**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

**Reportable**

Case No: 1252/2022

In the matter between:

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| **COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE** | **APPELLANT** |
| and | |
| **TUNICA TRADING 59 (PTY) LTD** | **RESPONDENT** |

**Neutral citation:** *Commissioner for the South African Revenue Service v Tunica Trading 59 (Pty) Ltd* (1252/2022) [2024] ZASCA 115 (24 July 2024)

**Coram:** MOLEMELA P, MOCUMIE, SCHIPPERS and MEYER JJA and TLALETSI AJA

**Heard:** 2 May 2024

**Delivered:** This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The time and date for hand-down is deemed to be 11h00 on 24 July 2024.

**Summary:** Administrative Law – review of Commissioner's decision refusing refund of excise duty and fuel levy – Customs and Excise Act 91 of 1964 (the Act) – notice of legal proceedings under s 96 – whether response to notice a 'decision' within the meaning of the Promotion of Administrative Justice Act 3 of 2000 – s 75(1)*(d)* of the Act – whether licensed distributor of fuel satisfied requirements for refund – meaning of s 64F of the Act – that fuel be obtained from stocks of licensee of customs and excise manufacturing warehouse.

## ORDER

**On appeal from:** Western Cape Division of the High Court, Cape Town (Le Grange J, Cloete J and Kusevitsky J sitting as court of appeal):

1 The appeal is upheld with costs, including the costs of senior counsel.

2 The order of the court a quo is set aside and replaced with the following:

'The application is dismissed with costs, including the costs of two counsel where so employed.'

## JUDGMENT

**Schippers JA (Molemela P, Mocumie and Meyer JJA and Tlaletsi AJA concurring)**

[1] The appellant, the Commissioner of the South African Revenue Service (the Commissioner), appeals against a decision of a full court of the Western Cape Division of the High Court, Cape Town (the High Court), which reviewed and set aside two decisions by the South African Revenue Service (SARS) relating to applications by the respondent, Tunica Trading 59 (Pty) Ltd (Tunica), for the refund of excise duty and fuel levy under the Customs and Excise Act 91 of 1964 (the Act). The appeal is with the leave of this Court.

**The facts**

[2] Tunica is a licensed distributor of fuel (LDF) in terms of s 60 of the Act. It is a small-scale distributor which purchases fuel for supply to foreign-going ships. In 2014 Tunica purchased fuel (diesel) from Masana Petroleum Solutions (Pty) Ltd

(Masana), which supplies fuel to small-scale distributors. A letter by BP Southern Africa (Pty) Ltd (BP) dated 5 March 2015, states that it supplies fuel to Masana in terms of a supply agreement between BP and Masana; that BP is a 45% shareholder in Masana; and that BP grants Masana access to its 'capabilities and resources'. It is common ground that BP is a licensee of a customs and excise manufacturing warehouse within the meaning of s 64F of the Act.

[3] On 28 October 2014, 4 November 2014 and 11 November 2014 respectively, Tunica applied to SARS for a refund of excise the duty and fuel levy under the Act, in respect of three consignments of fuel which Tunica had bought from Masana (the refund applications). The fuel was obtained from BP's depot in Montague Gardens, Cape Town, and sold to foreign-going ships, namely the Danah Explorer, the INS TEG in Simons Town and the INS TEG in Cape Town.

[4] This appeal concerns only one refund application, namely Tun 068, in respect of fuel delivered on behalf of Tunica to the INS TEG in Simons Town. The INS TEG is an Indian naval vessel. Tunica's remaining refund applications have not yet been decided by SARS.

[5] On 1 April 2015 SARS rejected the refund application on the ground of non-compliance with s 64F(1)*(b)* of the Act, because Tunica did not acquire the fuel from the licensee of a customs and excise manufacturing warehouse (BP). Instead, the fuel was purchased from an intermediary, Masana, which allegedly had purchased it from a licensed manufacturing warehouse, BP. Tunica was referred to s 77A-H of the Act and informed of its right to appeal the decision refusing its refund application.

[6] On 17 April 2015 Tunica appealed the decision of 1 April 2015 to an internal administrative appeal committee of SARS (the appeal committee). The grounds of appeal were these. SARS' interpretation of the Act was flawed and it provided no

evidence to support that interpretation. Section 64F(1) does not require a LDF to acquire the fuel directly from the licensee of a customs and excise manufacturing warehouse. The 'new interpretation' by SARS was an arbitrary change in the application of the Act, which was administratively unfair and effectively rendered s 64F(1) nugatory.

[7] On 28 September 2015 Tunica was advised that the appeal committee had disallowed the appeal. The reasons given were the following. The invoices for the fuel were in the name of Masana. The fuel was not sourced from the stocks of a licensed customs and excise manufacturing warehouse and could not be confirmed as a direct movement from such stocks. Tunica did not comply with s 64F(1)*(b)* of the Act read with rule 64F.06*(d)* of the Custom and Excise Act Rules (the Rules).

[8] On 26 October 2015 Tunica requested reasons for the appeal committee's decision, which it furnished on 4 January 2016. The committee confirmed the reasons for the decision in its letter of 28 September 2015 and added that Tunica 'did not qualify for the schedule 6 refund item'.

[9] On 3 February 2016 Tunica delivered to SARS, a notice of its intention to institute legal proceedings in terms of s 96(1) of the Act, for the refund of the excise duty and fuel levy (the s 96 notice). In its cause of action annexed to that notice, Tunica stated that on a proper construction of the Act and the rules, it was entitled to a refund, and that the decision by SARS was materially influenced by an error of law. It contended that obtaining fuel from the stocks of a licensee of a customs and excise manufacturing warehouse 'must include cases where the fuel is purchased from an intermediary like Masana'. Tunica also alleged that SARS had committed various reviewable irregularities as envisaged in the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

[10] On 3 February 2016 SARS informed Tunica that the s 96 notice had been handed to Ms Makhala Moloi, a senior manager in its litigation department and the main deponent to the answering papers. Subsequently, she informed Tunica that the documents it had submitted were insufficient. Tunica was requested to submit further documentation, given an opportunity to make an oral presentation and SARS proposed that Tunica not proceed with litigation until SARS provided a final response to the s 96 notice.

