Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE DIVISION, CAPE TOWN]

Coram: LE GRANGE, CLOETE, et KUSEVITSKY JJJ

Appeal Case No: A145 / 2021

In the matter between:

TUNICA TRADING 59 (PROPRIETARY) LIMITED	Appellant
And	
THE COMMISSIONER,	
SOUTH AFRICAN REVENUE SERVICE	Respondent

JUDGMENT DELIVERED: 21 APRIL 2022
(Electronically Delivered to Parties)

LE GRANGE, J:

Introduction:

[1] This is an appeal, with leave of the court *a quo*, against its judgment and order handed down on 23 February 2021. The underlying dispute between the parties

concerns the refusal by the Respondent ("SARS") to pay a claim lodged by the Appellant ("Tunica") in terms of s 75(1) of the Customs and Excise Act, 91 of 1964 ("the Customs Act") for a refund of the excise duty and fuel levy paid by it in respect of a consignment of fuel ("the fuel") purportedly exported by it.

[2] Tunica, is a licensed small-scale distributor of fuel in terms of the said section, which purchases fuel to supply *inter alia* foreign-going ships. On 4 November 2014, it applied to SARS for a refund in terms of section 64F of the Customs Act[1].

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[1] Section 64F(1) provides as follows:

> *"64F* ***Licensing of distributors of fuels obtained from the licensee of a customs and excise manufacturing warehouse***
>
> *(1) For the 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);*
>
> *'fuel' means any goods classifiable in any item of Section A of Part 2 of Schedule 1 liable to excise duty and goods classifiable in any item of Part 5 of Schedule 1 liable to fuel levy, used as fuel."*

[3] SARS in a decision on 1 April 2015 refused Tunica's application for a refund. On 28 September 2015 SARS' Internal Administrative Appeal Committee ("IAC") disallowed an internal administrative appeal by Tunica against such refusal ("the September 2015 decision").

[4] On 17 February 2017, SARS upheld the September 2015 decision ("the February 2017 decision").

[5] In the court *a quo*, Tunica sought *inter alia* the following relief:

i) That the decision by SARS on 17 February 2017, alternatively, the decision of the IAC taken on 28 September 2015 be set aside;

ii) The application was a review founded on the Promotion of Administrative Justice Act, 3 of 200 ("PAJA"), alternatively, section 172 of the Constitution of the Republic of South Africa, 108 of 1996 ("the Constitution"); alternatively a tariff appeal as provided for by section 47(9)(e) of the Customs Act.

[6] SARS approached the matter as if it was a tariff determination in terms of section 47(9)(a) of the Customs Act. The court *a quo*, agreed with SARS and found in its favour.

<u>Background facts:</u>

[7] The salient facts underpinning Tunica's refund application can be summarized as follows: Tunica on 4 November 2014, made an application for a refund in the prescribed format ("the refund application") to SARS in terms of the legislative and regulatory framework of the Customs Act. Two further applications for refunds were submitted on 28 October 2014 and 11 November 2014. The latter two is still under consideration by SARS as it only dealt with the first application.

[8] The refund application was in respect of the excise duty and fuel levy on a consignment of fuel which Tunica had purchased from Masana Petroleum Solutions (Pty) Ltd ("Masana"). At the time Masana was the beneficiary of a preferential supply agreement with BP Southern Africa ("BPSA"). Masana was as a result entitled to sell fuel obtained from BPSA. The fuel obtained came from BPSA's manufacturing warehouse.

[9] It is common ground that BPSA is a licensee of a customs and excise manufacturing warehouse within the meaning of section 64F, and owns 45% of Masana, which supplies BPSA fuel to small and non-contract distributors, like Tunica. BPSA also has a preferential supply agreement with Masana. It has identified Masana as its vehicle for broad-based black economic empowerment ("BBBEE"), who supplies small-scale distributors like Tunica so that BPSA can focus on its core business of supplying large bulk customers.

[10] According to Tunica it is not practicable or feasible for a small-scale distributor, like Tunica, to buy fuel directly from BPSA by reason of the onerous requirements and

high prices imposed by BPSA in that regard. The structure according to Tunica is intended to ensure that small-scale distributors purchase BPSA fuel through Masana.

[11] Tunica's refund application concerns a delivery of fuel to a foreign-going ship, namely the INS TEG with a bill of lading dated 01/01/2014 in Simon's Town. The fuel for the INS TEG was purchased by Tunica from Masana, operating from a BPSA depot in BP Road, Montague Gardens.

[12] SARS addressed a letter to Tunica on 5 March 2015, in which it indicated that it intended to reject the refund application, on the grounds that the fuel had not been purchased from a licensee of a customs and excise manufacturing warehouse, but had instead been purchased from what SARS termed "*an intermediary*", namely Masana.

[13] Tunica, on 17 March 2015, made certain submissions to SARS. It submitted that, because BPSA is a licensee of a customs and excise manufacturing warehouse and also the effective owner or controller of Masana, the fuel must be considered to have been acquired from the stocks of a licensee of a customs and excise manufacturing warehouse, as provided by section 64F.

[14] Tunica further submitted that BPSA has an exclusive supply agreement with Masana, which caters for smaller customers such as Tunica, while BPSA itself deals with large bulk customers. The duties and levies for the fuel had been paid by Tunica in

accordance with the Duty of Source System "DAS"[2], and the fuel had been sold to a vessel of foreign origin. According to Tunica it was entitled to the refund.

[15] Tunica has also attached a letter from BPSA in which it was indicated that Masana is fully integrated into BPSA's forward planning and supply processes, and its extensive supply chain network utilizing infrastructure consisting of ships, pipelines, rail and road, with access to BPSA's capabilities and resources.

[16] Tunica holds the firm view it complied, in respect of the fuel purchased, with all the requirements for the refund of excise duty and fuel levy as prescribed by the legislative and regulatory framework, including those that had been applied by SARS for the past few years. According to Tunica, the requirements that must be met for a refund under Section 64F of the Customs Act and been followed by SARS in the past are clear, which is the following:

16.1 The person to whom a refund is to be made must be a "licensed distributor".

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[2] The Duty at Source system of duties on fuel ("DAS") was introduced by SARS on 2 April 2003.
In terms of DAS, duties are paid by each oil company on fuel at the point at which the fuel leaves their manufacturing warehouses or refineries. Prior to the introduction of DAS, duties became payable on entry for home consumption, or the point at which it left a refinery or bonded warehouse for delivery to a customer. Duty was thus paid on sales.
Under DAS, duty is paid on the movement of fuel, when it leaves the manufacturing warehouse, and not on the sale of the fuel. That means that all fuel located anywhere in South Africa outside of a manufacturing warehouse is duty-paid, irrespective of how it is stored or moved from the time of removal from the warehouse in question until delivered either for home consumption or for export.
All such fuel retains its attribute of having been obtained from the stocks of a licensee of a manufacturing warehouse until either actually home-consumed or exported.
In turn, this means that invoices for duty paid are not generated by the oil companies to the licensed distributors that obtain fuel from their stocks as the duty is paid at source, to SARS, by the oil companies.

