodge an application for leave to amend...

(10) The court may, notwithstanding anything to the contrary in this rule, at any stage before judgment grant leave to amend any pleading or document on such other terms as to costs or other matters as it deems fit."

[10] A court hearing an application for an amendment has a discretion whether or not to grant it. The discretion must be exercised judicially, in light of all the facts and circumstances of the case before it². The court will weigh up, *inter alia*, the following³ in deciding whether or not to grant an amendment:

- (a) whether the amendment is *bona fide* - if it is, it will be granted especially where the effect of refusing it would simply bring the parties before the same court on the same issue⁴;
- (b) the applicant's explanation as to why he wishes to change his pleading and he must show *prima facie* that he has something worthy of consideration, a triable issue⁵;
- (c) if the amendment will result in a pleading being expiable it will not be allowed;
- (d) the approach of the court must not be overly technical;
- (e) the primary object in allowing an amendment is that the Court can determine the real issues between the parties and to obtain a proper ventilation of those issues so that justice may be done.⁶

[11] In general, an amendment will always be allowed unless the application to amend is *mala fide*, unless the amendment would cause an injustice or prejudice to the other party which cannot be cured by a costs order⁷ and may be made at any stage of the proceedings, as long as there is no prejudice to the other party.⁸

² Brocsand Pty) Ltd v Tip Trons Resources 2021 (5) SA 457 (SCA) para [15]

³ Trans-Drakensburg Bank Ltd v Combined Engineering (Pty) Ltd 1967 (3) SA 632 (D) as well as eg Telemetric v Advertising Standards Authority South Africa 2006 (1) SA 461 (SCA)

⁴ Moolman v Estate Moolman 1927 CPD 27 at 29 Trans-Drakensburg at 640H

⁵ Trans-Drakensburg at 641H

⁶ Rosenberg v Bitcom 1935 WLD 115 at 117

⁷ Devonian Shipping Ltd v MV Luis (Yeoman Shipping Co Ltd Intervening) 1994 (2) SA 363 (C) at 369E-G

⁸ SA Steel Equipment Co (Pty) Limited v Lurelk (Pty) Limited 1951(4) SA 167 (T) at 175 D; Trans-Drakensburg Bank Limited v Combined Engineering (Pty) Limited 1967(3) SA 632 (D) at 468 F Affordable Medicines Trust and Others v Minister of Health and Others 2006 (3) SA 247 (CC)

[12] SARS has not made out a case that the amendment, or its tardy introduction has caused it prejudice. Instead, the thrust of its objection has centered around whether the amendment introduces a triable issue.

[13] In **Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd and Another (2)**⁹ it was stated that a triable issue is one which, if it can be proved by the evidence foreshadowed in the application for amendment, will be viable or relevant, or which, as a matter of probability, will be proved by the evidence so foreshadowed.

[14] SARS firstly objects to the amendment as it argues that because the applicants do not seek to strike down s 49(9)(b)(i) together with s 47(9)(c) and s 75(1A)(f), Assmang's case is bad in law. The point of departure for a declaration of invalidity is that it is only where there is a differentiation between the same class of persons that it can be said that the legislation is discriminatory – SARS argues that *in casu*, the differentiation is between different classes of persons. The argument is further that, in any event, the fact that there is a differentiation does not of its own amount to discrimination.¹⁰

[15] Given this, it is necessary to set out the two impugned sections that Assmang argues are discriminatory. They are the following:

(a) S47(9)(c), which states:

“Whenever a court amends or orders the Commissioner to amend any determination made under subsection (9) (a) or (d) or any determination is amended or a new determination is made under paragraph (d) or as a result of the finalisation of any procedure contemplated in Chapter XA, the Commissioner shall not be liable to pay interest on any amount refundable which remained payable in terms of the provisions of paragraph (b) (i) for any period during which such determination remained in force.”

⁹ 2005 (6) SA 23 (C) at para [21]

¹⁰ Prinsloo v Van der Linde and Another 1997 (3) SA 1012 (CC) at pars [17] and [23] - [29]

(b) S75(1A)(f), which states:

“The provisions of the Value-Added Tax Act, 1991 (Act No. 89 of 1991), shall mutatis mutandis apply in respect of the payment of interest on any amount of fuel levy or Road Accident Fund levy which is being recovered as it is in excess of the amount due or is not duly refundable.”

[16] The case Assmang seeks to make on this issue is the following:

- (a) according to s 47(1) of the Customs Act, fuel levies are paid at the time of entry for home consumption.¹¹ According to the DAS regime, the duty is assessed and payable as close as possible to the point of domestic manufacture or the port of importation. In respect of fuel levy goods, duty is assessed at the point when the goods leave the licensed manufacturing warehouse;
- (b) thus, when Assmang purchased its fuel from the supplier, the price it pays includes the fuel levies as those would already have been paid by the supplier;
- (c) according to Note 6 of Schedule 6 Part 3 of the Customs Act, because Assmang uses the fuel for its mining operations on land, it is entitled to claim a refund on the fuel levy;
- (d) in the event that Assmang claims a refund and SARS refuses the refund, and Assmang eventually succeeds in obtaining a refund in subsequent court proceedings against SARS, the Customs Act provides that no interest is payable and the court is not empowered to grant interest in favour of Assmang.