[11] At a meeting at SARS' offices in Pretoria on 25 August 2016, Tunica made an oral presentation and provided further documents. It was decided that SARS would provide Tunica with a spreadsheet indicating the documentation required, which it did. Tunica completed the spreadsheet and submitted it to SARS.

[12] On 2 November 2016 SARS responded to the s 96 notice. SARS informed Tunica, inter alia, that the Montague warehouse is not a licensed manufacturer of oil as required under the Act; that Masana is not a licensed warehouse; that there was no purchase invoice between the oil major and Tunica;[1] that the road transporter of the fuel had to be registered under the Act; and that there was no proof that the fuel had been delivered. SARS stated that unless Tunica could provide information and documents to refute SARS' response, it was inclined to agree with the decision of the appeal committee.

[13] On 2 December 2016 Tunica's attorneys wrote to SARS, explaining their client's position. SARS replied on 17 February 2017, reiterating its stance that Tunica did not qualify for a refund of the excise duty and fuel levy.

[14] On 3 April 2017 Tunica sent another notice in terms of s 96 of the Act, informing SARS that legal proceedings would be instituted under the PAJA to

[1] Oil majors are the main players in the South African oil industry, such as BP Southern Africa, Total Energies and Shell Southern Africa.

review and set aside the decision to disallow the refund. In its response dated 19 April 2017, SARS informed Tunica that it would have to impugn the decision of the appeal committee and not Ms Moloi's response to the s 96 notice. SARS stated that Ms Moloi's response was not administrative action within the meaning of the PAJA, and thus not reviewable.

**Litigation history**

***The High Court***

[15] In June 2020 Tunica brought an application in the High Court in which it claimed inter alia the following relief:

(a) An order in terms of s 9 of PAJA extending the time period for the launch of the application, to the extent necessary.

(b) An order setting aside the decisions taken by SARS on 17 February 2017, alternatively on 28 September 2015, refusing Tunica's application for a refund of the excise duty and fuel levy.

(c) In the alternative to (b) above, an order in terms of s 172(1) of the Constitution, declaring the decisions invalid, and reviewing and setting them aside.

(d) An order remitting the application for a refund of the excise duty and fuel levy to the Commissioner for a decision within 15 days of the date of the order.

(e) In the alternative to (a), (b), (c) and (d) above: an order condoning Tunica's non-compliance with the time limit of one year in s 47(9)*(f)* of the Act to the extent necessary; an order that the application be deemed to be an appeal in terms of s 47(9)*(e)* of the Act against the decisions taken on 17 February 2017, alternatively on 28 September 2015, on the grounds set out in the founding papers; and an order upholding the appeal.

[16] The grounds for the review, alternatively the appeal, were these. The decision was materially influenced by an error of law as SARS' interpretation of

s 64F was flawed and rendered the provision nugatory. SARS took into account irrelevant considerations and ignored relevant ones. The fact that the fuel was purchased from Masana was irrelevant; it was obtained from the stocks of the licensee of a customs and excise manufacturing warehouse. The decision was not authorised by an empowering provision, was arbitrary and capricious, and irrational and unreasonable. The actions of SARS were procedurally unfair in that SARS had changed its approach to refunds without warning. The decision was otherwise unlawful and unconstitutional.

[17] The High Court (Desai J) dismissed the application with costs. Its main findings can be summarised as follows. Tunica was required to impugn the decision taken by the appeal committee on 28 September 2015. Ms Moloi's response to the s 96 notice dated 17 February 2017 was not reviewable because it is not administrative action as defined in the PAJA, nor the exercise of public power, which is reviewable in terms of the principle of legality.

[18] The High Court dealt with the matter as an appeal in terms of s 47(9)*(e)* of the Act, against the decision taken by the appeal committee on 28 September 2015. It stated that such appeal was an appeal in the wide sense which entailed a complete rehearing of the matter, with or without additional information; and that all the evidence necessary to decide the matter had been placed before it.

[19] The High Court held that the system created by the Act is one of self-assessment, and it is the duty of the entity claiming a refund to ensure strict compliance with its provisions, by rendering correct returns and keeping the prescribed and other records to substantiate the correctness of the returns lodged and payment made. Tunica, the court said, had not submitted the specified documents containing the prescribed information.

[20] The High Court found that the fuel was not obtained from the licensee of a customs and excise manufacturing warehouse; it was bought from Masana. There was no evidence that the transporter who had collected the fuel from BP's depot was a licensed remover of goods under the Act, nor evidence linking the fuel collected from the depot to that delivered to the vessel. It concluded that Tunica had not met the requirement that the fuel had been exported. Tunica was granted leave to appeal to a full court.

***The Full Court***

[21] The Full Court (Le Grange J, Cloete J and Kusevitsky J) upheld the appeal with costs. It set aside the High Court's order and replaced it with an order declaring the Commissioner's decisions taken on 17 February 2017 and 28 September 2015 invalid, and reviewed and set aside those decisions. The refund application was remitted to the Commissioner, who was directed to decide it within 30 days of the date of the order.

[22] The Full Court held that the September 2015 decision was not a tariff determination as contemplated in s 47(9)*(a)*(i) of the Act. Rather, it was a decision on Tunica's appeal lodged in terms of s 77B(1) of the Act, taken by the appeal committee and signed by its chairperson, as contemplated in s 77E(3). The Court also held that at no stage prior to the litigation did SARS inform Tunica that its appeal against the rejection of its application for a refund was being dealt with as an appeal under s 47(9)*(e)* of the Act.

[23] The Full Court concluded that SARS' response to the s 96 notice was a decision within the meaning of s 77F of the Act; and that it was the operative decision and therefore reviewable. It reasoned that SARS in its letter of 8 April 2016, had suggested that Tunica not proceed with litigation and invited Tunica to clarify certain issues before the Commissioner made a 'final decision'. This, the Full Court said, 'falls squarely within the provisions of s 77F the Customs Act'.