16.2 The fuel in respect of which a refund is to be made must resort under a category contemplated by Schedule 6 to the Customs Act to qualify for a refund to be made to the licensed distributor.

16.3 The fuel in respect of which a refund is claimed must have been obtained by the licensed distributor from the stocks of a licensee of a customs and excise manufacturing warehouse.

16.4 After it had been so obtained, the fuel must have been delivered for export and must have been exported.

16.5 The licensee of a customs and excise manufacturing warehouse must have paid the prescribed duties to SARS.

SARS's decision and the appeal

[17] On 1 April 2015, SARS rejected the refund application on the ground that the fuel was not "*purchased from the licensee of a Customs and Excise manufacturing warehouse*" namely BPSA, but was instead purchased from what SARS termed "*an intermediary*" namely Masana, which had purchased it from the "*licensed manufacturing warehouse*". According to SARS, it was of the view that it was the "*intention of the legislator*" in the provision of Section 64F(1)(b) that the fuel must be acquired from the licensee of a customs and excise manufacturing warehouse.

[18] Aggrieved by SARS's decision, Tunica on 17 April 2015 appealed the decision of 1 April 2015 to an internal appeal committee (the IAC) in terms of sections 77A to H of the Customs Act. In its appeal submission, Tunica addressed the grounds for the rejection of the refund application as set out in the letter from SARS. In particular, Tunica submitted the interpretation of section 64F of the Customs Act by SARS is flawed and does not provide a basis for rejecting the refund application, and that SARS's interpretation of the section would render it nugatory. According to Tunica, section 64F is clear as to the requirements that must be met for a refund to be made. The requirements are the following: Firstly, the person to whom a refund is to be made must be a "licensed distributor"; Secondly, the fuel in respect of which a refund is to be made must resort under a category contemplated by Schedule 6 to the Customs Act to qualify for a refund to be made to the licensed distributor; Thirdly, the fuel in respect of which a refund is claimed must have been obtained by the licensed distributor from the stocks of a licensee of a customs and excise manufacturing warehouse; Fourthly, after it had been so obtained, the fuel must have been delivered for export and must have been exported; and lastly, the licensee of a customs and excise manufacturing warehouse must have paid the prescribed duties to SARS.

[19] It is not in dispute that the abovementioned requirements have been met by Tunica. According to Tunica, until October 2014, SARS itself had interpreted the said section in the manner contended for by it. Tunica accordingly submitted that the decision by SARS was materially influenced by an error of law.

[20] Tunica further pointed out that the result of that erroneous interpretation of section 64F(1)(b) by SARS means that no licensed distributors would be able to claim a refund for the export of fuel, because all local oil manufacturers in South Africa utilize a network of authorised distributors to supply fuel to their end-customers and licensed distributors of fuel are therefore unlikely to be able to access fuel directly from such local oil manufacturers. Tunica submitted that in the result, this sudden change of approach by SARS after several years was arbitrary, unfair and unreasonable.

[21] On 28 September 2015 SARS disallowed the appeal (the September 2015 decision). The reasons given were the following:

a. *The invoices for purchase of the fuel were in the name of Masana Petroleum solution (Pty) Ltd (sic).*
b. *The fuel on the invoices was not sourced from the stocks of a licensed manufacturing warehouse and cannot be confirmed to be a direct movement from the stocks of such licensee.*
c. *The was non-compliance of section 64F(1)(b), read with rule 64F.06(d) to the Customs & Exicse (sic) Act, no. 91 of 1964 ("the Act").*";

[22] SARS further informed Tunica of its right to request reasons for the decision, and to apply to be dealt with in terms of the alternative dispute resolution process ("ADR") provided for by sections 77I to 77P of the Customs Act.

[23] The September 2015 decision by SARS was thus based on the fact that Tunica purchased the fuel from Masana, and therefore it could not be said that Tunica had obtained the fuel from the stocks of BPSA.

[24] Tunica, on 13 and 26 October 2015, requested reasons from SARS for the decision taken. On 26 October 2015, Tunica made an application for alternative dispute resolution ("ADR") in terms of section 77 I of the Customs Act and the same grounds as recorded earlier. On 4 January 2016, the appeal committee responded by reiterating the reasons given earlier, with an added general statement that Tunica had not complied with the provisions of section 64F of the Act and "*did not qualify for the schedule 6 refund item*".

[25] Tunica on 3 February 2016, delivered a notice of legal proceedings to SARS in terms of section 96(1)(a) of the Customs Act[3] ("the s 96 notice"). In its description of

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[3] Section 96. Notice of action and period for bringing action.-(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. [Para. (a) substituted by s. 26 (1) (a) of Act No. 32 of 2005 with effect from the date of promulgation of that Act, 1 February, 2006.] Wording of Sections

(b) Subject to the provisions of section 89, the period of extinctive prescription in respect of legal proceedings against the State, the Minister, the Commissioner or an officer on a cause of action arising out of the provisions of this Act shall be one year and shall begin to run on the date when the right of action first arose: Provided that where any proceedings are instituted concerning any decision defined in section 77A (1), such date shall begin to run on the date-

(i) of a final decision as contemplated in the rules for Part A of Chapter XA;

the cause of action, required by the s 96 notice, Tunica made a number of submissions to substantiate its contention that, on a proper construction of the Customs Act and the Rules, it is entitled to a refund for the reasons recorded earlier. Tunica in particular, submitted that the decision by SARS was subject to review in terms of PAJA as it was materially influenced by an error of law; irrelevant considerations were taken into account or failed to consider relevant considerations, namely that the fuel had been obtained from the stocks of BPSA; that the rejection of the refund applications was not authorized by the empowering provision; that the decision to refuse the refund applications was arbitrary or capricious in light of the fact that such applications had been granted for many years; and that the decision was irrational and unreasonable.

(ii) when the Commissioner advises the person who made use of the alternative dispute resolution procedures contemplated in the rules for Part B of Chapter XA that agreement has not been achieved at the conclusion or termination of such procedures; or

(iii) on the date a dispute is not settled and the Commissioner advises the person concerned as contemplated in section 77O (5) of Part C of Chapter XA. [Para. (b) substituted by s. 30 (1) (a) of Act No. 34 of 2004 and by s. 26 (1) (b) of Act No. 32 of 2005.] Wording of Sections

(c) (i) The State, the Minister, the Commissioner or an officer may on good cause shown reduce the period specified in paragraph (a) or extend the period specified in paragraph (b) by agreement with the litigant.

(ii) If the State, the Minister, the Commissioner or an officer refuses to reduce or to extend any period as contemplated in subparagraph (i), a High Court having jurisdiction may, upon application of the litigant, reduce or extend any such period where the interest of justice so requires.

(2) This section does not apply to the recovery of a debt contemplated in any law providing for the recovery from an organ of state of a debt described in such law.

