THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 378/2023

In the matter between:

THOLO ENERGY SERVICES CC **APPELLANT**

and

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

Neutral citation: *Tholo Energy Services CC v Commissioner for the South African Revenue Service* (Case no 378/2023) [2024] ZASCA 120 (6 August 2024)

Coram: SCHIPPERS, HUGHES, WEINER and KGOELE JJA and TOLMAY AJA

Heard: 10 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 6 August 2024.

Summary: Statutory construction – Customs and Excise Act 91 of 1964 (the Act) – s 47(9)*(e)* appeal against tariff determination – refund claim for fuel and Road Accident Fund levy by licensed distributor of fuel – fuel not obtained from stocks of licensee of customs and excise manufacturing warehouse envisaged in s 64F(1)*(b)* of the Act – exported without permit – not manufactured in Republic – not wholly and directly removed to country in customs union – not delivered by licensed remover of goods – determination correct – appeal dismissed.

ORDER

On appeal from: Gauteng Division of the High Court of South Africa, Pretoria (Molotsi AJ sitting as court of appeal in terms of s 47(9)*(e)* of the Customs and Excise Act 91 of 1964):

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Schippers JA (Hughes, Weiner and Kgoele JJA and Tolmay AJA concurring)

Introduction

[1] The appellant, Tholo Energy Services CC, is a licensed distributor of fuel (LDF) as defined in s 64F(1) of the Customs and Excise Act 91 of 1964 (the Act). In March 2017 the appellant submitted to the respondent, the Commissioner of the South African Revenue Service (the Commissioner), four claims for a refund of fuel and Road Accident Fund (RAF) levies under the Act, totalling some R4.25 million, in respect of 25 consignments of fuel (diesel) exported to the Kingdom of Lesotho (the refund claims).

[2] On 20 July 2017 the Commissioner made a determination under s 47(9)*(a)* of the Act, in terms of which he disallowed the refund claims (the determination). They were disallowed on the basis that the appellant had not complied with the requirements for refunds prescribed by the Act and the Customs and Excise Act Rules (the Rules).

[3] The appellant lodged an internal administrative appeal against the determination to an internal appeal committee (the appeal committee) of the South African Revenue Service (SARS). The appeal committee disallowed the appeal and confirmed the determination.

[4] The appellant then appealed the determination to the Gauteng Division of the High Court, Pretoria (the High Court), in terms of s 47(9)*(e)* of the Act. It sought an order declaring the determination invalid, alternatively reviewing and setting it aside; and that the determination be substituted with one allowing the refund claims.

[5] The High Court (Molotsi AJ) dismissed the appeal with costs, on the basis that the appellant had not complied with s 64F of the Act and its rules, nor the requirements prescribed in Schedule 6 to the Act. The High Court also found that the appellant had removed the fuel to Lesotho without the requisite permit issued in terms of the International Trade Administration Act 71 of 2002 (the ITA Act), by the International Trade Administration Commission (ITAC). The appeal is with its leave.

Facts

[6] The appellant's sole member is Mr Thabiso Moroahae. He is also a shareholder and the sole director of Tholo Energy Services (Pty) Ltd, a private company incorporated in Lesotho (Tholo Lesotho). It carries on business in that country and supplies fuel mainly to companies operating in the construction and mining industries.

[7] Between April and June 2016, 25 consignments of fuel of approximately 40,000 litres each, were collected on behalf of the appellant from depots of the Petroleum Oil and Gas Corporation of South Africa (SOC) Ltd (PetroSA), for removal to Lesotho. PetroSA is a licensee of a customs and excise manufacturing

warehouse (a refinery) in Mossel Bay, also known and referred to in the papers as a 'VM'.

[8] The appellant alleged that it had purchased the fuel from PetroSA and that payment was made by Tholo Lesotho. SARS disputed this. It contended that Tholo Lesotho sourced the fuel it supplied to its customers from South Africa, but used the appellant's particulars and credentials in its transactions with its South African suppliers and when dealing with SARS. The appellant denied this contention in reply and stated that it had acted in its own name and capacity as a LDF and licensed remover of goods under the Act.

[9] It is common ground that the fuel was not obtained from PetroSA's VM in Mossel Bay. Instead, 22 consignments of fuel were acquired from PetroSA's storage tanks at its depot in Bloemfontein. The remaining three consignments were obtained from PetroSA's depot at Tzaneen (two consignments) and from TotalEnergies at Alrode, Alberton (one consignment).

[10] All 25 consignments of fuel were removed to Lesotho. It is also common ground that on the dates that they were so removed, the appellant had not been issued with an export permit; and that PetroSA does not have a VM in Bloemfontein, Tzaneen or Alrode.

[11] On 17 March 2017 the appellant submitted the refund claims. SARS requested it to furnish further information. Subsequently SARS audited the refund claims and assessed whether the appellant had complied with its obligations under the Act and Rules, and whether it qualified for a refund.