The Court stated that if the September 2015 decision was a final decision, 'then the letter of 8 April 2016 would have served no purpose, as the Commissioner would have been *functus officio* and no further decision could have been taken by him'. It went on to say that Ms Moloi had signed the 'decision' on behalf of the Commissioner, which had legal consequences until set aside by a court.

[24] The Full Court held that the Commissioner committed an error of law which vitiated the decision refusing the refund application. Tunica was entitled to a refund of customs duties and fuel levies, since s 64F(1) of the Act requires a LDF to obtain or acquire – not purchase – fuel from the stocks of a licensee of a customs and excise manufacturing warehouse. This, according to the Full Court, would include cases where fuel is purchased from an intermediary, but emanates from the stocks of the licensee of a customs and excise manufacturing warehouse. The Full Court stated that Tunica's contention that SARS' interpretation of s 64F(1) would for practical purposes render the provision nugatory, had merit.

[25] The Full Court further held that SARS took into account irrelevant considerations, namely the fact that the fuel had been purchased from Masana. SARS ignored relevant considerations: BP's controlling interest in Masana; the fuel was supplied from the stocks of BP; Tunica delivered the fuel directly from BP's depot; and Tunica had complied with all regulatory requirements. Tunica's complaint that the rejection of its application was not authorised by the empowering provision, and was arbitrary and irrational, the Full Court said, had merit.

[26] The Full Court concluded that the High Court had erred in holding that the fuel had not been exported within the meaning of rule 64F.06 wholly and directly, either as cargo or in bunker. It stated that it was unlikely that fuel bought from a LDF and used by a foreign vessel 'which must of necessity return to its registered port, could ever be treated as fuel used for home consumption'; and 'includes the

situation where a foreign vessel consumes some of the fuel in South African waters'.

[27] Finally, the Full Court held that SARS had furnished new reasons for the impugned decision, which were factually incorrect. These were that Tunica had not submitted the specified documents; that the fuel was not directly exported; that there was no evidence that the transporter was a licensed remover of goods under s 64D of the Act, which the Court said was inapplicable; and that there was no evidence linking the fuel collected from the depot to that delivered to the vessel.

**Submissions in this Court**

***Submissions on behalf of SARS***

[28] Tunica's internal appeal was dismissed on 28 September 2015. It delivered the s 96 notice of its intention to review that decision in terms of the PAJA. That notice, SARS submits, constitutes the first step in litigation and falls outside the category of internal administrative appeals, alternative dispute resolution and dispute settlement contained in Chapter XA of the Act.

[29] SARS submits that its response to the s 96 notice dated 17 February 2017, is precisely that: it is not a decision taken in terms of s 77F of the Act. The response was the last step in a process of considering the s 96 notice. It does not constitute administrative action as envisaged in the PAJA. Moreover, there is no evidence to indicate that in issuing the response on 17 February 2017, SARS was acting in terms of s 77F of the Act.

[30] SARS submits that the Act creates a system of self-assessment that functions similarly to the Income Tax Act 58 of 1962 and the Value Added Tax Act 89 of 1991. Therefore, an entity that engages in a commercial activity to which the Act applies must ensure that it complies with the Act's provisions, in particular by

paying the correct duty or levy, and keeping the prescribed and other records to substantiate the correctness of returns lodged and payment made.

[31] SARS further submits that strict compliance with the Act is necessary to enable the Commissioner to effectively administer and enforce its provisions, and that Tunica has not met the requirements for a refund of the excise duty or fuel levy as contemplated in s 75(1)*(d)*. It provides for the payment of refunds 'to the extent and in the circumstances stated in the item of Schedule No. 6 in which such goods are specified subject to compliance with the provisions of the said item'. The relevant item in this case is item 623.25 in Schedule 6, which requires that the fuel be obtained from stocks of the licensee of a customs and excise manufacturing warehouse, subject to compliance with Note 10. Tunica did not meet this requirement. In terms of Note 10, fuel so obtained must be wholly and directly exported by a LDF in order to be considered for a refund of duty. Tunica did not meet this requirement either.

***Tunica's submissions***

[32] Tunica supports the Full Court's conclusion that the operative decision that had to be challenged was the response to the s 96 notice on 17 February 2017, for the reasons stated in that Court's judgment. Tunica contends that 'the February 2017 decision was the final decision by the Commissioner in respect of the refund application, that it is administrative action, and that it is reviewable in terms of PAJA, alternatively section 172(1) of the Constitution'.

[33] Tunica submits that the September 2015 decision fell to be reviewed and set aside on numerous grounds contained in the PAJA. Its main review ground was that the decision was materially influenced by an error of law, namely the incorrect interpretation of s 64F of the Act.

[34] Tunica further submits that for many years 'SARS itself had interpreted the Act and rules in such a way that a refund would be made in these circumstances', which suggests that SARS also understood the section in a way that makes business and commercial sense. Subsequently, so it is submitted, SARS 'decided to interpret the section in a way which requires words to be read into it, and which renders the section nugatory'.

[35] Tunica submits that SARS' interpretation of s 64F is incorrect for the following reasons. The requirement that the fuel must be obtained (not purchased) from stocks of a licensee of a customs and excise manufacturing warehouse, must include cases where the fuel is purchased from an intermediary like Masana. If the legislature intended to refer to fuel purchased directly from the licensee of a customs and excise manufacturing warehouse, it would have said so. These licensees impose onerous conditions and high prices on the sale of fuel stocks directly to a LDF, and prefer to do so through authorised distributors like Masana. Consequently, a LDF like Tunica finds it difficult to purchase fuel directly from local oil manufacturers, which means that SARS's interpretation 'renders section 64F(1) nugatory for all practical purposes'.

**The issues**

[36] In this Court the parties accepted that the matter should be dealt with as a review under the PAJA, and not as an appeal against a tariff determination in terms of s 47(9)*(e)* of the Act. SARS conceded that an order extending the time period for the launch of the review application in terms of s 9 of the PAJA, was in the circumstances unnecessary.

[37] There are three issues raised by this appeal:

(a) The first is whether the response by SARS to the s 96 notice is a decision which is reviewable under the PAJA.