(3) Notwithstanding the provisions of the Admiralty Jurisdiction Regulations Act, 1983 (Act No. 105 of 1983), when any person applies to the High Court for an order for the sale of any arrested property, such person shall deliver a notice of such an application at the place prescribed in the rules. [S. 96 substituted by s. 136 of Act No. 60 of 2001. Sub-s. (3) inserted by s. 30 of Act No. 21 of 2006.]

[26] SARS allocated the s 96 notice on 3 February 2016 to Ms. Moloi for her attention. On 8 April 2016, SARS addressed a letter to Tunica in which it indicated that it was of the view that in considering the s 96 notice "*together with supporting documentation presented… not all documentation furnished is sufficient to allow the Commissioner to make an informed decision*". It further indicated that the Commissioner "*before making a final decision*" required clarification of certain issues as well as documentation.

[27] Tunica complied with the request and provided a list of particulars and documentation in respect of "*the movement of each consignment from the manufacturing warehouse until exportation*". SARS further requested documents regarding BPSA's ownership of Masana. Tunica was also invited to make an oral presentation. SARS also proposed that Tunica should not proceed with litigation until a "*final response*" from SARS had been provided, and that Tunica would be granted "*an extension of 30 days from date of final response to do so*".

[28] On 25 August 2016, a meeting was held at SARS offices in Pretoria, attended by Ms. Grobbelaar from Tunica. Tunica provided the documents which it understood had been requested in the letter of 8 April 2016. According to Grobbelaar, she explained the flow of documentation in respect of the purchase and collection of fuel by Tunica from Masana, and the delivery of the fuel to the foreign-going ship or purchaser. She also pointed out that the terminal bill of lading in respect of a consignment is issued by the terminal (BPSA), while the Masana invoice to Tunica is generated off the terminal

bill of lading. It is not in dispute that the bills of lading, which are included in the documents submitted to SARS, clearly reflected the supplier as BPSA.

[29] Grobbelaar further explained that once an order number is issued, email confirmation thereof is not kept as this is not a necessary document and in any event, the order number is reflected on the oil company invoice. Furthermore, the terminal bill of lading is likewise usually not kept, as that is not a requirement, and the oil company invoice, which is kept, is generated off the terminal bill of lading. At the meeting with SARS, it was decided that SARS would provide Tunica with a spreadsheet indicating what documentation it required, and that SARS would contact Tunica directly in respect of any further documentation required before making a final decision. SARS provided the spreadsheet on 28 September 2016 as agreed. SARS required further documentation which according to Tunica is not prescribed by any part of the legislative and regulatory framework. Tunica was further of the view that the new information required was also vague and imprecise as the documentation required was described in very general terms. Tunica listed an instance, where SARS among others required a document of "*proof of delivery to export country*". According to Tunica, it was not clear what was required, and whether it is the bunker delivery note ("BDN"), which is signed by the ship and stamped by customs, or something else particularly as the fuel was not for delivery to an export country but was meant for supply as stores for a foreign-going vessel.

[30] The spreadsheet was completed and filled in by Tunica and provided to SARS with certain remarks regarding the road transporter that was used to transport the fuel to the vessel, namely: that Masana was not given a bill by BPSA for payment; Masana has a handover price from BPSA and at the end of the month, the volumes moved and pricing is calculated after which a systems entry is generated; It is common practice, when multiple trucks are delivering on the quay side, for an operations person to oversee all deliveries, and to sign the final paperwork; In the case of the delivery to the Danah Explorer, the operations person who signed the bunker delivery note ("BDN") was Mr. Dharumdan; In the case of the deliveries to the INS TEG, Mr. Brushett an employee of Tunica to supervise delivery at the port, signed the BDN.

[31] It is common cause that SARS never reverted on Tunica's completion of the spreadsheet, and Tunica was never requested to provide further documentation.

[32] On 2 November 2016, SARS addressed a further letter to Tunica. In that letter, SARS listed its responses to the s 96 notice. Those responses consisted of a number of assertions, mainly related to a number of technical requirements related to the transport of the fuel. According to Tunica, none of those requirements are formal requirements in any legislative provision, rule or regulation, and none of those had been raised by SARS in its initial indication of an intention to reject the refund application, or by the appeal committee. SARS again stated that Masana is not "*a licenced warehouse*".

[33] Tunica holds the view that SARS's assertions in its letter as mentioned above are incorrect, and advanced the following reasons: i) Montague Gardens is not a manufacturing warehouse. It is a holding depot. According to SARS, the fuel stored at the depot is bought from Chevron and obtained from Chevron's refinery (i.e. Chevron's manufacturing warehouse) situated in Milnerton, Cape Town. According to Tunica, there is no difference between obtaining fuel from Chevron's refinery and the BPSA depot in Montague Gardens as the licensed manufacturing warehouse of Chevron is the source of the fuel, and BPSA is a licensee of a customs and excise manufacturing warehouse. And, fuel may be obtained "*at any place in the Republic… from stocks of a licensee of a customs and excise manufacturing warehouse.*"

[34] Furthermore, Tunica was uncertain as to what SARS had in mind in respect of the road transport of the fuel, Tunica used a road hauler for the road transport of the fuel. According to Tunica, there can be no bunker receipt from the road hauler, as there is no contract between the ship which purchases the fuel and the transporter thereof, and there is no change of ownership of the fuel. The contract was between Tunica and the ship which purchases the fuel. The only documentation available from the road hauler was a delivery receipt, which has been provided to SARS.

[35] Tunica was also uncertain why SARS required "*proof that the registered hauler… delivered the fuel that they picked up*", as Tunica has already showed the product and quantity picked up by the road hauler by means of the terminal bill of lading and the Masana invoice, and the same product and quantity delivered to the foreign-going ship

purchasing the fuel, by means of a BDN signed by the ship. The purpose of the requirement of seal numbers also created uncertainty with Tunica as there is no legislative requirement for them, and they are not recorded on delivery as upon delivery, the seals are cut off and discarded and sometimes no seals are used.

[36] SARS in the letter of 2 November 2016 further indicated that "*unless [Tunica] can provide information with documents to back up what we have highlighted herein, this office is inclined to agree with the decision of [the appeal committee]. Such decision will stand and this office will consider [Tunica's] Section 96 notice to have been duly dealt with and finalised*."

[37] On 2 December 2016, Tunica's attorneys addressed a letter to SARS in which it again explained all of Tunica's contentions.

[38] SARS informed Tunica on 17 February 2017 that after considering Tunica's letter dated 15 December 2016, which appears to be a reference to the letter of 2 December 2016, it was of the view that Tunica "*still does not qualify for a refund*", for the reasons set out in the SARS letter of 2 November 2016. The letter, was signed by Moloi "For: Commissioner for the South African Revenue Services", concluded that "Our office therefore, upholds the decision of the [Internal Appeals Committee] and that of the branch office". The letter also refers to Tunica having to "*pay all monies due and payable to SARS without further delays*".

[39] It is obvious that there is no payment outstanding from Tunica as it applied for a refund of duties and levies already paid.