[12] On 27 June 2017 the Commissioner sent a letter of intent to the appellant in which it was informed that SARS was of the *prima facie* view that it had not complied with the provisions of the Act, nor with the requirements for a refund of

duty specified in Schedule 6 to the Act read with the Rules. SARS informed the appellant that the Commissioner intended to disallow the refund claims and granted it an opportunity to respond to the letter of intent within 21 days, by producing evidence that the fuel was dealt with in compliance with the Act. The appellant was specifically requested to furnish proof that the fuel had been purchased from the licensee of a VM and of the actual litres exported; and that it was in possession of an export permit.

[13] On 30 June 2017 the appellant responded to the letter of intent. It stated that duty at source had been paid at the VM when the fuel was purchased; that the actual quantities of fuel loaded were reflected on the bills of lading; and that it never applied for a permit because SARS had informed it that permits were not required for export to BLNS countries (Botswana, Lesotho, Namibia, Swaziland) in the common customs area of the Southern African Customs Union.

[14] On 20 July 2017, after considering the appellant's submissions to the letter of intent, the Commissioner made the determination. The refund claims were disallowed on the grounds that the appellant had not complied with the following provisions of the Act and Rules:

(a) ss 75 and 76;
(b) s 64F read with rules 64F.01 and 64F.07;
(c) s 19A4 read with rule 19A4.04 and Note 11(b) of Part 3 of Schedule 6 to the Act;
(d) rebate item 671.09 of Schedule 6; and
(e) rebate item 671.11 of Schedule 6.

The appellant was informed that it was entitled to lodge an internal administrative appeal against the determination, as envisaged in s 77A-H of the Act.

[15] On 31 July 2017 the appellant, assisted by its attorneys of record, lodged an internal administrative appeal. The grounds of appeal, in sum, were these. SARS'

interpretation of s 64F(1)*(b)* was incorrect. The appellant had substantially complied with the refund items in Schedule 6 to the Act. At the relevant times, there was a practice generally prevailing that ITAC permits were not required for exports to BLNS countries.

[16] On 20 October 2017 and pursuant to the appellant's request, its attorney made oral representations to the appeal committee. Mr Moroahae, the appellant's director, was present when the representations were made.

[17] On 5 December 2017 the appeal committee asked the appellant to provide further information and documents. These were furnished by the appellant on 1 February 2018. Subsequently, on 7 May 2018 the appeal committee inspected various premises where the fuel had allegedly been manufactured and stored. On 10 December 2018 the appeal committee disallowed the internal appeal, on the basis that the fuel was not obtained from the stocks of the licensee of a VM as required by s 64F(1)*(b)* of the Act.

[18] On 8 October 2019 the appellant delivered a notice of its intention to institute legal proceedings against SARS, as required by s 96(1) of the Act (the s 96 notice). In the annex to the s 96 notice the appellant set out its cause of action, essentially that SARS' determination that the fuel was not obtained from stocks of the licensee of a VM and that an ITAC permit was required to export the fuel, was incorrect.

[19] Subsequently SARS requested the appellant to furnish additional information and documents to enable it to evaluate the intended litigation. The appellant provided the information and documents on 31 March and 30 April 2020.

[20] On 15 July 2020 SARS responded to the s 96 notice. It informed the appellant that its appeal under s 47(9)*(e)* of the Act 'is an appeal de novo' which required the appellant to 'prove compliance with the provisions of the Act, in

particular but not limited to rebate item 671.11 read with the notes thereto, section 75 and section 19A read with the rules thereto'. SARS went on to say that 'the Commissioner is entitled to oppose the intended litigation on different or additional factual and/or legal bases than those contained in the letter communicating the decision to refuse the four refund claims dated 20 July 2017 and the subsequent internal administrative appeal decision dated 10 December 2018'.

[21] SARS' response to the s 96 notice, in summary, was this.

(a) PetroSA obtained the fuel from other oil majors and there was no evidence regarding the origin of the fuel.[1]

(b) The fuel was obtained from unlicensed premises.

(c) The appellant did not pay PetroSA for the fuel. Instead, payment was made by Tholo Lesotho.

(d) The export entry had to be supported by the PetroSA invoice and not an invoice issued by the appellant. The latter invoice did not reflect the correct volume and value of the fuel, which as a result had been incorrectly declared.

(e) The refund claims were not accompanied by the requisite customs declaration form.

(f) The fuel was not removed by a licensed remover of goods in bond.

(g) The fuel was not wholly and directly exported to the purchaser. There were significant discrepancies regarding the amount of fuel loaded according to the bills of lading, and what was declared for export on the export bill of entry and the delivery notes.

(h) The appellant was not in possession of an export permit.

[1] An oil major is a licensee of a customs and manufacturing warehouse, such as BP Southern Africa (Pty) Ltd and TotalEnergies South Africa (Pty) Ltd.