(b) The second issue, which is at the heart of the appeal, is the proper construction of s 64F of the Act. It provides inter alia that a LDF is entitled to a refund of duty in respect of fuel obtained at any place in the Republic, 'from stocks of a licensee of a customs and excise manufacturing warehouse'.

(c) The third issue is whether Tunica complied with the requirements of s 64F(1)*(b)* of the Act.

## Is the response to the s 96 notice reviewable?

[38] Section 96(1) in relevant part provides:

'**96 Notice of action and period for bringing action**

(1)*(a)*(i) No process by which any legal proceedings are instituted against the State, the Minister, the Commissioner or an officer for anything done in pursuance of this Act may be served before the expiry of a period of one month after delivery of a notice in writing setting forth clearly and explicitly the cause of action, the name and place of abode of the person who is to institute such proceedings (in this section referred to as the **"litigant"**) and the name and address of his or her attorney or agent, if any.

(ii) Such notice shall be in such form and shall be delivered in such manner and at such places as may be prescribed by rule.

(iii) No such notice shall be valid unless it complies with the requirements prescribed in this section and such rules.'

[39] Recently in *Commissioner SARS v Dragon Freight*, this Court described the purpose of s 96(1) as follows:

'The purpose of section 96(1) is self-evident: to allow SARS, the organ of state charged with the administration of the Act, to investigate or review the merits of the intended legal proceedings and decide what position to adopt in relation thereto. It may, for example, in an appropriate case decide to resolve the dispute before the institution of legal proceedings, so as to avoid unnecessary and costly litigation at public expense.

SARS is a large and complex institution with extensive administrative responsibilities and high workloads. Its functions are not confined to the levying of customs and excise duties under the Act, but include the recovery of taxes under the Income Tax Act 58 of 1962 and the administration of the Value-Added Tax Act 89 of 1991. The section 96(1) notice enables SARS

to ensure that a matter is brought timeously to the attention of the appropriate official for investigation or review.'[2]

[40] It follows that the Commissioner may respond to a s 96(1) notice in one of three ways:

(a) He or she may not respond at all. Since a litigant's right to proceed with its cause of action is not dependent on the Commissioner's response, it is entitled to proceed with the intended legal proceedings after the expiry of the one-month period.

(b) The Commissioner may concede the relief sought in the intended legal proceedings or settle the matter on some other basis, thus rendering the institution of proceedings unnecessary.

(c) The Commissioner may within the one-month period inform the litigant that he or she does not concede the relief sought in the intended proceedings. In that event the litigant would have to wait until the one-month period expires, unless the Commissioner agrees that litigation may be commenced immediately.

[41] Although the Commissioner did not respond to the s 96 notice within one month, the response in (c) applies in this case. It is clear from the evidence, contrary to the finding of the Full Court, that SARS' response to that notice in its letter of 8 April 2016 is not a decision made under s 77F of the Act. SARS' response was thus not reviewable.

[42] Section 77F must be read with s 77E. These provisions, in relevant parts, state:

'**77E Appointment and function of appeal committee**

[2] *The Commissioner for the South African Revenue Service and Others v Dragon Freight (Pty) Ltd and Others* [2022] ZASCA 84; [2022] 3 All SA 311 (SCA); 85 SATC 289 paras 33-34.

(1) The Commissioner may appoint a committee of officers or a committee of officers and other persons to consider and decide appeals or make recommendations in relation to such appeals to the Commissioner.

(2) An appeal committee may-

*(a)* consider and decide; or

*(b)* make recommendations to the Commissioner on matters prescribed by rule.

(3) Any decision signed by the chairperson of the appeal committee shall be regarded as a decision of the committee and to have been made by an officer.

(4) The chairperson of the appeal committee must maintain a record of the proceedings prescribed by rule.'

'**77F Decision of Commissioner and committee**

(1) The Commissioner may-

*(a)* refer the matter back to the committee for further consideration;

*(b)* reject or accept or accept and vary the recommendation of the committee;

*(c)* confirm or amend the decision or withdraw it and make a new decision.'

[43] A notice in terms of s 96 plainly falls outside the appeal process contemplated in s 77F of the Act. Rather, it is a mandatory first step required by the Act before legal proceedings may be instituted against the Commissioner. It is therefore not surprising that the response to the s 96 notice does not constitute 'administrative action' as defined in the PAJA, namely:

'any decision taken, or any failure to take a decision, by . . . an organ of state, when . . . exercising a public power or performing a public function in terms of any legislation . . . which adversely affects the rights of any person and which has a direct, external legal effect . . .'[3]

[44] Applied to the present case, Tunica sent the s 96 notice pursuant to the dismissal of its appeal by the appeal committee on 28 September 2015, after it had requested reasons for that decision. The s 96 notice unequivocally states that '[t]here are a number of grounds on which Tunica intends to challenge the approach

[3] Section 1 of the PAJA; *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* [2005] ZASCA 43; [2005] 3 All SA 33 (SCA); (2005) 6 SA 313 (SCA) para 23, affirmed in *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hydro-Tech Systems (Pty) Ltd and Another* [2010] ZACC 21; 2011 (1) SA 327 (CC); 2011 (2) BCLR 207 (CC) para 37.

by SARS as constituting an error of law' under the PAJA – a decision which directly affected its right to a refund of the customs duty and fuel levy. Consequently, there can be no suggestion that Tunica was seeking a decision by the Commissioner in terms of s 77F of the Act.

[45] What is more, the letter by Ms Moloi dated 8 April 2016 makes it clear that it was not written in anticipation of a decision by the Commissioner under s 77F. The letter states the following:

(a) It is written in response to the s 96 notice.

(b) In considering the s 96 notice and supporting documentation, SARS inclines to the view that the documentation is insufficient to make 'an informed decision' (in response to the notice). Tunica is invited to clarify certain issues by furnishing the documents listed in the letter before a final decision is made.

(c) If Tunica is of the opinion that an oral presentation would assist in explaining its compliance with the Act and finalising the matter, SARS would grant it such an opportunity.

(d) Tunica should not proceed with litigation pending finalisation of the s 96 notice, and should it be necessary to file papers in the High Court, Tunica would be granted an extension of 30 days to do so.