[40] Tunica, on 3 April 2017, sent a further section 96 notice, with the aim of indicating that, after all the attempts made to comply with the various demands made by SARS, and following the request by SARS not to institute legal proceedings until a "final response" on the issue by SARS had been provided, Tunica was now going to institute legal proceedings.

[41] In response to the section 96 notice, SARS sent a letter to Tunica's attorneys on 19 April 2017, and, in which it said that the February 2017 decision did not constitute administrative action, and is not reviewable, because the legal advisor who made that decision had not been authorized to make any such decision. Instead, the decision which is to be impugned by Tunica is alleged to be the decision by the appeal committee on 28 September 2015, which is said to be "*the final decision taken by the Commissioner*". The implication is obviously that Tunica should have instituted legal proceedings at some earlier stage. It appears that Tunica launched its application on approximately 21 June 2017.[4]

[42] On 25 August 2017, the State Attorney acting for SARS addressed a letter to Tunica's attorneys, from which it appeared that SARS had taken the view that the September 2015 decision constitutes a tariff determination within the meaning of

[4] Although the initial notice of motion does not form part of the appeal record, the founding affidavit was deposed to on 21 June 2017.

section 47(9)(a) of the Customs Act. In terms of section 47(9)(e) and (f), an appeal against such a tariff determination lies to the High Court, and must be prosecuted within one year from the date of the determination.

[43] SARS further indicated that it was not open to Tunica to impugn the decisions in question by means of a review application. In that regard, reference was made to the judgment of the Gauteng Division of the High Court in the matter of *Levi Strauss SA (Pty) Ltd v Commissioner for the South African Revenue Service*, Case No. 20923/2015.

[44] SARS further indicated that it would require an interlocutory application to be made by Tunica to compel it to lodge the Rule 53 record. Tunica was also invited by SARS to amend and supplement its papers in the review application to lodge a tariff appeal, and indicated that it would not object to such an amendment.

[45] According to Tunica, out of an abundance of caution, and in order to avoid unnecessary delays in the determination of this dispute, it sought leave to amend its notice of motion in the review application to include alternative relief in the event that the Court found (1) that the September 2015 decision was a tariff determination and (2) that section 47(9)(e) of the Customs Act ousts the right of an aggrieved party to review the decision.

[46] The amended notice of motion therefore included as alternative relief an application for orders condoning, to the extent necessary, non-compliance with the time limit of one year in section 47(9)(f) of the Customs Act, deeming the application to be

an appeal in terms of section 47(9)(e), hearing the appeal together with the review application, and upholding the appeal. This was set out in a supplementary affidavit, which formed part of the papers before the court *a quo*.

Grounds of Appeal:

[47] Tunica raised the following main grounds in the appeal before us: first, the court *a quo* erred in finding that the September 2015 decision was a tariff determination in terms of s 47(9)(a) of the Act and proceeded to assume that the right of an appeal in terms of section 47(9)(e) of the Customs Act had ousted Tunica's right to take the decision on review in terms of PAJA and the Constitution. Secondly, the court *a quo*, incorrectly characterized the February 2017 decision as being a "section 96 decision" which is not reviewable either in terms of PAJA or on the principle of legality. Thirdly, it failed to consider Tunica's application for the review and setting aside of the September 2015 and February 2017 decisions. And, lastly, it erred in deciding that the September 2015 decision was a tariff determination and impermissibly proceeded to go far beyond the ambit of the September 2015 decision by deciding the appeal on evidence that was not properly before the court.

The Regulatory Framework:

[48] The legislative and regulatory framework which governs refunds of duties and levies in respect of fuel is underpinned by section 75, as well as section 64F, of the Customs Act read together with Schedule 6 thereof ("Schedule 6"), and Rule 64F of the

Customs and Excise Act Rules ("the Rules") published in Government Notice R.1874 of 8 December 1995 and as subsequently amended by Government Notices R.488; Government Notice 1258 of 30 December 2005; Government Notice 305 of 31 March 2006; Government Notice 961 of 29 September 2006 and Government Notice R.987 of 29 October 2010.

[49] The Commissioner thus derives the power to pay refunds of duties and levies as provided for in section 75 of the Customs Act. It is therefore perhaps convenient to refer to some of the important sections in the Customs Act and the Rules as well as to the relevant sections of PAJA.

The Customs Act:

Definition of "officer" in Section 1:

"*'officer' means a person employed on any duty relating to customs and excise by order or with the concurrence of the Commissioner, whether such order has 'been given such concurrence has been expressed before or after the performance of the said duty*";

Section 3(1):

"*(1) Any duty imposed or power conferred on the Commissioner may be performed or exercised by the Commissioner personally or by an officer or any other person under a delegation from or under the control or direction of the Commissioner.*";

Section 47(9)(a)(i):

"*(9) (a) (i) 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.";

Sections 47(9)(e) and (f):

"*(e) 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.*";

"*(f) Such appeal shall, subject to section 96 (1), be prosecuted within a period of one year from the date of the determination.*";

Section 64F(1) and (3) of the Customs Act:

"*(1) For the 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 No. 6 in respect of such fuel which has been duly delivered or exported as contemplated in paragraph (b);

(2)(a) …

(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 No. 6 providing for such refund and any rule prescribing requirements in respect of movement of such fuel to any such country or for export.";

Rule 64F.04:

"*64F.04* ***Issue of invoices or dispatch delivery notes in respect of fuel removed from stocks of a licensee of a customs and excise manufacturing warehouse***

(a) Any licensed distributor who obtains any fuel from stocks of a licensee of a customs and excise manufacturing warehouse for any purpose contemplated in section 64F and specified in any item of Schedule No. 6, must in addition to any other document required to be completed in respect of any procedure prescribed in the Act, complete an invoice or dispatch delivery note, serially or transaction numbered and dated which must include at least

(i) the licensed name, customs client number and physical address of the licensed distributor who so obtains such goods;

(ii) the licensed name and customs client number of the licensee of such warehouse, as well as the physical address of the storage tank from which the fuel was obtained;

(iii) a description of the goods so obtained, including the relevant tariff item thereof;

(iv) the quantity of goods (of which the volume must be stated at 20° Celsius) so obtained;

(v) the date the goods were obtained from such tank;

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

(vii) the price charged for each unit and the total price of the invoiced goods.

(b) ….

(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.";

Rule 64F.04:

"Procedures relating to the movement of fuel to a BLNS country or exported

64F.06 (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.'

Rule 64 F.07(b) and (c):

"Application for a refund of duty

(b) Any such application must be on form DA 66 and must be supported by –

(i) (aa) forms SAD 500 and SAD 502 or SAD 505 duly completed as contemplated in rule 19A4.04;

(bb) where relevant, the final rail consignment note, the bill of lading or air way bill;

(ii) the invoice from the licensee of the customs and excise warehouse from whom the goods were obtained;

(iii) …;

(c) The licensed distributor must submit with each application or refund a statement to the effect that-

(i) the goods obtained from the licensee of the customs and excise manufacturing warehouse and removed to any other country in the common customs area or exported as reflected on such application were duly removed to and received in such other countries or were duly exported, as the case may be;

(ii) a record of such removal or export is available at the place of business of such licensed distributor as contemplated in rule 64F.05 and will be kept in accordance with the requirements of that rule."

