Case No: 171/97

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE

In the matter of:

ENGEN PETROLEUM LIMITED	First Appellant
BP SOUTHERN AFRICA (PTY) LIMITED	Second Appellant
CALTEX OIL SA (PTY) LIMITED	Third Appellant
SHELL OIL SA (PTY) LIMITED	Fourth Appellant

and

THE COMMISSIONER FOR CUSTOMS AND EXCISE	First Respondent
THE MINISTER OF FINANCE	Second Respondent

Coram:	Mahomed CJ, Hefer, Olivier, Streicher JJA and Farlam AJA
Date of hearing:	12 March 1999
Date of Delivery:	25 March 1999

Customs and Excise - Rebates of Excise duty and fuel levy - Rebate items 603.02.01 and 640/06 in Schedule 6 applicable in respect of distillate fuel supplied as stores to foreign fishing vessels plying their trade in South African waters.

J U D G M E N T

Hefer JA

[1] A wide variety of goods are subject to excise duty and fuel levy under the Customs and Excise Act 91 of 1964. On some of them rebates of the full duty and levy are allowed. The present case relates to the rebates pertaining to distillate fuel supplied as stores for fishing vessels not recognised as South African ships.

[2] The dispute arose from an amendment during October 1993 to Schedule 6 to the Act where the rebates are listed. Previously full rebates of excise duty and fuel levy were allowed on distillate fuel supplied as stores for 'foreign-going' ships. With retrospective effect from 1 January 1988, the amendment extended the rebates to fishing vessels not recognised as ships of South African nationality in terms of the Merchant Shipping Act, 1951.

[3] Before the amendment, but after the effective date thereof, appellants had supplied diesel oil (a distillate fuel) to fishing vessels registered in Namibia. These vessels were not regarded as foreign-going ships and the supplies did not originally qualify for rebates. But they were not recognised as South African ships either. For this reason, the appellants, after the promulgation of the amendment, claimed to be entitled to full rebates under the new items 603.02.01 and 640.06 in Schedule 6. First respondent disagreed and the appellants approached the Transvaal Provincial Division for relief. In the notice of motion as eventually amended they claimed an order declaring that -

> '1.1 the right to a rebate of excise duty under rebate item 603.02.01, and the right to a rebate of fuel levy under rebate item 640.06, in each case of Schedule 6 to the Customs and Excise Act, 1964, in respect of the supply of distillate fuel as stores for a fishing vessel, is not, and since 21 March 1990 (and 1

January 1988 in the case of 1.1(b)(i) below) has not been, precluded merely -

(a) by reason of the fact that such fishing vessel may be (or at the time of supply might have been) registered in Namibia; or
(b) by reason of the fact that the distillate fuel supplied to such fishing vessel may be (or might have been) used by that vessel -
    (i) for the purpose of catching fish and bringing the catch back to the Republic, or
    (ii) for the purpose of plying between a port

in the Republic and a port in Namibia;

1.2 distillate fuel may validly be, and have been, taken from a customs and excise warehouse and supplied as stores for a fishing vessel not recognised as a ship of South African nationality in terms of the Merchant Shipping Act, 1951, under rebate of duty as contemplated in 1.1 above.'

[4] The respondents did not oppose prayer 1.1(a) but counter-claimed for two orders which were essentially the obverse of those sought by the appellants in prayers 1.1(b)(i) and (ii) of the notice of motion. The Court *a quo* (Preiss J) granted the unopposed prayer, refused the other prayers in the notice of motion, allowed the counter-application and granted the appellants leave to appeal to this Court.

[5] The appeal turns on prayer 1.1(b)(i). Preiss J did not address the real issues which this prayer raised because, as respondents' counsel conceded, he misconceived the case put up by the

appellants and the extent of the relief claimed by them. It is plain however that the learned judge accepted the respondents' contention that Items 603.02.01 and 640.06 envisage cases where distillate fuel is exported and, for this reason, do not apply to the supply of diesel oil to fishing vessels in the case contemplated in prayer 1.1(b)(i).

[6] In this Court the argument on behalf of the respondents followed the same lines. To understand their contention it is necessary to know that goods which are subject to excise duty and fuel levy may only be manufactured in licensed customs and excise warehouses and, in terms of s 20(4), may only be removed for the purpose of

> '(a) home consumption and payment of duty due thereon;
>
> (b) rewarehousing in another customs and excise warehouse in bond as provided in section 18;
>
> (c) .....
>
> (d) export from customs and excise warehouse (including supply as stores for foreign-going ships or aircraft).'