[46] That the Commissioner's response to the s 96 notice is not administrative action and consequently not reviewable, is placed beyond question in Ms Moloi's letter to Tunica's attorneys dated 2 November 2016. It records SARS' response to the s 96 notice and concludes as follows:

'Based on the above mentioned, unless your client can provide information with documents to back up what we have highlighted herein, this office is inclined to agree with the decision of the IAA [Internal Appeal Committee].

*Such decision will stand* and this office will consider your client's *Section 96 notice* to have been duly *dealt with and finalised*.'[4]

[47] Tunica's attorneys wrote to SARS on 2 December 2016 in which they again addressed the issues. They said that there was no basis for Ms Moloi to agree with the decision of the appeal committee; that they were awaiting SARS' 'final decision'; and that they reserved their client's rights to proceed with legal action.

[48] On 17 February 2017 Ms Moloi once more informed Tunica's attorneys that their client did not qualify for a refund for the reasons stated in her letter of 2 November 2016. The attorneys were again advised that SARS agreed with the appeal committee's decision.[5]

[49] For these reasons, the Full Court's findings that 'the decision . . . in February 2017 where the process was completed and a final decision had been made'; and 'SARS cannot simply treat the decision taken by Ms Moloi as though it did not exist', are unsustainable on the evidence. So too, its finding that 'the 17 February 2017 decision is the operative decision which constitutes administrative action as defined in PAJA and is therefore reviewable'. The Full Court's order on this aspect must therefore be set aside.

**Section 64F of the Act**

[50] Three preliminary points are required to be made at the outset. First, the fact that for many years SARS had interpreted the Act and rules in such a way as to grant an application for a refund of the kind claimed in this case – which the Full Court took into account – is irrelevant. This is because, as Harms JA said in *KPMG*, 'interpretation is a matter of law and not of fact and, accordingly, is a matter for

[4] Emphasis added.
[5] The letter by Ms Moloi states: 'Our office therefore, upholds the decision of the IAA and that of the branch office.'

the court and not for witnesses'.[6] Thus, if on a proper construction of s 64F Tunica is not entitled to a refund, that is the end of its case.

[51] Further, in terms of the principle of legality, an aspect of the rule of law, a body exercising public power such as SARS, must act within the powers lawfully conferred on it.[7] For this reason the doctrine of estoppel – that SARS has for many years granted applications for refunds of the kind in question – cannot be applied against it. To do so would be to confer on SARS a power that it does not have, and grant validity to an *ultra vires* act (an act beyond the powers of an administrator). In *RPM Bricks* this Court held that estoppel 'cannot . . . be used in such a way as to give effect to what is not permitted or recognised by law'.[8]

[52] Second, given that interpretation is a matter of law, the fact that a small-scale distributor may encounter difficulty in purchasing fuel directly from the licensee of a customs and excise manufacturing warehouse, is likewise irrelevant to the construction of s 64F. The Full Court's conclusion that there is merit in the argument that SARS' interpretation would for practical purposes render s 64F nugatory, is therefore misplaced.

[53] Third, in construing a taxing act, a court 'will not presume in favour of any special privilege of exemption from taxation'.[9] On the contrary, a rebate of excise duty is a privilege and strict compliance with its conditions may be exacted from the claimant. As was held by a full court in *BP v Secretary for Customs and Excise*,[10] approved by this Court in *Toyota South Africa*:[11]

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[6] *KPMG Chartered Accountants SA v Securefin Ltd and Another* [2009] ZASCA 7; 2009 (4) SA 399 (SCA); [2009] 2 All SA 523 (SCA) para 39.
[7] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) paras 56 and 58.
[8] *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* [2007] ZASCA 28; [2007] SCA 28 (RSA); 2008 (3) SA 1 (SCA) para 23.
[9] *Ernst v Commissioner for Inland Revenue* 1954 (1) SA 318 (A) at 323E.
[10] *BP Southern Africa (Pty) Ltd and Others v Secretary for Customs and Excise and Another* 1984 (3) SA 367 (C) at 376A-C.
[11] *Toyota South Africa Motors (Pty) Ltd v Commissioner, South African Revenue Service* 2002 (4) SA 281 (SCA) para 45.

'[T]he rebate of excise duty is a privilege enjoyed by those who receive it. It has been stated that it is neither unjust nor inconvenient to exact a rigorous observance of the conditions as essential to the acquisition of the privilege conferred and that it is probable that this was the intention of the Legislature . . . Moreover, the provision is obviously designed to prevent abuse of the privilege and evasion of the conditions giving rise to such privilege and again this supports the view that a strict compliance with the requirements laid down is necessary.'

### *The statutory and regulatory provisions*

[54] The starting point is s 75(1) of the Act. It provides:

'Subject to the provisions of this Act and to any conditions which the Commissioner may impose–

. . .

*(d)* in respect of any excisable goods or fuel levy goods manufactured in the Republic described in Schedule 6, . . . a refund of the excise duty, fuel levy or Road Accident Fund levy actually paid at the time of entry for home consumption shall be granted to the extent and in the circumstances stated in the item of Schedule 6 in which such goods are specified, subject to compliance with the provisions of the said item and any refund under this paragraph may be paid to the person who paid the duty or any person indicated in the notes to the said Schedule 6:

Provided that any rebate, drawback or refund of Road Accident Fund levy as contemplated in paragraph *(b), (c)* or *(d),* shall only be granted as expressly provided in Schedule 4, 5 or 6 in respect of any item of such Schedule.'

[55] Section 64F reads inter alia as follows:

'**Licensing of distributors of fuels obtained from the licensee of a customs and excise manufacturing warehouse**

(1) For purposes of this Act, unless the context otherwise indicates–

"**licensed distributor**" means any person who–

*(a)* is licensed in accordance with the provisions of section 60 and this section;

*(b)* obtains at any place in the Republic for delivery to a purchaser in any other country of the common customs area for consumption in such country or for export (including supply as ships' or aircraft stores), fuel, which has been or is deemed to have been entered for payment of excise duty and fuel levy, from stocks of a licensee of a customs and excise manufacturing warehouse; and

*(c)* is entitled to a refund of duty in terms of any provision of Schedule 6 in respect of such fuel which has been duly delivered or exported as contemplated in paragraph *(b)*.