Section 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 manufactured in the Republic describe in Schedule No. 6, a rebate of the excise duty specified in Part 2 of Schedule No. 1 or of the fuel levy and of the Road Accident Fund levy specified respectively in Part 5A and Part 5B of Schedule No.1 in respect of such goods at the time of entry for home consumption thereof, or if duly entered for export and exported in accordance with such entry, or 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 No. 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 No. 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 No. 4, 5, or 6 in respect of any item of such Schedule.";

Section 77A (1) – Definitions of "Commissioner" and "officer":

"*'Commissioner' includes, depending on the context, the delegated officer who made the decision in dispute against which an appeal is lodged*';

"*'officer' includes, depending on the context, an officer who is delegated by the Commissioner and acts on behalf of the Commissioner as contemplated in section 3(2)*";

Sections 77E (1), (2) and (3):

"*(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. (Our underlining)

Sections 102(4) and (5) of the Customs Act:

"*(4) 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, the question arises whether the proper duty has been paid or whether any goods or plant have been lawfully used, imported, exported, manufactured, removed or otherwise dealt with or in, or whether any books, accounts, documents, forms or invoices required by rule to be*

completed and kept, exist or have been duly completed and kept or have been furnished to any officer, it shall be presumed that such duty has not been paid or that such goods or plant have not been lawfully used, imported, exported, manufactured, removed or otherwise dealt with or in, or that such books, accounts, documents, forms or invoices do not exist or have not been duly completed and kept or have not been so furnished, as the case may be, unless the contrary is proved.

(5) 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."; (Our underlining)

Rebate Item 623.25:

"*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.*"; (Our underlining and bold font)

Note 10(b) to Part 1F of Schedule 6 ("Note 10"):

"*(b) Requirements in respect of refunds:*

(i) ….

(ii) Any application for a refund of excise duty in terms of this section 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". (Our underlining)

The Promotion of Administrative Justice Act, 3 of 2000 ("PAJA")

Section 6(2):

"*(2) A court or tribunal has the power to judicially review an administrative action if-*

(a) the administrator who took it-

(i) was not authorised to do so by the empowering provision;

(ii) acted under a delegation of power which was not authorised by the empowering provision; or

(iii) was biased or reasonably suspected of bias;

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action was procedurally unfair;

(d) the action was materially influenced by an error of law;

(e) the action was taken-

(i) for a reason not authorised by the empowering provision;

(ii) for an ulterior purpose or motive;

(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;

(iv) because of the unauthorised or unwarranted dictates of another person or body;

(v) in bad faith; or

(vi) arbitrarily or capriciously;

(f) the action itself-

(i) contravenes a law or is not authorised by the empowering provision; or

(ii) is not rationally connected to-

(aa) the purpose for which it was taken;

(bb) the purpose of the empowering provision;

(cc) the information before the administrator; or

(dd) the reasons given for it by the administrator;

(g) the action concerned consists of a failure to take a decision;

(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so

unreasonable that no reasonable person could have so exercised the power or performed the function; or

(i) the action is otherwise unconstitutional or unlawful.".

Section 8:

"*Remedies in proceedings for judicial review*

(1) The court or tribunal, in proceedings for judicial review in terms of section 6 (1), may grant any order that is just and equitable, including orders-

(a) directing the administrator-

(i) to give reasons; or

(ii) to act in the manner the court or tribunal requires;

(b) prohibiting the administrator from acting in a particular manner;

(c) setting aside the administrative action and-

(i) remitting the matter for reconsideration by the administrator, with or without directions; or

(ii) in exceptional cases-

(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or

(bb) directing the administrator or any other party to the proceedings to pay compensation;

(d) declaring the rights of the parties in respect of any matter to which the administrative action relates;

(e) granting a temporary interdict or other temporary relief; or

(f) as to costs.

(2) The court or tribunal, in proceedings for judicial review in terms of section 6 (3), may grant any order that is just and equitable, including orders-

(a) directing the taking of the decision;

(b) declaring the rights of the parties in relation to the taking of the decision;

(c) directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties; or

(d) as to costs.".

Counsel:

[50] Mr. J Butler SC assisted by Ms. A du Toit appeared for Tunica. Mr. JA Meyer SC assisted by Mr. M Tjiana appeared for SARS.

[51] Mr. Butler's main submissions were the following: i) Tunica complied with all the requirements, in the application of 1 April 2014 in respect of the fuel purchased, for the refund of the excise duty and fuel levy as prescribed by the legislative and regulatory framework and as previously applied by SARS; ii) the rejection by SARS of Tunica's refund application was premised on an erroneous interpretation of s 64F of the Customs Act and contrary to the established interpretation that SARS applied for approximately 5 years; iii) SARS' reading of s 64F(1)(b) that the fuel in question has to be acquired directly from the licensee of a customs and excise manufacturing warehouse was materially influenced by an error in law and fatally flawed and the sudden change in approach after several years was arbitrary; iv) SARS, impermissibly relied on a number of technical and other requirements related to the transport of the fuel when it considered Tunica's cause of action as prescribed in s 96(1)(a) of the Customs Act ("the s 96 Notice") which are not prescriptive in any legislation, rule or regulation; v) the 17 February 2017, decision by SARS was fundamentally flawed and unfair, since the initial refusal in the April and September 2015 decisions, it has put forward two different reasons for refusing the refund application. And lastly, the court *a quo*, incorrectly characterized the February 2017 decision as being a "section 96 decision" which is not reviewable either in terms of PAJA or on the principle of legality and failed to consider Tunica's application for the review and setting aside of the September 2015 and February 2017 decisions.

[52] The nub of Mr. Meyer's argument can be summarized as follows: The decision taken on 17 February 2017 by Ms Moloi, was an internal decision by SARS and does not constitute conduct that is reviewable, either in terms of PAJA or on the principle of legality. Furthermore, the decision that needs to be impugned is the IAC's decision taken on 28 September 2015, as it considered the question whether diesel was exported in compliance with rebate items contained in Schedule 6 to the Customs Act, and by virtue of the provisions of section 47(9)(a)(i)(bb) that decision constituted a tariff determination. According to Mr. Meyer, the system created by the Customs Act is one of self-assessment and in order for the Commissioner to effectively administer and enforce the Act strict compliance thereof is necessary. Furthermore, the court *a quo* correctly decided the matter on the basis that it is a tariff appeal in terms of section 47(9)(e) of the Customs Act. It was also argued that the export requirement of rebate item 623.25 and Note 10 of SARS alone justify the finding and judgment of the court *a quo*. According to Mr. Meyer, if section 64F(1)(b) is read in context with rebate item 623.25 it becomes clear that the word "obtain" in section 64F (1)(b) is to be read as meaning "purchased" and or "collect". It was further argued that on the latter construction Tunica did not purchase the diesel from BPSA but from Masana who bought it from BPSA and that the IAC's decision was accordingly correct. Mr. Meyer also alluded to the phrase *"stocks of such licensee"* in Rebate Item 623.25 to bolster the argument that the phrase can only be read to mean that the fuel in issue must have been obtained from the stocks of the licensee who manufactured it and from whom it is bought. And lastly, it was contended that the court *a quo* correctly decided the matter

as Tunica's claim failed to comply with the relevant statutory provisions of the Customs Act.