Submissions in this Court

Appellant's submissions

[22] The appellant submits that the Commissioner's reliance on new grounds for the determination is *ultra vires* (beyond the powers of an administrator). Once the determination was the subject of proceedings under Chapter XA of the Act, so it is submitted, it became a final decision subject to a tariff appeal in terms of s 47(9)*(e)* and the Commissioner could not amend or vary such determination to the appellant's prejudice.

[23] The appellant contends that upon making the determination, the Commissioner was *functus officio* (an administrator is not entitled to revoke or alter a decision in the absence of statutory authority to do so). The Commissioner, so it is contended, could not change the determination by supplementing the grounds for it and the findings. Even if this were permissible, SARS cannot vary the determination without granting the appellant an opportunity to make representations; an amended determination must be issued; and the appellant must be given an opportunity to dispute the amended determination.

[24] Consequently, so the appellant submits, this Court should interpret s 47(9)*(e)* of the Act – pre-constitutional legislation – in the light of the Constitution and the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). It is further submitted that SARS' additional findings regarding the determination are 'administratively unjust, procedurally unfair, and constitutionally invalid'; and that these grounds fall outside the ambit of the determination and do not form part of the justiciable issues in the tariff appeal.

[25] The appellant therefore contends that there are only two issues in the tariff appeal. The first is whether a LDF is required to obtain fuel from a VM itself, or whether it must be obtained from 'stocks of the licensee of a VM' anywhere in the

Republic; and the second, whether an export permit issued by the ITAC is a requirement for a refund.

[26] As to the first issue, the appellant's argument, in summary, is the following:

(a) The Commissioner ignores the wording of s 64F(1)*(b)* of the Act, which requires the fuel to be obtained from *stocks of the licensee of a customs and excise manufacturing warehouse*, not the warehouse itself. PetroSA is the licensee of a VM. The VM cannot be the licensee of itself. There is no provision in the Act, the Rules nor the items in Schedule 6, which requires a LDF to obtain the fuel from the VM itself.

(b) Rule 19A4.04 provides that fuel levy goods removed for any purpose by the licensee must be removed from stocks which have been entered or deemed to have been entered for home consumption (duty paid stock); and where such goods may be removed for any purpose, they may only be so removed from a storage tank owned by or under the control of the licensee.

(c) The Commissioner ignores the fact that SARS itself introduced the duty-at-source scheme, with the result that all fuel removed from a VM is duty paid stock. Consequently, there is no obligation, express or implied, to acquire the fuel from a VM.

(d) In *Tunica Trading*[2] a full court held that a LDF which obtains fuel from the depot of a licensee (and not from the VM itself) is entitled to a refund.

[27] Regarding the second issue, the appellant submits that it did not require a permit and that it did not export the fuel. It contends that the Act, the Rules and the relevant item in Schedule 6 to the Act differentiate between a 'removal' of fuel levy goods to a BLNS country and the 'export' of goods to other countries, and that the provisions of the ITA Act are inapplicable to the refund claims.

[2] *Tunica Trading 59 (Pty) Ltd v Commissioner South African Revenue Service* [2022] ZAWCHC 52; [2022] 4 All SA 571 (WCC); 85 SATC 185 paras 70 and 97.

[28] The appellant also contends that the alleged impermissible additional grounds for the determination, namely that there is no proof that the fuel was manufactured in South Africa; that it was not transported by a licensed remover of goods in bond; that it was not wholly and directly removed for delivery to Lesotho; and that payment was made by Tholo Lesotho and not PetroSA, have no merit, for the following reasons. During the inspection *in loco* SARS had established that the fuel was locally manufactured and originated from PetroSA's VM in Mossel Bay. The appellant complied with the requirement of removal by a licensed remover of goods, since the appellant and Tholo Lesotho (which removed the goods) have the same member, director and shareholder. Although Tholo Lesotho paid PetroSA for the fuel, the Act does not require the LDF to do so.

Respondent's submissions

[29] Counsel for the Commissioner submits that the main issue in this appeal is the correctness of the determination: whether the fuel was exported as provided in rebate item 671.11 in Part 3 of Schedule 6 to the Act, which is relevant to the more general question, namely whether the appellant is entitled to the refunds claimed.

[30] It is submitted that in exercising its appellate jurisdiction and considering the correctness of the determination, the High Court is required to conduct a complete rehearing of the merits of the matter with or without additional evidence, and to make its own determination. This necessarily means that the High Court was not limited to the grounds on which the Commissioner made the determination.

[31] In summary, the Commissioner contends that the fuel was not exported in accordance with the requirements of rebate item 671.11 as required, for the following reasons:

(a) There is no evidence that the goods were manufactured in South Africa.

(b) The fuel was not obtained from stocks of the licensee of a VM.

(c) The fuel was not wholly and directly removed for delivery to Lesotho.

(d) The fuel was not transported by a licensed remover of goods.

