

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



CASE NO.: 2023-045310

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

26/03/2024...

In the matter between:

RICHARDS BAY MINING (PTY) LTD

and

COMMISSIONER FOR THE SOUTH AFRICAN
REVENUE SERVICE

JUDGMENT

van der Westhuizen, J

- [1] This application is directed at the granting of specific relief that relates to the interpretation of sections of specific statutes.

- [2] The issues to be determined are questions of law. In so far as there may be facts that are relevant to the determination, those are largely common cause.
- [3] This matter concerns the interpretation of two sections in two different statutes. The first is in respect of the scope of section 105 of the Tax Administration Act, 28 of 2011 (TAA); whether it contains an ouster of the High Court's jurisdiction in respect of all matters related to the South African tax administration procedures and provisions. The second concerns the interpretation of the provisions of section 4(2) of the Mineral and Petroleum Resources Royalty Act, 28 of 2008 (the Act), and thereby a determination of the scope of that section.
- [4] Although the true issue raised by the applicant in these proceedings related to the interpretation of section 4(2) of the Act, the respondent raised as a point *in limine* an objection to this Court's jurisdiction in hearing this matter. It is thus required that a determination is first made in respect of whether this court has jurisdiction to hear the issue relating to the interpretation of section 4(2) of the Act.
- [5] The first determination relates to one of jurisdiction. The respondent contended that section 105 of the TAA has ousted the High Court's jurisdiction in all matters relating to tax issues. The respondent contended that the only court to have jurisdiction in respect of tax matters, is the Tax Court. In this regard, there are conflicting approaches by the courts, least of which are those advanced in judgments of the Supreme Court of Appeal.
- [6] Section 105 of the TAA provides:

"A tax payer may only dispute an assessment or 'decision' as described in section 104 in proceedings under this Chapter, unless a High Court otherwise directs."

- [7] This section has enjoyed the scrutiny by the courts, and of importance that of the Supreme Court of Appeal. Decisions of the Constitutional Court are to be considered as well, in particular the judgment in *Metcash Trading Ltd v Commissioner South African Revenue Services*.¹
- [8] On a purposive reading of section 105 of the TAA, it is gleaned that in respect of a dispute of an assessment or a decision as described in section 4 of the TAA, such dispute is to be heard by the Tax Court, *unless a High Court otherwise directs*. Thus, inherently section 105 of the TAA acknowledges that a High Court may entertain a disputed assessment or a decision. The issue is: when would a High Court direct otherwise. On this issue there are conflicting decisions. The most recent decision of the SCA is that in *Lueven Metals (Pty) Ltd v Commissioner for the South African Revenue Service*.² An application for leave to appeal that judgment is pending before the Constitutional Court. That application for leave suspended the order of that decision. It is not for this court to resolve those divergent decisions.
- [9] In *Barnard Labuschagne Incorporated v South African Revenue Service*³ the Constitutional Court held that the jurisdictional fact on which Chapter 9 of the TAA dispute resolution process, as contemplated in section 105 of the TAA, depends, relates to a dispute of an assessment (or decision as defined in section 104 of the TAA). In the context of the judgment in *Transnet v Total*,⁴ where there is no dispute in respect of an assessment or decision, as defined in section 104 of the TAA, section 105 of the TAA would not find application.⁵
- [10] In *Transnet v Total, supra*, the Constitutional Court confirmed that jurisdiction is determined by the pleadings, *i.e.* the applicant's pleaded case.

¹ 2001(1) SA 1109 (CC)

² [2023] ZASCA 144 (8 November 2023)

³ 2022(5) SA 1 (CC) para 41

⁴ 2023(3) BCLR 333 (C)

⁵ See minority judgment in *Lueven, supra*, para 33 where the significance of the definition of "assessment" in the context of section 105 of the TAA is noted.

[11] The applicant contended that the present issue, that of interpretation, does not impugn an “assessment” or “decision” of the respondent. Hence, section 105 of the TAA found no application. For section 105 to operate against the applicant, its pleadings would determine whether it disputes an “assessment” or a “decision” by SARS. In this regard it is gleaned from the notice of motion that it concerns the interpretation to be afforded to section 4(2) of the Act. Clearly, it does not concern an assessment or decision contemplated in section 104 of the Act. The applicant’s pleaded case concerned declaratory relief relating to the interpretation of a section of the Act. That fact is supported by the applicant’s affidavits filed in this application. It constitutes the main relief sought in the notice of motion.

[12] In *Metcash, supra*, that court held:

- (a) Section 169 of the Constitution confers upon the High Court specific jurisdiction to consider issues of legality;
- (b) Section 172 of the Constitution vests in the High Court the specific power to grant declaratory relief and to make any order that is just and equitable;
- (c) A strong presumption operated against any ouster or curtailment of an ordinary court’s jurisdiction, even pre-constitutionally;
- (d) Under the current Constitution, the mere fact that a party has a statutory appeal against a decision of SARS, it does not preclude such party from instituting a review against that decision. In terms of post-constitutional principles of justice, an affected person may enjoy a right of appeal in the wide sense, as well as a right of review before the High Court.