The impugned decision:

[53] One of the main questions to be answered in this case, is which decision by SARS is to be impugned. According to SARS, it is the September 2015 decision whilst Tunica holds the firm view that the February 2017 decision is the final and operative one. Tunica in any event has also asked for the review and setting aside of the earlier decision.

[54] The stance adopted by SARS that the final decision is the September 2015 one, that Ms. Moloi, a legal adviser, had no power to make decisions in respect of refund claims and was merely asking for the information to decide whether or not to oppose the litigation as envisaged in the s 96 notice, is in my view unsustainable.

[55] The jurisdictional requirements of the s 96 notification are essentially twofold. First, an aggrieved party had to formally notify the Commissioner of its intention to litigate upon the grounds on which it intends to do so. And secondly, it is to afford the Commissioner one month, subject to any reduction of the period as provided for in s 96(1)(c), to consider the notice and decide on whether or not the intended litigation is to be defended. It is common cause that after the IAC rejected Tunica's appeal, it filed the s 96 notice. We know that in a letter dated 8 April 2016, SARS informed Tunica not to proceed with litigation until it had received a "*final response*" and Tunica was invited

to clarify issues and submit documents, before "[*t]he Commissioner*" was to make a "*final decision*".

[56] The request by SARS falls squarely within the provisions of 77F of the Customs Act, which provides that the Commissioner may refer a matter back to an appeal committee for further consideration, reject or accept or accept and vary the recommendation of the committee, or confirm or amend the decision or withdraw it and make a new decision. Tunica, as stated earlier, spent time and resources engaging with SARS, attending a meeting, writing letters, and providing documentation. From the abovementioned it is clear that section 77F provides that the Commissioner '*may*' reconsider a decision by the appeal committee which on a proper reading of the Customs Act permits the Commissioner to take a final decision.

[57] It is obvious that from the correspondence on 8 April 2016, SARS in no uncertain terms invited Tunica to clarify certain issues *before* the Commissioner makes a *'final decision'*. (my underlining). To suggest that Tunica should have ignored the above correspondence and reviewed or appealed the September 2015 decision, is simply untenable, because if SARS is correct then Tunica had to provide documentation and submissions for no apparent purpose to an unauthorized official that cannot make any decision on the refund application. Such a proposition is unsustainable as it would mean that SARS deliberately misled Tunica which would be reprehensible.

[58] Furthermore, the argument by SARS that the February 2017 decision was some kind of a decision in response to the section 96 notice, or a decision to oppose the

litigation proposed in the section 96 notice, is inconceivable. The provisions in s 96 do not contemplate for a decision of that kind. In fact, SARS out of its own accord in its letter dated 8 April 2016, invited Tunica to clarify issues and submit documents, before "[*t]he Commissioner*" was to make a "*final decision*". In that context the final decision by the Commissioner can only mean that which is provided for in s 77F of the Customs Act, namely, that the Commissioner may refer a matter back to an appeal committee for further consideration, reject or accept or accept and vary the recommendation of the committee, or confirm or amend the decision or withdraw it and make a new decision. If the representations and documentation SARS requested from Tunica was simply for its own internal decision about whether to oppose the litigation, and could not have resulted in a final decision on the refund application, then the letter of 8 April 2016 was grossly misleading and fundamentally prejudicial towards Tunica.

[59] Moreover, if SARS's version is accepted that the September 2015 decision was the "final decision" of the Commissioner, 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. Furthermore, the argument by SARS that the legal advisors who are allocated a dispute in respect of an appeal committee's decision are not authorized to make a decision in that regard, is also of no assistance to SARS. Firstly, it would mean that Ms. Moloi's functions would serve no purpose, and the Commissioner can simply disregard such a decision taken if he considers it to be a mistake. And secondly, the latter would fly in the face of the well-established Oudekraal principle. As held by the Constitutional Court in MEC for Health, Eastern Cape and

Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute[5] such conduct: *'[w]ould spawn confusion and conflict, to the detriment of the administration and the public. And would undermine the courts' supervision of the administration.'* The Constitutional Court further held, in confirming the Oudekraal principle, that even where a decision has been taken without authority, it constitutes administrative action which stands until set aside.[6]

[60] Lastly, SARS in its own letter of 8 April 2016 contradicted itself that the September 2015 decision is the final one. The letter recorded that a "*final response*" had not been taken by the Commissioner, who required further documentation "*to allow the Commissioner to make an informed decision".* Tunica was then invited to clarify issues and submit documents, before "[*t]he Commissioner*" was to make a "*final decision*". The decision then came in February 2017 where the process was concluded and a final decision had been made. It was further signed by Ms Moloi "*For: Commissioner for the South African Revenue Services*". On these stated facts SARS cannot simply treat the decision taken by Ms Moloi as though it did not exist. Until properly set aside by a court of law it has legal consequences[7].

[61] From the abovementioned it follows that the 17 February 2017 decision is the operative decision which constitutes administrative action as defined in PAJA and is therefore reviewable. There is no dispute that Tunica's application was brought within

[5] 2014 (3) SA 481 (CC) at paragraphs 87-103
[6] See ft 5.
[7] MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute 2014 (3) SA 219 SCA at para 22-23.

the 180 day period prescribed in s 7(1) of PAJA. The court *a quo*, therefore mistakenly characterized the February 2017 decision as being a "section 96 decision" which is not reviewable in terms of PAJA or on the principle of legality. It further follows that Tunica's application for the review and setting aside of the September 2015 and February 2017 must as a result be considered afresh.

The Review

[62] At the heart of Tunica's review and setting aside of the September 2015 and February 2017 decisions is the averment that SARS gave an erroneous interpretation of s 64F of the Customs Act. According to SARS, the fuel in question had to be "purchased" directly from the licensee of a customs and excise manufacturing warehouse. Tunica argues that the fuel only had to be "obtained" as opposed to "purchased" from the licensee of a customs and excise manufacturing warehouse which according to Tunica was the interpretation by SARS for almost 5 years. Furthermore, that SARS impermissibly relied on a number of technical and other requirements related to the transport of the fuel when it considered Tunica's cause of action as prescribed in the s 96 Notice which are not prescriptive in any legislation, rule or regulation.

[63] The question now is whether the interpretation preferred by SARS by requiring the word "purchase" to be read into the section 64 F of the Customs Act is a salutary one or does it render the section nugatory as contended by Tunica. The approach to be

adopted in the interpretation of a statute is trite[8]. The wording in s 64 F clearly permits refunds of duties and levies in respect of fuel *'obtained'* from *'stocks of a licensee of a customs and excise manufacturing warehouse'*, which are the large oil companies like BPSA and Shell and to deliver it for export which includes supplying fuel as stores for foreign-going ships.