(e) The fuel was not removed by a LDF, the appellant.

(f) The appellant did not pay the debt in respect of which the refund was sought.

(g) The fuel was unlawfully exported to Lesotho without the requisite export permit.

Issues

[32] This appeal raises three issues:

(a) The first is the nature of an appeal in terms of s 47(9)*(e)* of the Act. More specifically, is the Commissioner confined to the grounds for disallowing the refund claims, or is he entitled to advance additional grounds for refusing them?

(b) The second is whether the High Court was correct in dismissing the appeal on the grounds of non-compliance with s 64F(1)*(b)* of the Act and the appellant's exportation of the fuel without an ITAC permit.

(c) The third issue, namely whether the refund claims were rightly refused on additional grounds, arises if the Commissioner is entitled to do so.

The nature of an appeal under s 47(9)*(e)* of the Act

[33] Section 47(9)*(a)*(i) provides:

'The Commissioner may in writing determine–

(aa) the tariff headings, tariff subheadings or tariff items or other items of any Schedule under which any imported goods, goods manufactured in the Republic or goods exported shall be classified; or

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

[34] Section 47(9)*(b)*(i) states:

'Whenever any determination is made under paragraph *(a)* or any determination is amended or withdrawn and a new determination is made under paragraph *(d)*, any amount due in terms

thereof shall, notwithstanding that such determination is being dealt with in terms of any procedure contemplated in Chapter XA or any proceedings have been instituted in any court in connection therewith, remain payable as long as such determination or amended or new determination remains in force: Provided that the Commissioner may on good cause shown, suspend such payment until the date of any final judgment by the High Court or a judgment by the Supreme Court of Appeal.'

[35] Section 47(9)*(e)* provides:

'An appeal against any such determination shall lie to the division of the High Court of South Africa having jurisdiction to hear appeals in the area wherein the determination was made, or the goods in question were entered for home consumption.'

[36] In *Pahad Shipping*[3] this Court considered the nature of an appeal in terms of s 65(6)*(a)* of the Act, against a determination by the Commissioner of the transaction value of goods. Referring to the distinction between the types of appeal in *Tikly*,[4] Streicher JA said:

'The parties dealt with the case as if it was an appeal in the wide sense, ie as if it was a complete re-hearing of the case and a fresh determination of the merits of the case. Correctly so, in my view, for the following reasons:

(a) The Act does not require of the respondent to hear evidence, to give any reasons for his determination or to keep any record of proceedings. As was held in *Tikly* (*supra*) at 592B–C, these considerations militate completely against the "appeal" being an appeal in the strict sense.

(b) It is implicit in the provisions of section 65(4)(*c*)(ii)(*bb*) to the effect that the determination by the respondent ceases to be in force from the date of a final judgment by the High Court or this Court that the court must itself make a determination upon appeal to it. That eliminates the appeal being a review in the sense set out in (iii) above (see *Tikly* at 591H–592A).

(c) As there is no provision for a hearing before the determination of the transaction value by the respondent the Legislature must, in my view, have intended "appeal" to be an appeal in the wide sense.'[5]

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[3] *Pahad Shipping CC v Commissioner for the South African Revenue Services* [2009] ZASCA 172; [2010] 2 All SA 246 (SCA).
[4] *Tikly and Others v Johannes NO and Others* 1963 (2) SA 588 (T).
[5] *Pahad Shipping* fn 3 para 14.

[37] Accordingly, an appeal in terms of s 47(9)*(e)* is an appeal in the wide sense, but it remains an appeal against the determination. As Wallis JA explained in *Levi Strauss*:

'[A]n appeal under s 49(7)*(b)* of the Act is an appeal against the determination. While it is an appeal in the wide sense, involving a complete rehearing and determination of the merits, it remains an appeal against what was determined in the determination, and nothing more. It is open to SARS to defend its determination on any legitimate ground, but it is not an opportunity for it to make a wholly different determination, albeit one with similar effect.'[6]

[38] The appellant concedes – as it must – that the appeal in this case is an appeal in the wide sense, which involves a complete rehearing and redetermination of the merits of the matter, with or without additional evidence or information. Indeed, this is specifically authorised by the empowering provision.

[39] Not only is a court permitted to admit new evidence or information in a s 47(9)*(e)* appeal, but it also relies on the parties' assistance in considering new evidence and information in those proceedings to assist it to arrive at the correct decision. In *Toneleria Nacional*,[7] this Court stated that it was regrettable that the parties had not tendered evidence in the court of first instance on products that had to be classified and the industry in which they are produced, in an appeal against a tariff determination. The Judge had to conduct research on the Internet to obtain this information.

[40] It follows that the appellant's argument that the Commissioner was not entitled to raise additional grounds for the determination in the s 47(9)*(e)* appeal; and that this was administratively unjust and procedurally unfair, has no merit. The Commissioner was entitled to raise additional, legitimate grounds for the rejection

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[6] *Commissioner, South African Revenue Service v Levi Strauss South Africa (Pty) Ltd* [2021] ZASCA 32; [2021] 2 All SA 645 (SCA); 2021 (4) SA 76 (SCA) para 26.