- [13] It follows that section 105 of the TAA finds no application in the present instance. The respondent's preliminary point is thus without substance and cannot be upheld. It stands to be dismissed.
- [14] Consequently this court has jurisdiction to hear the matter on the interpretation of section 4(2) of the Act. The respondent's point *in limine* stands to be dismissed.
- [15] The applicant conducts mining operations. It thus falls *inter alia* within the provisions of the Mineral and Petroleum Resources Royalty Act.
- [16] Since that Act came into effect in November 2009, and at least since 2010, the respondent and the mining industry have interpreted the Act in accordance with the tenor of the explanatory memorandum relating to the Bill prior to the promulgation of the Act. A copy of the explanatory memorandum that accompanied the Bill before Parliament, was for some unknown reason unsigned. Not much turned thereon, despite the fact that the respondent sought to make a meal thereof, but was compelled to acknowledge that no other explanatory memorandum existed, or saw the dawn of light. That document constituted the only explanatory memorandum put before parliament in respect of the Bill. The respondent accepted that the unsigned copy was appropriately before this court, and that the court could take cognisance thereof, as an aid when determining the interpretation of section 4(2) of the Act.⁶
- [17] Section 4(2) of the Act provides as follows:

"The percentage mentioned in section 3(2) is-

0.5 + [earnings before interest and taxes/(gross sales in respect of unrefined mineral resources x 9)] x 100"

- [18] The debate related to the words "*mineral resources*". The applicant contended that those words clearly indicated the plural form of the

⁶ *University of Johannesburg v Auckland Park Theological Seminary* 2021(6) SA 1 (CC)

concept. On the other hand, the respondent contended that it should be considered to be a reference to the singular form of the concept.

- [19] The applicant further contended that in the context of the text of that section, it explicitly deploys the plural form of the operative concept: *unrefined mineral resources*. In the statutory context of the Act, there were also references in other provisions to a mineral resource or an undefined mineral resource. Those were provisions that had a reference to the singular form.
- [20] The respondent contended that, in the statutory context of this Act, the content of section 4(2) related to the singular form of mineral resource in view of the use of the singular form in other sections of the Act. Thus, section 4(2) of the Act required the calculation to be performed by adopting a mineral - by - mineral, or category – by - category approach. In applying this methodology, the respondent submitted that its contention found support in the definition of “*mineral resource*” in the Act, and with further regard to other sections in the Act where reference was to “*mineral resource*”, *i.e.* in the singular form. In that regard, it was submitted that sections 2 and 3 of the Act supported the contention of the respondent that the singular form was intended. The respondent further contended that nowhere in the Act was reference made to *mineral source* in the plural form. That approach ignores the reference in section 4 of the Act where the calculation of royalty is to be calculated with reference to “*mineral resources*”, *i.e.* the concept in the plural form. In both subsections (1) and (2) of section 4, the calculations were to be made with reference to “*mineral resources*” in the plural form. A similar reference to the plural form of the concept *mineral resources* is to be found in the provisions of sections 5(1) and (2) of the Act. Where there is a general reference to the singular form of mineral “resource”, there are also specific references elsewhere in the Act to the plural form.

- [21] The canons of construction of interpretation are trite.⁷ Primarily, the language used in the context of the provision or clause is the starting point. That is to be considered in the context of the document as a whole and applying the ordinary rules of grammar and syntax. A holistic approach is to be undertaken, where simultaneously the text, context and purpose is to be considered.⁸
- [22] Applying the approach explained in *Auckland Park Seminary, supra*, no absurdity results in following the plural form of *mineral resources* in section 4(2) of the Act. In the context of the Act as a whole, the legislature did apply the singular form of *mineral resources* where so intended, e.g. in sections 1, 2, 3, 6 and 6A of the Act. It follows that the change in the meaning of the wording in section 4(2) of the Act was intentional.⁹ To hold otherwise, would defeat the purpose of the rules of interpretation. It would nullify the principle of considering the ordinary language, grammar and syntax used in in the section, in particular where no absurdity would follow by applying that principle.
- [23] The applicant submitted that a compelling rational for the difference between the use of the singular and plural forms of the concept of *mineral resource(s)* can be derived with reference to the various provisions where the use of the concept is found. In that instance, section 6 of the Act applies the singular form as it requires an individual approach to each mineral resource for the purpose of establishing the tabulated condition of each particular resource in the Schedule to the Act. In contradistinction, the plural form of the concept is used in sections 4 and 5 as it intended to calculate one overall royalty applicable to the extractor of the ore body which may contain multiple minerals mined in a single mining enterprise as part of a single extraction exercise. That

⁷ See *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012(4) SA 593 (SCA); *Botma-Batho Transport (Edms) Bpk v S Botma & Seun Transport (Edms) Bpk* 2014(2) SA 494 (SCA); see also *Minister of Police v Fidelity Security Services (Pty) Ltd* 2023(3) BCLR 270 (CC)

⁸ *University of Johannesburg v Auckland Park Theological Seminary, supra*

⁹ *Van Zyl v Auto Commodities (Pty) Ltd* 2021(5) SA 171 SCA; *Barry v Clearwater Estates NPC* 2017(3) SA 364 (SCA)

submission is preferable. Capital and operational expenditure incurred in such exercise may not be practicable in allocating such expenditure to each individual mineral.