[64] As to the legislature's intention of using the term "obtain" consideration must firstly be given 'to the language used in the light of the ordinary rules of grammar and syntax; the context in which it appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document'[9].

[65] In the present instance the ordinary dictionary meaning of the term "obtain" is to *"get hold of; to gain possession of, to procure; to acquire, in any way..[10]"* In this instance the legislature is assumed to have chosen its words with care and to have intended that every word used to have effect. The term "purchase" is used by the legislature in s 15 of the Customs Act, where a distinction is made between goods "purchased" and goods "otherwise acquired". Objectively viewed, it is clear that the

[8] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) para 18; Commissioner, South African Revenue Service v Bosch and Another 2015 (2) SA 174 (SCA) at para 17.
[9] See Endumeni supra at para 10.
[10] Oxford Dictionary

legislature did not intend to define the qualifying fuel strictly but rather broadly by using the word "obtain" because if it intended to refer to only fuel "purchased" directly from the licensee of a custom and excise manufacturing warehouse, it would simply have said so. This interpretation is supported by the use of the words "obtains" and "obtained" – without any reference whatsoever to "purchase" – 8 times in Rules 64F.04 read with 64F.06 and 64F.07 dealing with the "issue of invoices or dispatch of delivery notes in respect of fuel removed from stocks of a licensee of a customs and excise manufacturing warehouse", "procedures relating to the movement of fuel to a BLNS country or exported" and "application for a refund of duty" respectively.

[66] Moreover, on the facts, it is evident that a licensed distributor like Tunica finds it very difficult to purchase fuel directly from local oil manufacturers like BPSA as they prefer to do business through authorized distributors like Masana. The contention by Tunica that on SARS' interpretation s 64F (1) would for all practical purposes be rendered nugatory, is therefore not without merit.

[67] Our law is clear, where on the objective facts, there are two possible meanings, a sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document[11]. Furthermore, where there are two possible constructions, one of which would render a statutory provision nugatory, while the other will make it effective, then on the principle that the legislature

[11] ibid

must be presumed to have intended to make a valid and effective provision, the latter construction should be adopted rather than the former[12].

[68] In my view, on a proper interpretation of the wording in s 64 F of the Customs Act, the requirement that a distributor must have *obtained* the fuel "*from stocks of a licensee of a customs and excise manufacturing warehouse*" cannot be interpreted to restrict the refund to cases where the fuel was purchased directly from such a licensee, but must include cases where the fuel is purchased from an intermediary like Masana, where the fuel is in fact from the stocks of such licensee, and obtained from those stocks even if not purchased directly. In fact, it is not in issue that at least from 2010 until October 2014, SARS itself had interpreted the Act and rules in such a manner that the refund would be made in these circumstances.

[69] For all reasons as stated above the Commissioner clearly committed an error of law which vitiates the decision to refuse the refund application submitted by Tunica which accordingly is reviewable and needs to be set aside.

[70] Tunica has also complained that SARS took into account irrelevant considerations or failed to consider relevant considerations when it considered its refund application and that conduct is reviewable under s 6(2)(e)(iii) of PAJA. The complaint is not without substance and the Commissioner's conduct is reviewable under s 6(2)(e)(iii) of PAJA for the following reasons: First, it is evident that s 64F requires that the fuel must have been obtained from the stocks of a licensee of a customs and excise

[12] Ex Parte Manners 1950 (3) SA 861 (T) at 864G;

manufacturing warehouse and not only purchased directly from such a licensee. The fact that the fuel had been purchased from Masana is therefore an irrelevant consideration that was considered by SARS. Furthermore, on the objective facts it is clear that SARS had failed to take into account the relevant considerations regarding BPSA's controlling interest in Masana, that the supplies of the fuel came from the stocks of BPSA, and delivery of the fuel was taken by Tunica directly from the BPSA refinery and depot.

[71] Secondly, SARS also failed to take into account the relevant consideration that the fuel had been obtained from the stocks of BPSA, via Masana. It also failed to properly consider that Tunica had indeed complied with all of the regulatory requirements for obtaining a refund of excise duty and fuel levy; and

[72] Thirdly, the record of decision filed by the Commissioner in terms of Rule 53 ("the record") contained only the forms and documentation supplied to SARS by Tunica, and correspondence addressed to Tunica by SARS, all of which had in any event been attached to the founding affidavit. There is no indication in the record of any meetings of any officials, panels or other internal structures at SARS, and no agendas, minutes, transcripts or other records of any meetings where any of the applications or submissions made by Tunica to SARS were considered, discussed or decided.

[73] In view of the abovementioned, Tunica's further complaints that the rejection of the refund applications were not authorized by the empowering provision and the February 2017 decision was made arbitrarily and irrationally are also not without merit.

Tariff Determination:

[74] Despite the fact that the relief sought by Tunica was in the first instance a review of the February 2017 decision, alternatively the September 2015 decision, the court *a quo* declined to consider the review. Instead, the court proceeded to decide the application as an appeal in terms of section 47(9)(e).

[75] On the facts before us, it is clearly evident that the September 2015 decision was not a tariff determination as contemplated in section 47(9)(a)(i) as the decision, which was signed by the chairperson of the IAC, was a decision taken by the appeals committee in terms of section 77E of the Customs Act. In this regard section 77E(3) of the Customs Act is also helpful in that it provides that "*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*".

[76] Moreover, the September 2015 decision clearly pertained to whether or not Tunica fell within the definition of a licensed distributor in terms of section 64F(1)(b) and not as SARS wants to have it that rebate item 623.25 in Schedule 6 must be read into the reasons provided by the appeals committee.

[77] The decision to disallow Tunica's appeal was therefore not a decision taken by the Commissioner as contemplated in section 47(9)(a)(i). The latter is further fortified by the fact that the decision was taken in response to an appeal by Tunica in terms of section 77B(1) of the Customs Act. In addition, the heading in SARS letter of September

2015 clearly recorded that: "*The internal administrative appeal lodged by you in terms of the provisions of section 77A to H of [the Customs Act], signed 23/04/2015 and received on 28/04/2015 refers*". It continued and advised Tunica that "*The Committee therefore decided to disallow the appeal"*.

[78] Moreover, at no stage until the present litigation was underway, did SARS inform Tunica that its redress was an internal appeal in terms of section 47(9)(e) of the Customs Act.

[79] From the above-mentioned, it follows that the finding by the court *a quo* that the September 2015 decision was a tariff determination was flawed.

Tunica's right of review or does section 47(9)(e) oust it

[80] The court *a quo* went on to decide Tunica's application solely on the basis that the September 2015 decision was a tariff determination despite the fact that the relief sought by Tunica was in the first instance a review.

[81] According to SARS, the court *a quo* was correct as the decision concerned the question whether the fuel was exported in compliance with the rebate items as contained in schedule 6 of the Customs Act.