[7] *Commissioner, South African Revenue Service v Toneleria Nacional RSA (Pty) Ltd* [2021] ZASCA 65; [2021] 3 All SA 299 (SCA); 2021 (5) SA 68 (SCA); 83 SATC 42 para 29.

of the refund claims, as was done in the answering affidavit. The High Court was permitted to decide the correctness of the determination on the additional grounds. And it must be stressed that these grounds did not change the determination at all – whether the fuel had been exported in compliance with the relevant provisions of the Act, the Rules and the rebate items in Schedule 6.

Was the High Court correct in dismissing the appeal?

The statutory and regulatory provisions

[41] Section 75(1) of the Act, insofar as is relevant, 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.'

[42] 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*.'[8]

[43] One of the rules prescribing requirements regarding the movement of fuel for export, and on which the Commissioner relied, is rule 64F.04. It provides, inter alia, that:

(a) a LDF who obtains any fuel from stocks of a licensee of a VM, must, in addition to any other document required to be completed in respect of any procedure prescribed in the Act, provide an invoice or a dispatch delivery note which must at least contain the licensed name, customs client number and physical address of the LDF who obtained the goods, the licensed name and customs number of the licensee of the VM, and the physical address of the storage tank from which the fuel was obtained;[9]

(b) the business name and address of the person in the country of export or in the common customs area to whom the goods are removed;[10] and

(c) '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'.[11]

[44] In making the determination, the Commissioner also relied on rules 64F.01 and 64F.07:

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[8] Emphasis added.
[9] Rule 64F.04*(a)*(i) and (ii).
[10] Rule 64F.04*(a)*(vi).
[11] Rule 64F.04*(c)*, emphasis added.

(a) Rule 64F.01*(a)* defines, inter alia, 'fuel' as 'fuel as defined in section 64F and includes "fuel levy goods" contemplated in rule 19A.01*(c)*'. It provides that a 'manufacturing warehouse' means a 'licensed customs and excise manufacturing warehouse'; and that a 'refund' means 'a refund of excise duty, fuel levy or Road Accident Fund levy as provided for in items 623.11, 671.09 and 671.11 of Schedule No 6'. Rule 64F.01*(b)* states that except as otherwise provided in s 64F and its rules, the provisions of, inter alia, the rules for s 19A, and s 64D and its rules, apply to any activity of, or in connection with, a LDF.

(b) Rule 64F.07 provides that an application for a refund must be on form DA66 and must be supported by the invoice from the licensee of the customs and excise warehouse from whom the goods were obtained.[12]

[45] Rule 19A4.04, inter alia, provides:

'19A4.04 *(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.

. . .

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

(bb) removal to a BLNS country;

. . .

(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.

[12] Rule 64F.07*(b)*(ii).

> *(b)* (i) *(aa)* When fuel levy goods are exported, including supply as stores for foreign going ships, entry must be made thereof on form SAD 500 at the office of the Controller before loading.
>
> *(bb)* In the case of a removal by a licensed distributor each such form shall bear the invoice number of the licensee of the manufacturing warehouse from whom the goods are obtained.'

[46] Note 11(b) in Part 3 of Schedule 6 to the Act states that any application for the refund of a fuel or RAF levy is subject to compliance with s 64F and its rules, rule 19A4.04 and any other rule regulating the export of goods.

[47] Item 671.09 provides that goods liable to the fuel levy and RAF levy are obtained by a LDF as contemplated in s 64F, from stocks of the licensee of a VM. This is reiterated in item 671.11 in terms of which the appellant applied for a refund, which states that such goods are delivered to a purchaser in any other country in the common customs area by a LDF, subject to compliance with Note 12. In turn, Note 12 provides that any load of fuel obtained from the licensee of a VM 'must be wholly and directly removed for delivery in any other country in the common customs area by the licensed distributor in order to be considered for a refund of duty'.

[48] In terms of tariff heading 2710, a permit issued under the ITA Act is required to import or export restricted goods. Diesel is specifically listed as restricted goods.

[49] In sum, then, in order to qualify for a refund of duty, the appellant was obliged to meet the following requirements:

(a) The fuel must have been manufactured in South Africa (s 75(1) of the Act).

(b) It had to be obtained directly from stocks of the licensee of a VM (s 64F(1)*(b)* read with rule 19A4.04*(a)*(i) and (ii)).

(c) The appellant had to produce an invoice from the licensee of the VM to the LDF – the appellant, not an intermediary – showing the licensed name,

customs client number and physical address of the LDF and the storage tank of the licensee, from which the fuel was obtained (rules 64F.04*(c)* and 64F.07*(b)*(ii)).