- [24] It is to be noted that the reference to *unrefined mineral resources*, clearly contemplates the non-further processing thereof into separate and distinct minerals as to be found in the Schedule to the Act.
- [25] The purpose¹⁰ of the accompanying explanatory memorandum to the Bill, was to inform Parliament what was intended with the Bill. In that regard, the explanatory memorandum explained the policy choice and methodology adopted by Parliament and the approach to per-mineral methodology was specifically rejected. The memorandum stipulated a regime which imposed royalties on an aggregated basis applicable to the *mineral resources*, *i.e.* in the plural form. The explanatory memorandum clearly contradicts an interpretation as contended for by the respondent – a clear support of the ordinary language, grammar and meaning interpretation. Such interpretation to be afforded to section 4(2) of the Act, supports the purpose of the royalty regime to compensate the State fully for the value of the minerals.¹¹
- [26] In so far as it is required to consider the parties' prior approach to the meaning of the phrase "*mineral resources*" in section 4(2) of the Act, the respondent (as well as the industry), until this matter came to the fore in the present instance, applied the aggregated approach contended for by the applicant, and in line with the explanatory memorandum to the Bill.
- [27] It follows that the interpretation of section 4(2) of the Act as contended for by the respondent, cannot be upheld. It is a contradictory approach to applying the ordinary principles of interpretation. It stands to be rejected.

¹⁰ *University of Johannesburg, supra*; *United Manganese of Kalahari (Pty) Ltd v Commissioner, South African Revenue Service* 2018(2) SA 275 (GP); *Commissioner, South African Revenue Service v United Manganese of Kalahari (Pty) Ltd* 2020(4) SA 428 (SCA); *National Union of Metal Workers v Aveng Trident Steel* 2021(2) BCLR 168 (CC)

¹¹ *United Manganese of Kalahari, supra*

- [28] The respondent relied on further residual defences, one of which is that the applicant had failed to follow the internal remedies, namely, a review in terms of PAJA. There is no merit in that defence. As recorded earlier, the applicant is entitled to seek a declaratory. It was not obliged to follow a review procedure, which in the present instance was not available, nor applicable.¹²
- [29] The other residual defence related to alleged “mootness”.¹³ The Constitutional Court held in respect of contested construction of a statutory provision that it presents a “live issue” to be adjudicated upon.¹⁴
- [30] Neither of the further two residual defences accordingly have any merit. Both fail.
- [31] Consequently, the applicant is entitled to the declaratory sought in the notice of motion.

I accordingly grant the following order:

- 1 The respondent's point *in limine* on the issue of jurisdiction is dismissed.
- 2 It is declared that for purposes of determining the percentage to be applied under section 4(2) of the Mineral and Petroleum Resources Royalty Act, 28 of 2008:
 - (a) All unrefined mineral resources transferred by Richards Bay Mining (Pty) Ltd, as the same extractor must be aggregated ; accordingly

¹² See *Forestry South Africa v Minister of Human Settlements, Water and Sanitation* [2024] 1 All SA 22 (SCA)

¹³ See *BP Southern Africa (Pty) Ltd v Commissioner for the South African Revenue Service* [2024] ZASCA 2 (SCA)

¹⁴ *Competition Commission v Hosken Consolidated Investments Ltd* 2019(3) SA 1 (CC)

- (b) A single percentage is to be calculated (thus only one royalty rate is to be applied) in respect of all unrefined mineral resources transferred by Richards Bay Mining (Pty) Ltd, as the same extractor; therefore
 - (c) The calculation is not to be performed by adopting a mineral - by - mineral or category – by – category approach.
- 3 The respondent is ordered to pay the applicant's costs, such costs to include the costs of two counsel;
- 4 Leave is granted in terms of Rule 6(5)(e) of the Uniform Rules of Court to file the further affidavit deposed to by Andries Myburg on 26 August 2023, including its annexure.


C J VAN DER WESTHUIZEN
JUDGE OF THE HIGH COURT

On behalf of Applicant: Adv JJ Gauntlett SC KC
Adv FB Pelser

Instructed by: Edward Nathan Sonnenbergs Inc.

On behalf of Respondent: Adv L Sigogo SC
Adv M Masilo

Instructed by: Motsoeneng Bill Attorneys Inc.

Date of Hearing: 07 February 2024

Judgment Delivered: 26 March 2024