(2) . . .

(3) *(a)* In addition to any other provision of this Act relating to refunds of duty, any refund of duty contemplated in this section *shall be subject to compliance with the requirements specified in the item of Schedule 6 providing for such refund and any rule prescribing any requirement in respect of the movement of such fuel to any such country or for export*.'[12]

[56] The item specified in Schedule 6 in terms of which Tunica applied for a refund of duty, is item 623.25. It provides:

'Fuel liable to excise duty which, after entry or deemed entry for home consumption and payment of duty by a licensee of a customs and excise manufacturing warehouse contemplated in section 19A and its rules is obtained from stocks of such licensee and exported (including supply as stores for foreign-going ships), by a licensed distributor contemplated in section 64F, subject to compliance with Note 10 to this Section.'

[57] Note 10(b) in Part 1F of Schedule 6 (Note 10) reads:

'(b) Requirements in respect of refunds:

(i) . . .

(ii) Any application for a refund of excise duty in terms of this item shall be subject to compliance with–

(aa) section 64F and its rules;

(bb) rule 19A4.04 *mutatis mutandis* and any other rule regulating the export of goods to which this item relates.

(iii) (aa) Any load of fuel obtained from the licensee of a customs and excise manufacturing warehouse must be wholly and directly exported by the licensed distributor in order to be considered for a refund of duty.

(bb) A refund shall only be payable on quantities actually exported.'

[58] The rules prescribing the movement of fuel envisaged in s 64F(3) are contained in rule 64F.06. One of the reasons for refusing Tunica's application for a refund, was non-compliance with rule 64F.06. It provides:

[12] Emphasis added.

‘(a) The procedures and other requirements prescribed in rule 19A4.04 which regulate the removal of fuel levy goods to a BLNS country or when exported shall apply *mutatis mutandis* in respect of fuel so removed to any other country in the common customs area or so exported as contemplated in section 64F and these rules.

(b) Unless the licensed distributor uses own transport, such fuel, if wholly or partly transported by road, must be carried by a licensed remover of goods in bond contemplated in section 64D.

(c) The number and date of the invoice issued by the licensee of the customs and excise manufacturing warehouse from whom the licensed distributor obtained the goods for such removal or export must be reflected on the form SAD 500.

(d) Any load of fuel obtained from the licensee of a customs and excise manufacturing warehouse must be wholly and directly removed for delivery to a BLNS country or exported, as the case may be, in order to be considered for a refund of duty.’

[59] The procedures and requirements prescribed in Rule 19A4.04 regulating the removal of fuel levy goods, are the following:

‘**Procedures relating to goods removed from a customs and excise warehouse**

*(a)* (i) Any fuel levy 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”.

(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 the control of a licensee of a customs and excise manufacturing or special customs and excise storage warehouse.

(iii) Only a licensee of such manufacturing warehouse or the special customs and excise storage warehouse contemplated in rule 19A4.01*(b)*(ii) or a licensed distributor as contemplated in section 64F may export fuel levy goods.

(iv) Only a licensee of such manufacturing warehouse or a licensed distributor as contemplated in section 64F may remove fuel levy goods to any BLNS country.

(v) When any fuel levy goods are transported by road for -

*(aa)* export;

*(bb)* removal to a BLNS country;

*(cc)* removal to another customs and excise manufacturing warehouse or to a special customs and excise storage warehouse;

*(dd)* removal to a rail tanker, a ship or an aircraft for onward removal for export

such removal shall only be by a licensed remover of goods in bond as contemplated in section 64D unless the goods are carried by the licensee or licensed distributor using own transport.'

[60] Finally, there is the reverse onus provision in s 102(5) of the Act:

'If in any prosecution under this Act or in any dispute in which the State, the Minister or the Commissioner or any officer is a party, it is alleged by or on behalf of the State or the Minister or the Commissioner or such officer that any goods or plant have been or have not been imported, exported, manufactured in the Republic, removed or otherwise dealt with or in, it shall be presumed that such goods or plant have been or (as the case may be) have not been imported, exported, manufactured in the Republic, removed or otherwise dealt with or in, unless the contrary is proved.'

[61] In summary and for present purposes, Tunica was required to establish the following:

(a) The fuel was manufactured in South Africa.

(b) The fuel was entered for home consumption on payment of duty by the licensee of a customs and excise manufacturing warehouse (the licensee).

(c) The fuel was obtained from the stocks of the licensee.

(d) Any load of fuel obtained from the licensee was wholly and directly removed from the licensee's stocks for export by Tunica.

(e) The assessment by SARS that the fuel was not exported, removed, or otherwise dealt with or in (ie not obtained from the licensee), is wrong.

***SARS' interpretation of s 64F(1)(b): an error of law?***

[62] It is a settled principle that when construing a statute, the inevitable point of departure is the language of the provision, understood in the context in which it is

used, and having regard to its purpose. This constitutes the unitary exercise of interpretation.[13]

[63] On its plain language, a LDF means a person who obtains fuel *from the stocks* of the licensee (s 64F(1)*(b)*). The word 'stocks' is not defined in the Act and must be given its ordinary meaning. It is defined inter alia as: 'goods kept on the premises of a shop or warehouse';[14] 'a supply of goods that is available for sale in a shop';[15] 'the total amount of goods or the amount of a particular type of goods available in a shop';[16] or 'the inventory of goods of a . . . manufacturer'.[17]

[64] These definitions indicate that to qualify for a refund, a LDF must acquire the fuel directly from the inventory of the licensee – not from an intermediary such as Masana. This is hardly surprising, since it is an express requirement of s 75(1)*(d)* of the Act that a refund of excise duty or fuel levy is granted in respect of excisable goods or fuel levy goods manufactured in the Republic. And in terms of ss 19(1) and (2), a customs and excise manufacturing warehouse is a *warehouse* (ie premises) specifically licensed for the manufacture of dutiable goods from imported or locally-produced materials. Simply put, the fuel must be obtained from stocks at the warehouse of the licensee to qualify for a refund of customs and excise duty.