(d) The fuel must have been removed by a licensed remover of goods in bond (rule 64F.06*(b)* and *(d)* read with rule 19A4.04(v)*(bb)* and *(dd)*).

(e) It had to be wholly and directly removed for delivery to the purchaser in Lesotho (Note 12(b)(iii)(aa)).

(f) The appellant had to obtain an ITAC permit.

[50] It must be emphasised that each of these requirements must be met, failing which a refund of a fuel or RAF levy may not be granted. This is because a rebate of excise duty (or a refund of fuel levy) is a privilege and strict compliance with its conditions may be exacted from the claimant. In *BP v Secretary for Customs and Excise*,[13] approved by this Court in *Toyota South Africa*,[14] a full court held:

'[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.'

[51] Consequently, the appellant's submission that '[t]he right to a refund is not dependent on actual compliance with all sections of the Act (and the schedules), unless expressly stated', is wrong. Moreover, the above statutory and regulatory provisions and in particular ss 75(1) and 64F(3)*(a)* of the Act are cast in peremptory terms. A refund 'shall be granted to the extent and the circumstances stated in the item of Schedule 6'; and any refund of duty is expressly subject to compliance with the requirements specified in the Schedule 6 items and any rule prescribing any

[13] *BP Southern Africa (Pty) Ltd and Others v Secretary for Customs and Excise and Another* 1984 (3) SA 367 (C) at 375H-376D.
[14] *Toyota South Africa Motors (Pty) Ltd v Commissioner, South African Revenue Service* 2002 (4) SA 281 (SCA) para 45.

requirement relating to the export of fuel. And rule 64F.06*(d)* requires any load of fuel obtained from the licensee of a VM to be wholly and directly removed (from the VM) for export, before a refund may even be considered.

[52] In addition, the use of the phrase 'subject to compliance with' in s 64F(3)*(a)* and s 75(1) of the Act; and rebate item 671.11, is deliberate. 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.[15]

[53] What is more, the appellant ignores s 102(5) of the Act, which requires it to show that the determination is wrong. It provides in relevant part:

'If . . . in any dispute in which . . . the Commissioner or any officer is a party, it is alleged by. . . the Commissioner or such officer that any goods . . . have been or have not been . . . exported, manufactured in the Republic, removed or otherwise dealt with or in, it shall be presumed that such goods . . . have been or (as the case may be) have not been . . . exported, manufactured in the Republic, removed or otherwise dealt with or in, unless the contrary is proved.'

Was the fuel exported in compliance with the statutory provisions?

[54] The appellant provided no proof that the fuel was obtained from the licensee of a VM. In support of its submission that this is not a requirement in terms of s 64F(1)*(b)* of the Act, it relies on *Tunica Trading*.[16] In that case, a full court of the Western Cape Division of the High Court, Cape Town (the WCHC), held that a LDF is entitled to a refund of customs duty and fuel levies, because s 64F(1) requires the LDF to obtain or acquire – not purchase – fuel from stocks of the licensee of a VM. This, so the WCHC reasoned, would include a case where fuel is purchased from an intermediary, but emanates from stocks of the licensee of a VM. The appellant therefore submits that a LDF which obtains fuel from a depot of the licensee and not from a VM itself, is nonetheless entitled to a refund of duty.

[15] *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.
[16] *Tunica Trading* fn 2 above.

[55] However, most recently this Court held that the WCHC's interpretation of s 64F(1)*(b)*, is incorrect. The WCHC disregarded the items specified in Schedule 6 to the Act, and the rules prescribing the requirements in relation to the export of fuel.[17] Consequently, its order granting the LDF a refund of the customs duty and fuel levy in that case, was set aside.

[56] This Court's findings in *Commissioner SARS v Tunica Trading*, may be summarised as follows:

(a) On its plain wording, s 64F(1) states that a LDF means a person who obtains fuel 'from stocks of a licensee' of a VM. This means that the fuel must be acquired from stocks kept on the premises of the VM. Put differently, the LDF must obtain the fuel directly from the licensee's inventory at the VM. The fuel may not be acquired from an intermediary.

(b) This interpretation is consistent with the plain language of s 19(1) and (2) of the Act: a VM is a *warehouse* (ie premises) specifically licensed for the manufacture of dutiable goods from imported or locally-produced materials. It is also consistent with the definition of 'manufacturing warehouse' in rule 64F.01*(a)*, which means a '*licensed* customs and excise manufacturing warehouse' – not a depot nor unlicensed premises.[18]

(c) The plain wording of s 64F(1)*(b)* is buttressed by the immediate context. Section 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 expressly states that such refund is 'subject to compliance with the requirements specified in the item of Schedule No. 6', namely rebate item 671.09, which requires the fuel to be obtained from stocks of the licensee of a VM, and any rule prescribing requirements for the movement of such fuel for export.