[7] The distinction in s 20(4) between ***home consumption*** (which is defined as 'consumption or use in the Republic') and ***export*** (a term which is not defined) is a prominent and important feature of the Act. A corresponding and equally important distinction is that between ***excise duty and fuel levy***, on the one hand, and ***export***

duty, on the other. Export duty may be imposed by the Minister of Finance in terms of s 48(4) on goods intended for export. Excise duty and fuel levy are imposed by the Act itself on goods entered for home consumption. S 47(1) provides that

> '[s]ubject to the provisions of this Act, duty shall be paid for the benefit of the National Revenue Fund on all imported goods, all surcharge goods and all fuel levy goods in accordance with the provisions of Schedule No 1 ***at the time of entry for home consumption of such goods***.'

The relevant parts of s 37 read as follows:

> '(1) In respect of any goods manufactured in a customs and excise warehouse there shall be paid, subject to the provisions of section *seventy-five*, ***on entry for home consumption thereof***, duty at the undermentioned rates, namely -
>
> (a) ...
>
> (b) if such goods are liable to excise duty, the excise rate of duty applicable in terms of Schedule No 1 on such manufactured goods.
>
> (8) There shall be paid ***on entry for home consumption***, in addition to any duty payable in terms of this section and subject to the provisions of sections 27(3) and 75, surcharge or fuel levy at the rate applicable in terms of Schedule No 1 ...'

[9] Rebates are provided for in s 75 in the following terms:

> '75(1)Subject to the provisions of this Act and to any conditions which the Commissioner may impose -
>
> (a) ...
> (b) ...
> (c) ...
> (d) in respect of any excisable goods

> or fuel levy goods described in Schedule No 6, a rebate of the excise duty ... or of the fuel levy ... in respect of such goods ***at the time of entry for home consumption*** ... shall ... be granted to the extent and in the circumstances stated in the item of Schedule No 6 in which such goods are specified ...'

(The emphasis in all the foregoing provisions is mine.)

[10] Turning to Schedule 6 one finds Item 603.02.01 (the rebate of excise duty payable on distillate fuel) in Part 1 and Item 640.06 (the rebate of fuel levy) in Part 3. The relevant portions of the Schedule read as follows:

Rebate item	Tariff item	Code	CD	Description	Extent of rebate
603.00				EXPORTS	
603.01				Excisable goods exported from a customs and excise warehouse (including supply as stores for foreign-going ships or aircraft but excluding fishing vessels provided for in rebate item 603.02):	
.....				.....	
603.02				Excisable goods supplied as stores to any fishing vessel not recognised as a ship of South African nationality in terms of the Merchant Shipping Act,	
		01.00	5	1951 (Act No 57 of 1951):	
.01	105.10			Distillate fuel	Full duty

Rebate item	Tariff item	Code	CD	Description	Extent of rebate
640.04	195.00	01.00	5	Fuel levy goods exported (including supply as stores for foreign-going ships or aircraft but excluding fishing vessels provided for in item 640.06)	Full fuel levy
640.06	195.00	01.00	5	Fuel levy goods supplied as stores for any fishing vessel not recognised as a ship of South African nationality in terms of the Merchant Shipping Act, 1951 (Act 57 of 1951): Distillate fuel	Full fuel levy

[11] Preiss J found the key to the dispute in the fact that goods supplied as stores for foreign-going ships are expressly mentioned as exports in Items 603.01 and 640.04 and that Item 603.02.01 appears under the same heading. The learned judge ascribed the fact that the fuel levy was not treated in similar fashion in Item 640.06 to an 'accidental omission' and concluded that the rebates are not allowed in cases where the fuel is not exported.

[12] It is immediately apparent that the notion of rebates of excise duty or fuel levy on ***exported*** goods is completely incongruous with the provisions of the Act which I have mentioned. Apart from ss 37(1) and (8), 47(1) and 75(1)(d), Note 1 to Part 1 of the very Schedule tells us that the goods described in Part 1 may be entered under rebate of excise duty in respect thereof ***at the time of entry for home consumption***; and Note 7 to Part 3 is to the effect that the rebate of fuel levy shall be allowed ***subject to s 75*** which, it will be recalled, only provides for rebates in respect of goods entered for

home consumption. The fact of the matter is simply that exported goods are not subject to, nor can they qualify for rebates granted on excise duty and fuel levy; they are simply not 'excisable goods or fuel levy goods' in respect of which, in the express words of s 75(1)(d), rebates are granted.