[65] The plain wording of s 64F(1)*(b)* is buttressed by the immediate context. Following from the conjunction 'and' in the latter provision, s 64F(1)*(c)* states that a LDF is a person who 'is entitled to a refund of duty in terms of Schedule No. 6'. This is underscored by s 64F(3)*(a)* which provides that such refund is 'subject to compliance with the requirements specified in the item of Schedule No. 6' (rebate

[13] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18, affirmed in *Airports Company South Africa v Big Five Duty Free (Pty) Limited and Others* [2018] ZACC 33; 2019 (2) BCLR 165 (CC); 2019 (5) SA 1 (CC) para 29.
[14] Investopedia (www.investopedia.com).
[15] Oxfordlearnersdictionaries.com
[16] Cambridge Dictionary (https://dictionary.cambridge.org).
[17] Merriam-Webster Dictionary (https://www.merriam-webster.com).

item 623.25), and any rule prescribing requirements for the movement of such fuel for export.

[66] Rebate item 623.25, in turn, confirms the requirement that the fuel is obtained from the licensee's inventory, subject to compliance with Note 10. It is plain from Note 10 that any application for a refund of excise duty is subject to compliance with s 64F and its rules,[18] and rule 19A4.04.[19] Note 10 also states that any load of fuel obtained from the licensee must be wholly and directly exported by the LDF in order to be considered for a refund of duty,[20] and that '[a] refund shall only be payable on quantities actually exported'.[21]

[67] The s 64F rules make it clear that a LDF may obtain fuel only from stocks of the licensee at the warehouse:

(a) Rule 64F.01(a) defines, inter alia, 'manufacturing warehouse' as a '*licensed* customs and excise manufacturing warehouse'.[22] In other words, a LDF may obtain fuel only from stocks at a licensed warehouse – not a depot.

(b) Rule 64F.04*(c)* provides:

> 'In addition to the requirements specified in rule 19A.04, the invoice issued by the licensee of the customs and excise manufacturing warehouse to the licensed distributor must reflect the rate of duty and amount of duty included in the price to the licensed distributor.'

This rule is consistent with the definition of 'manufacturing warehouse', and requires the LDF to purchase the fuel directly from the licensee to qualify for a refund of duty. Nothing could be clearer.

(c) Likewise, rule 64F.04 states that any LDF who obtains any fuel from stocks of the licensee for any purpose contemplated in s 64F, must provide an invoice or dispatch delivery note which must include the licensed name, customs client number and physical address of the LDF who obtained the fuel; and 'the licensed name and customs client number of the licensee of

[18] Note 10.6*(b)*(ii)*(aa)*.
[19] Note 10.6*(b)*(ii)*(bb)*.
[20] Note 10.6*(b)*(iii)*(aa)*.
[21] Note 10.6*(b)*(iii)*(bb)*.
[22] Emphasis added.

such warehouse, as well as the physical address of the storage tank from which the fuel was obtained'.

(d) This interpretation is reinforced by rule 64F.06*(d)* which requires any load of fuel obtained from the licensee to be *wholly and directly* removed (from the warehouse) for export, before a refund may even be considered.[23] Rule 64F.06*(d)* does not envisage the interposition of an intermediary.

[68] Rule 19A4.04, with which a LDF must comply to obtain a refund, provides that when fuel levy goods are removed for any purpose 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 the control of the licensee at a licensed warehouse. This again underscores the requirement that a LDF must obtain the fuel from stocks at the warehouse of the licensee.

[69] There is a deliberate use of the phrase 'subject to compliance with' in s 64F(3)*(a)* and s 75(1) of the Act; rebate item 623.25; and Note 10. This means that a claimant for a refund of duty must satisfy the requirements of those provisions, failing which a refund may not be granted.[24]

[70] The plain language of s 64F(1)*(b)* and (3) of the Act, rebate item 623.25 and Note 10, places the meaning and effect of these provisions beyond doubt: fuel purchased from an intermediary simply cannot qualify for a refund of excise duty or fuel levy under s 75(1)*(d)*. As this Court said in *Capitec*:

'Interpretation begins with the text and its structure. They have a gravitational pull that is important. The proposition that context is everything is not a licence to contend for meanings

[23] Emphasis added.
[24] *BP Southern Africa (Pty) Ltd and Others v Secretary for Customs and Excise and Another* 1985 (1) SA 725 (A) at 734B-E; 735H-I and 737A.

unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text.' [25]

[71] The text and structure of the relevant provisions are entirely consistent with the purposes of the Act. These include the control of importation, export and manufacture of certain goods. Fuel, like alcohol and tobacco, is a product that is highly controlled under the Act.

[72] The purpose of licensing storage and manufacturing warehouses is to enable the Commissioner to control the entry to, storage at, and removal of goods from, such warehouses. That is clear from s 19 of the Act. So, for example, s 19(3) of the Act authorises the Controller to cause any customs and excise warehouse to be locked with a state lock for such period as he or she deems fit, during which period no person may remove or break such lock or enter the premises without the Controller's permission. Section 19(4)*(a)* provides that the Controller may at any time take stock of the goods in any customs and excise warehouse and, subject to s 20(5), duty must forthwith be paid on any deficiency. In terms of s 19(4)*(b)*, if the stock is found to be greater than the quantity which should be in the warehouse, then, subject to s 75(18), the excess must be debited to stock and the duty thereon paid on entry for consumption.

[73] Section 19A of the Act empowers the Commissioner to make rules in relation to customs and excise warehouses in which excisable or fuel levy goods are manufactured or stored. This includes the power to prescribe:

'. . . any deferment of payment of duty, the conditions on which such deferment is granted and the period, or differentiated periods of deferment, in respect of any licensee or any class or kind of such goods;[26]

. . . the accounts to be kept and the accounts and other documents to be submitted with such payment;[27]

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[25] *Capitec Bank Holdings Limited v Coral Lagoon Investments 194 (Pty) Limited* [2021] ZASCA 99; 2022 (1) SA 100 (SCA) para 51.
[26] Section 19A(1)(iii)*(bb)* of the Act.
[27] Section 19A(1)(iii)*(cc)* of the Act.