(d) Consistent with s 64F(1)*(b)* which requires fuel to be obtained directly from a licensed warehouse, rule 64F.06*(c)* requires a claimant for a refund, in

[17] *The Commissioner for the South African Revenue Service v Tunica Trading 59 (Pty) Ltd* [2024] ZASCA 115.
[18] Emphasis added.

addition to the requirements specified in rule 19A.04, to furnish the invoice issued by the licensee of the VM to the LDF, which must reflect the rate and amount of duty included in the price to the LDF. This is the clearest indication that the LDF must obtain fuel directly from the licensee of a VM, from stocks kept at the VM. This construction 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 VM) for export, or delivery to a BLNS country, before a refund of duty may even be considered.

(e) The text and structure of the relevant provisions are entirely consistent with the purposes of the Act, which include the control of importation, export and manufacture of certain goods. 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. 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 the relevant 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. For these reasons, s 64F(1), the Rules, and the items of Schedule 6 require that fuel be obtained from a controlled environment.

[57] The unchallenged evidence is that in terms of the 'duty at source' scheme, the excise duty and fuel levy is paid by the licensee of the VM. Section 64F(1)*(b)* says so in express terms. The LDF pays the licensee of the VM a price inclusive of the duty and levy and although it sells for export at a price excluding the duty and levy (an 'export price'), the LDF is required to pay the duty and levy to the VM and can recover same by applying for a refund from the Commissioner. It is therefore not surprising that rule 64F.06*(c)* requires the LDF to furnish the invoice issued by the licensee of the VM to the LDF, which must reflect the rate and amount of duty included in the price to the LDF.

[58] The appellant failed to establish that the fuel was obtained from stocks of the licensee at a licensed VM, as the Commissioner rightly determined. The fuel was removed from PetroSA's depots in Bloemfontein and Tzaneen, and from the depot of TotalEnergies in Alrode. The undisputed evidence is that none of these depots is a licensed manufacturing warehouse. Solely on this ground, the appeal in terms of s 47(9)*(e)* of the Act was correctly dismissed.

[59] Three consequences flow from the appellant's failure to comply with s 64F(1)*(b)* of the Act, which also show that its appeal was correctly dismissed. First, the appellant could not, and did not, establish that the fuel was manufactured in South Africa (s 75(1)). Second, it could not produce an invoice issued to it by the licensee of the VM, showing (i) the rate and the amount of duty included in the price to the LDF (rule 64F.04*(c)*); and (ii) the licensed name and customs client number of the licensee of the VM (the licensed warehouse), and the physical address of the storage tank from which the fuel was obtained (rule 64F.04*(a)*(ii)). And third, the appellant could not demonstrate compliance with rule 19A4.04*(a)*(ii): the fuel was not removed from a storage tank at a licensed warehouse, owned by or under the control of the licensee.

[60] As to its exportation of the fuel without an ITAC permit, the appellant submits that no 'export of fuel levy goods occurred', because the Act, the Rules and Note 12 differentiate between a 'removal' of fuel to a BLNS country and the 'export' of fuel to other countries. Then it is submitted that the SARS' External Oil Directive 'does not trump the appellant's entitlement as LDF to its refund'.

[61] These submissions however do not bear scrutiny. The External Oil Directive states, inter alia, that all mineral products (which include diesel produced from crude oil) 'require an export permit which must be obtained in advance of the export', issued by the ITAC; that when fuel levy goods are exported, entry must be made thereof on a declaration at the office of the Controller; and that in the case of

export by a licensed distributor, each declaration shall bear the invoice number of the licensee of the VM from whom the goods are obtained.

[62] It is common ground that the appellant failed to comply with these provisions, and that it was not in possession of an export permit issued by the ITAC. SARS published on its website a list of restricted goods which are allowed to exit South Africa only on certain conditions. Diesel is included in that list and it is specifically stated that an ITAC permit is required to export fuel.

[63] It follows that the appellant's submission that an ITAC permit 'is irrelevant insofar as it concerns the refund provisions' has no merit. So too, its submission that SARS – an organ of state bound by the principle of legality – may not insist on compliance with the law. And as stated in the answering affidavit, an applicant applying for a licence as a LDF is required to acknowledge that it is acquainted with all legal requirements relating to the activity to be undertaken in terms of the licence, and agrees to comply with those requirements.

[64] The submission that the fuel was not exported, is likewise without merit. Section 6(1) of the ITA Act empowers the Minister responsible for trade and industry (the Minister) to prescribe that no goods of a specified class or kind may be exported from the Republic, except on the authority of a permit. The Minister did so in Notice R92 published in Government Gazette 35007 dated 10 February 2012, in terms of which the goods described in Schedules 1, 2, and 3 to the notice, shall not be exported except on the authority of an export permit issued under s 6. Fuel levy goods such as petrol and diesel, are included in Schedule 1.