¹¹ The Duty-at-Source regime (DAS)

[17] According to Assmang, the discrimination lies in the following:

- (a) according to s 45 of the Value-Added Tax Act 89 of 1991 (VAT Act), interest is payable on any refund due to the vendor in the event that SARS has failed to pay the refund within a specified period;
- (b) s 187 of the Tax Administration Act 28 of 2011 (Tax Act) contains a similar provision in favour of the taxpayer;
- (c) but the Customs Act makes provision that no interest is payable in the event that a diesel rebate is payable;
- (d) this is per se discriminatory when the provisions of s 75(1A)(f) are considered.

[18] Assmang also argues that it is clear that Minister of Finance may well have in mind the payment of interest on outstanding amounts, as s105 was put into the Statute – but s105 is not in force as yet: it has been enacted but not promulgated.

[19] Assmang argues that the differentiation is unconstitutional as it offends

- (a) the principle of equality as it may receive refund but no interest, as opposed to others who receive refunds and interest; and
- (b) it is an arbitrary deprivation of property as, if it is due a refund it is without interest, whereas SARS is due interest on all amounts payable.

[20] Assmang also argues that its relief does not become academic if s 47(9)(b)(i) remains and this is because that section is focused on the “pay now, argue later” principle which is focused on ensuring that the taxpayer complies with SARS’ determination until such time as it has been set aside - I agree that the focus of the sections is different.

[21] SARS argues that any differentiation vis-à-vis the provisions of the Customs Act, the VAT Act and the Tax Act are justified as the diesel refund scheme under the Customs Act is voluntary¹² and those who participate in it do so voluntarily and are therefore bound by its terms. This includes that diesel refunds are dependent on SARS being satisfied that those applying for a refund are entitled to one. But any refund from SARS is determined on that basis, no matter whether in terms of the Customs Act or the VAT Act or the Tax Act, and in my view the fact that a scheme is voluntary does not, *per se* mean that any discrimination is justified.

[22] In any event, this argument does not explain why interest is not payable by SARS if it is found that its refusal to pay the diesel rebate was incorrect.

[23] SARS then argues that Assmang additionally has no triable issue as it has not made out any case for when any interest payable by SARS would be payable – it argues that this issue has not been addressed at all. SARS poses the following questions: firstly, what is the form the interest would take and secondly, from which date would it run?

[24] Assmang argues that the issue of the date from which interest may run is not a proper basis upon which to object to the amendment – it is not the date that is determinative of the discriminatory provisions, it is the provisions themselves.

[25] In any event s172 of the Constitution provides:

“Powers of courts in constitutional matters.-

(1) When deciding a constitutional matter within its power, a court –

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconstancy; and

(b) may make any order that is just and equitable, including-

¹² Which the others are not

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.”

[26] Making “*any order that is just and equitable*” may, depending on the evidence that is before the court at the time, include determining the date from which interest is payable.

[27] Finally, it has been submitted that there are a number of other matters presently pending before our courts in which the same constitutional point has been raised. In these, the Minister of Justice and/or the Minister of Finance have filed papers in respect of the constitutional point alone. Whilst this is not determinative of the present application, it is illustrative of the reason why neither has opposed the application for amendment, thereby abiding the decision of the court.

[28] Given the above, I am of the view that there is a triable issue raised and therefore leave to amend should be granted. I am also of the view that there is no reason to depart from the general order that costs should follow the result.

THE ORDER

[29] The order that is granted is the following:

1. The Applicant is granted leave to amend its notice of motion in the following respects:

1.1 By deleting paragraph [3] and replacing it with a new paragraph [3] which reads as follows:

“[3] Sections 47(9)(c) and 75 (1A)(f) of the Customs and Excise Act, 91 of 1964 are declared invalid for being inconsistent with the Constitution of the Republic of South Africa, Act 108 of 1996.”

1.2 By inserting new paragraphs after paragraph [3], which read as follows:

“[4] The declaration of invalidity is not retrospective.

[5] The order is suspended for a period of six months to afford the legislature an opportunity to cure the invalidity.

[6] During the period of suspension, sections 47(9)(c) and 75(1A)(f) of the Customs and Excise Act, 91 of 1964, will be deemed to read as follows; what is in bold being the reading-in:

[a] Section 47(9)(c) be struck out and deleted.

[b] Section 75(1A)(f):

"75(1A) Notwithstanding anything to the contrary contained in this Act or any other law –

(f) The provisions of the Value-Added Tax Act, 1991 (Act No. 89 of 1991), shall mutatis mutandis apply in respect of any amount of fuel levy or Road Accident Fund levy which is being recovered as it is in excess of the amount due or is not duly refundable, **or is being refunded for being due to a user rebate item 670.04 of Schedule No 6 Part 3.**"

[7] the Applicant is entitled to interest at the prescribed legal rate on the diesel refunds from the date that the claims

for diesel refunds were submitted to SARS. Where SARS applied set off against the Applicant's value-added tax refunds, the Applicant is entitled to interest from the date on which SARS applied set off."

2. The respondent is ordered to pay the applicant's costs which include the costs of two counsel.

B NEUKIRCHER
JUDGE OF THE HIGH COURT

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 27 June 2023.

Appearances:

Applicant:	Advocate AP Joubert SC with Advocate LF Laughland Instructed by Edward Nathan Sonnenbergs Inc
Respondent:	Advocate C Puckrin SC with Advocate MPD Chabedi and Advocate NK Nxumalo Instructed by Klagsbrun Edelstein Bosman Du Plessis Inc
Date of hearing :	11 May 2023
Date of judgment:	27 June 2023