. . . any procedures or requirements or documents relating to the entry and removal of goods from and to any such customs and excise warehouse or for export or for use under rebate of duty;'[28]

[74] Goods in respect of which duty is deferred must be physically held in a customs and excise warehouse. The licensee of the warehouse has control over goods held in it and must ensure that the goods are not released for home consumption, without customs duty and excise duty being paid. If such goods were so released and sold without duty being paid, SARS would not receive the duty that was otherwise payable, and a fraud would be committed on the fiscus.

[75] These provisions illustrate that the Act and Rules relating to customs and excise warehouses confer extensive powers on SARS to control and supervise the activities conducted at such warehouses, and the movement of imported and excisable goods until any relevant duty has been paid.[29] As Rogers J explained:

'The reasons for this are not hard to discern. The duty payable on goods is determined with reference to their value, character and quantity. SARS may thus wish to examine the goods to see that they accord with what it has been told. Furthermore, once goods are beyond SARS' reach it may prove difficult to recover the duty from the liable party. An important feature of SARS' control is that goods may not be moved from a particular controlled environment until "due entry" has been made of the goods, even though the goods might only be moving from one controlled facility to another.'[30]

[76] What this shows, is that the purposes of the Act in securing goods and exercising physical control over goods stored in and removed to and from a customs and excise warehouse, would be subverted if those goods may be obtained from an intermediary. For these reasons, s 64F(1)*(b)*, the Rules and the items of Schedule 6 require that fuel be obtained from a controlled environment.

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[28] Section 19A(1)(iii)*(dd)* of the Act.
[29] *Gaertner and Others v Minister of Finance and Others* [2013] ZAWCHC 54; 2013 (6) BCLR 672 (WCC); 2013 (4) SA 87 (WCC); [2013] 3 All SA 159 (WCC) paras 20 and 99.
[30] *Gaertner* fn 29 para 20.

[77] It follows that SARS' interpretation of the Act is correct. The Full Court erred in holding that on a proper interpretation of s 64F(1)*(b)* of the Act, it includes the purchase of fuel from an intermediary; that the purchase of the fuel from Masana was an irrelevant consideration which SARS had taken into account; and that Tunica had complied with all regulatory requirements.

**Did Tunica comply with the requirements of s 64F(1)*(b)* of the Act?**

[78] Tunica did not begin to make out a case for a refund of the customs duty or fuel levy. On its own version, Tunica failed to establish that the fuel was obtained from the stocks of the licensee. Ms Gillian Grobbelaar, the deponent to the founding affidavit, states that Tunica purchased the fuel from Masana,

'who at the time was (and to the best of my knowledge still is) the beneficiary of a preferential supply agreement with BP Southern Africa ("BPSA") in terms of which *Masana was entitled to sell fuel obtained from BPSA prior to the removal of such sold fuel from BPSA's manufacturing warehouse*.'[31]

[79] This is inadmissible hearsay.[32] There is no evidence from BP or Masana to show that the fuel originates from the stocks of a licensee of a customs and manufacturing warehouse. The high watermark of Tunica's case on this score is the letter from BP stating that it supplies fuel to Masana under a legal supply agreement; that it is a 45% shareholder in Masana; and that BP is able to fulfil Masana's fuel supply requirements for its customers.

[80] A consequence of its failure to adduce evidence of the origin of the fuel, is that Tunica has not established that the fuel was manufactured in South Africa as required by s 75(1) of the Act. On this basis too, its claim for a refund of duty had to fail.

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[31] Emphasis added.

[32] *Vulcan Rubber Works (Pty) Ltd v South African Railways and Harbours* 1958 (3) SA 285 at 296F-G; *S v Ndhlovu and Others* 2002 (6) SA 305 (SCA) paras 13-14.

[81] Tunica also failed to comply with s 64F(1)*(b)* of the Act. It did not obtain the fuel from the licensee's stocks, but from an intermediary, Masana. It is common ground that the fuel was acquired from a BP depot, which in turn obtained the fuel from Chevron.

[82] Tunica has also not complied with s 64F(3)*(a)* of the Act, read with item 623.85 and Note 10. It did not obtain the fuel from a licensee of a customs and manufacturing warehouse, and therefore cannot produce the number and date of the invoice issued by such licensee, as required by rule 64F.06*(c)*. In addition, the fuel was not wholly and directly exported as contemplated in rule 64F.06*(d)*: it was moved from Chevron to a BP depot.

[83] In the result, Tunica has not shown that SARS' assessment that the fuel was not exported, removed or otherwise dealt with or in, is wrong.

[84] The Full Court found that it was unlikely that fuel used by a foreign-owned and registered vessel which must necessarily return to its registered port, could ever be treated as fuel used for home consumption. This includes a situation in which a foreign vessel consumes some of the fuel in South African waters. By reason of the conclusions to which I have come, it is not necessary to deal with this finding.

**Conclusion**

[85] The appeal committee refused Tunica's appeal essentially because the fuel had not been sourced from the stocks of a licensed customs and excise manufacturing warehouse, and was not a direct movement from the stocks of such licensee. In deciding that Tunica failed to comply with s 64F(1)*(b)* of the Act read with rule 64F.06*(d)* and Schedule 6 to the Act, SARS committed no reviewable irregularity.

[86] It follows that the appeal must succeed. The following order is made:

1 The appeal is upheld with costs, including the costs of senior counsel.

2 The order of the court a quo is set aside and replaced with the following:

‘The application is dismissed with costs, including the costs of two counsel where so employed.’

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A SCHIPPERS

JUDGE OF APPEAL

Appearances:

| | |
|---|---|
| For appellant: | J A Meyer SC |
| Instructed by: | MacRobert Attorneys, Pretoria |
| | Claude Reid Inc, Bloemfontein |
| For respondents: | J Butler SC (with A du Toit) |
| Instructed by: | De Klerk and Van Gend Attorneys, Cape Town |
| | McIntyre Van Der Post, Bloemfontein |