[65] Section 1 of the ITA Act defines 'export'. It means 'to take or send goods, or to cause them to be taken or sent, from the Republic to a country or territory outside the Republic'. It accords with the definition of 'exportation' by the World

Customs Organisation: 'The act of taking out or causing to be taken out any goods from the Customs territory.'[19]

[66] The appellant exported the fuel to Lesotho. There is no scope in the ITA Act or the External Oil Directive for an interpretation that the fuel was not exported, because Lesotho is a member state of the Customs Union. The s 47(9)*(e)* appeal was rightly dismissed on this ground also. It goes without saying that the appellant failed to show that the determination is wrong, as envisaged in s 102(5) of the Act.

The additional grounds for refusing the refund claims

[67] These grounds may be dealt with shortly. As stated, a claimant for a refund of excise duty or fuel levy must strictly comply with the requirements for such refund. The appellant's failure to comply with a single requirement would justify the rejection of its refund claims.

Fuel not manufactured in South Africa

[68] The appellant alleges that during inspections it was established that the fuel was locally manufactured and originated from PetroSA's VM in Mossel Bay. It contends that 'the origin of the fuel is irrelevant'.

[69] The contention that the origin of the fuel is irrelevant, is directly at odds with s 64F(1) and (3) of the Act, the Rules and the items of Schedule 6. Since the appellant did not obtain the fuel from a licensed warehouse, it failed to show that the fuel was manufactured in South Africa, as contemplated in s 75(1) of the Act. In fact, one of the reasons for the determination was non-compliance with the provisions of s 75(1). The appellant's claim that it was established that the fuel was locally manufactured, is unsustainable on the evidence. None of the depots from which the fuel was obtained is registered with SARS as a VM.

[19] *Glossary of International Customs Terms* December 2018, published by the World Customs Organisation http://www.wcoomd.org.

Fuel not wholly and directly removed

[70] Assuming that the fuel was manufactured in South Africa (which was not established), it was first removed from a manufacturing warehouse for home consumption to the depots in Bloemfontein, Tzaneen and Alrode. Thereafter it was removed from those depots to Lesotho.

[71] This is not a direct removal as contemplated in rule 64F.06*(d)*, which states that the fuel must be wholly and directly removed for delivery to a BLNS country, in order to be considered for a refund of duty. The movement and storage of fuel in storage tanks, prior to export (or removal), does not comply with the requirement that the fuel be 'wholly and directly' exported.[20] Similarly, Note 12(b)(iii)(aa) provides that any load of fuel obtained from the licensee of a VM must be wholly and directly removed for delivery in any other country in the common customs area. For this reason also, the appellant did not qualify for a refund of the fuel and RAF levy.

Fuel not transported by licensed remover of goods

[72] Note 12(b)(ii)(aa) renders an application for a refund subject to compliance with rule 64F and its rules. Rule 64F.06*(b)* provides that unless the LDF uses own transport, fuel wholly or partly transported by road must be carried by a licensed remover of goods in bond as envisaged in s 64D of the Act.[21]

[73] It is common ground that Tholo Lesotho, which transported the fuel to Lesotho, is not a registered remover of goods in bond. On this basis also, the refund claims must fail.

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[20] *Kepu Trading (Pty) Ltd v Commissioner for the South African Revenue Services* (3516/18) [2022] ZAGPPHC 1026 (28 December 2022) paras 42-43.

[21] Section 64D(1) of the Act provides:

'No person, except if exempted by rule, shall remove any goods in bond in terms of section 18 (1) (a) or for export in terms of section18A, or any other goods that may be specified by rule unless licensed as a remover of goods in bond in terms of subsection (3).'

Fuel not delivered by LDF

[74] Item 671.11 of Schedule 6 to the Act states, inter alia, that goods liable to the fuel and RAF levy is delivered by a LDF contemplated in s 64F, subject to compliance with Note 12. Both item 671.11 and Note 12(b)(iii)(aa) require that the fuel must be removed for delivery in a country in the common customs area by the LDF.

[75] The appellant failed to comply with this requirement. The fuel was delivered by Tholo Lesotho to the purchaser in Lesotho. It is not a LDF. However, the appellant says that the nationality of the drivers and origin of the vehicles were disclosed to SARS, and that Tholo Lesotho has the same member, director and shareholder. All of this is irrelevant and does not change the fact that on this basis too, the appellant did not qualify for a refund.

Conclusion

[76] SARS also claims that the appellant is not entitled to a refund of duty on the ground that Tholo Lesotho, not the appellant, paid PetroSA for the fuel and there is no evidence that the appellant paid any levies. By reason of the conclusions to which I have come, it is unnecessary to deal with this ground; nor the challenge to the determination on the basis that it is reviewable on the grounds contemplated in the PAJA, alleged in the founding affidavit.

[77] The following order is made:

The appeal is dismissed with costs, including the costs of two counsel.

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A SCHIPPERS

JUDGE OF APPEAL

Appearances:

For appellant:	P A Swanepoel SC (with C A Boonzaaier and M Davids)
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