[13] I am not prepared to accept a submission by respondents' counsel that, by including them in the list of full rebate items, the legislature merely sought to ensure that excise duty and fuel levy are not payable in respect of exported goods. The distinction between exported goods and goods entered for home consumption is so clear, and the imposition of excise duty and fuel levy only on the latter so explicit, that it is inconceivable that the legislature would have selected such a tortuous method of informing us of something which is so obvious. It is significant moreover that, after the 1993 amendment, thirteen other items appeared between Items 603.01 and 603.02 in the portion of Part 1 of Schedule 6 that I quoted. One of these has since been deleted by way of a further amendment. Part 1 of the Schedule thus contains under the exports heading what seems to be a constantly changing selection from the host of items appearing as excisable goods in Schedule 1. We do not know what the determinants for the selection are but the very fact that a handful of specified exported items are selected from time to time seems to me to be an indication that they are included in Schedule 6 for a reason of which we have not been informed. Be

that as it may, I cannot imagine that the legislature would prefer to exempt exported goods generally from excise duty and fuel levy by ponderously selecting certain goods and declaring them to be those in respect of which full rebates will be allowed.

[14] The validity of the respondents' argument may, apart from its incongruity, be tested by enquiring into the effect of the 1993 amendment upon the rebates which existed before its promulgation. As mentioned earlier Schedule 6 at that stage provided only for full rebates of excise duty and fuel levy in respect of excisable goods and fuel levy goods 'exported (including supply as stores for foreign-going ships or aircraft)'. The respondents have not challenged a statement by Mr Henderson, the deponent to one of the affidavits filed by the appellants, that the amendment was an attempt to clarify uncertainty, especially as far as foreign-registered fishing vessels are concerned, arising from the vagueness of the term 'foreign-going ships'. Yet they contend that rebate items 603.02.01 and 640.06 only apply to ***foreign-going*** fishing vessels which are not recognised as South African ships. The very essence of their case is that the amendment has achieved nothing. I cannot accept that the legislature would go the length of devising the intricate system of inclusion and exclusion adopted in the amended Schedule 6 merely for the sake of maintaining the *status quo ante*. It is much more likely, as appellants' counsel submitted, that the intention was to grant the benefit of full rebates to an additional and

discrete category of ships, whether foreign-going or not.

[15] It should be mentioned in this connection that Mr Henderson has not told us precisely what the problem was which arose from the uncertainty about foreign fishing vessels; nor have the respondents. Respondents' counsel drew attention to the fact that fishing vessels from other countries are a common sight in South African waters and suggested that the amendment was aimed at preventing an unfair advantage to these vessels in the form of duty-free bunkers which our own ships do not enjoy. Items 603.02.01 and 640.06, he submitted, were not meant to apply to foreign vessels plying their trade along our shores.

Attractive though it may be, the suggestion is entirely speculative. We do not know that the amendment was meant to eliminate any particular mischief and if it was, we do not know what the mischief was. Judging by the facts in *BP Australia Ltd v Bissaker (Collector of Customs for the State of Western Australia)* 163 (1987) CLR 106, foreign fishing vessels snarl the business of customs officials all over the world and any number of reasons come to mind why a particular fiscal measure may be adopted. The mischief aimed at is often an important consideration in the construction of a statute; but where, as in the present case, it is not readily ascertainable it would be entirely wrong to grasp the first attractive suggestion that is proffered.

[16] Bearing all this in mind we must apply the established canon

of construction that different parts of the same statute should, if possible, be construed so as to avoid a conflict between them (*Amalgamated Packaging Industries Ltd v Hutt and Another* 1975 (4) SA 943 (A) at 949 H). Items 603.02.01 and 640.06 must accordingly be interpreted in such a way that they accord, as far as possible, with the principle of the Act that rebates are only granted in respect of goods entered for home consumption. Viewing the matter in this way the answer to the problem becomes clear: the immediate context in which Items 603.02.01 and 640.06 appear, certainly supports the respondents' case; but, taking the observations in paragraph 11 into account, the construction for which they contend, is in conflict with provisions in the body of the Act and in Schedule 6 itself. The construction for which the appellants contend, on the other hand, accords with the Act and the rest of the Schedule and must be preferred. Prayer 1.1(b)(i) of the amended notice of motion should accordingly have been granted.

[17] Appellants' counsel did not pursue prayer 1.1(b)(ii) and only faintly argued that prayer 1.2. should have been granted. In view of the concluding words of that prayer he conceded however that an order in terms thereof would take the matter no further than an order in terms of prayer 1.1(b)(i).

[18] The order to be made does not appear with any clarity from the notice of motion, which was drafted in a negative and cumbersome way. In order to address the real problem between the

parties, I will make the order that follows.

1. The appeal succeeds with costs, including the costs of two counsel.

2. It is declared that the Appellants are entitled to the benefit of rebate items 603.02.01 and 640.06 in respect of diesel fuel supplied in South African ports to any fishing vessel not recognised as a ship of South African nationality in terms of the Merchant Shipping Act, 57 of 1951, even in the event of such fuel being used by the vessel in question for the purpose of catching fish and bringing the catch back to the shores of the Republic of South Africa.

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HEFER JA

Concurred: Mahomed CJ
Olivier JA
Streicher JA
Farlam AJA