[82] On 16 March 2022, after the hearing and judgment was reserved, SARS submitted a judgment which had been handed down in the Gauteng Division on 11 March 2022, *Cell C (Pty) Ltd v The Commissioner of the South African Revenue Service*

(Case No. 30959/2019) to this Court. According to SARS, the finding in the *Cell C* matter is supportive of its view that there is no right of review in terms of s 6 of PAJA as there was an appeal available to Tunica in terms of s 47 (9)(e) of the Customs Act.

[83] Tunica, with justification, did not take kindly to SARS's approach as it did so without requesting the Court's permission and without notifying it of their intention to do so.[13] Tunica contended that the *Cell C* judgment is in any event of no assistance to SARS as on the facts the remedy in s 47(9)(e) was not available to them.

[84] In the *Cell C* matter there was an application in terms of Rule 30A to compel SARS to dispatch a record in relation to a decision regarding a tariff determination, the impugned decision. *Cell C* sought to appeal a tariff determination and requested that such determination be withdrawn and re-determined. It also sought that the impugned decision be reviewed, set aside and varied retrospectively. The central dispute before the court was thus whether, in the light of the wide appeal afforded to a party in section 47(9)(e) of the Customs and Excise Act 91 of 1964, the High Court has jurisdiction to review SARS's tariff determination in terms of Rule 53 of the Uniform Rules of Court. After some analysis of court judgments on this issue the learned Judged came to the conclusion that a High Court does not have review jurisdiction and cannot in terms of Rule 53 compel SARS to produce a record.

[85] *In casu*, the facts are significantly different. First, the September 2015 decision

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[13] In *Moto Health Care Medical Scheme v HMI Healthcare Corporation (Pty) Ltd and Others* 2019 JDR 0985 (SCA) at para [38] the Supreme Court of Appeal strongly deprecated this practice and granted punitive costs against a party who behaved in this way.

by SARS, was signed by the Chairperson of the Appeals Committee, which decision was taken by the Appeals Committee in terms of section 77E of the Customs Act. The decision was not a decision taken by the Commissioner as contemplated in section 47(9)(a)(i); Secondly, the decision was taken in response to an appeal by Tunica in terms of section 77B(1) of the Customs Act. The decision was therefore not taken in response to an application by Tunica for a tariff determination or a request for such determination from an internal branch of SARS; Thirdly, Tunica's attention was drawn in the September 2015 decision to section 77D of the Customs Act as regards its right to require reasons and that section governs the right of an appellant to request reasons for an appeal in terms of section 77B of the Customs Act. Tunica was as a result informed as part of the September 2015 decision that should it not be satisfied with the decision; it could apply to be dealt with in terms of the Alternative Dispute Resolution Process in terms of sections 77I to 77P of the Customs Act. It was only when the current litigation was underway that Tunica was informed that its redress was an internal appeal in terms of section 47(9)(e) of the Customs Act. And, finally the September 2015 decision pertains to whether or not Tunica fell within the definition of a licensed distributor in terms of section 64F(1)(b) and not whether the fuel fell within the purview of rebate item 623.25 in Schedule 6. For these stated reasons section 47(9)(a) does not find application in this matter.

[86] In any event, the issue that there is no right of review in terms of section 6 of PAJA, when an appeal is available in terms of section 47(9)(e) of the Customs Act, need not be considered by this Court because as stated previously, on the facts, the remedy

in section 47(9)(e) was not available to Tunica.

Is the February 2017 decision capable of review

[87] The decision by the court *a quo* that the February 2017 decision was a section 96 decision which did not constitute reviewable conduct, either in terms of PAJA or on the principle of legality was clearly incorrect. The February 2017 decision was quite clearly a decision in terms of section 77F of the Customs Act and was administrative action. The decision was taken by an organ of state exercising a public power in terms of legislation and had a direct, external legal effect which adversely affected Tunica's rights. Similar decisions by the Commissioner were held by the Constitutional Court to constitute administrative action.[14] It follows that the February 2017 decision is reviewable.

The September 2015 decision

[88] The court *a quo* decided the September 2015 decision as a tariff determination. In doing so it determined the appeal in terms of a s 47(9)(e) appeal which provides for an appeal against a 'determination'. According to that determination Tunica's handling of the fuel did not fit within the ambit of section 64F(1)(b), read with rule 64F.06(d)

[14] Metcash Trading Ltd v Commissioner, South African Revenue Services, and Another 2001 (1) SA 1109 CC.

and the determination was, because Tunica purchased the fuel from Masana, it could not be said that Tunica obtained the fuel from the stocks of BPSA.

[89] In its judgment at page 13 line 10, the court a quo said the following: "*It was the discovery of the non-compliance and widespread fraud that triggered the auditing of all claims including this one*". In refusing the appeal the court clearly considered factors far wider than those which formed the basis of the September 2015 decision. In fact, it considered the process launched by SARS as an audit and it then sought to determine for itself whether all the regulatory provisions had been met. This approach was clearly impermissible. The existence of a wide appeal does not mean that an appellate authority may extend the enquiry beyond the ambit of the decision which is being appealed. The rehearing must be related to the limited issue of whether the party appealing should have been successful[15].

[90] Furthermore, the finding by the court *a quo* at page 6 line 16-19 that the INS TEG had been "*in South Africa to participate in naval exercises and the diesel was to be [used] by it during those activities*", was based on an annexure which was attached to the founding affidavit in Tunica's review application. The annexure was an email from Grobbelaar to SARS in which she says "*I assume Foreign Navy vessels are always deemed foreign? Even if they are conducting exercises around the SA coast line?*" The court *a quo* relied on that email to find it related to the INS TEG and proof that it was in

[15] Groenewald NO and Others v M5 Developments (Cape) (Pty) Ltd 2010 (5) SA 82 (SCA) at paras 24-25

South Africa to perform naval exercises and that it would be using the fuel in question for that purpose.

[91] In my view, the court clearly misdirected itself on this issue. Firstly, it is unclear as to what the question is a reference to; Secondly, it is also unclear whether the question related to the INS TEG or to another vessel, or to naval vessels generally. But more importantly, even if one were to assume that that finding was correct, despite there being no proper basis for doing so, for the fuel to fall within section 64F (1)(b), it must have been obtained "*for export (including supply as ships' or aircraft stores)*".

[92] In the present instance the distinction between home-consumption and foreign consumption is central as the purpose of the Customs Act is to ensure that excise duty and fuel levy are imposed only on goods for home-consumption.[16] In my view, the court *a quo* correctly assumed that the words "foreign-going" should be read in before the word 'ships' as s 20(4) of the Customs Act[17] which is the provision governing how

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[16] In this regard see: Engen Petroleum Ltd v Commissioner of Customs and Excise 1993 (3) SA 690 (SCA) paras 6, 7 and 13;

[17] 20 Goods in customs and excise warehouses:

(1)…

(2) ….

(3) ….

(4) No goods which have been stored or manufactured in a customs and excise warehouse shall be taken or delivered from such warehouse except in accordance with the rules and upon due entry for one or other of the following purposes- (a) home consumption and payment of any duty due thereon;

(b) rewarehousing in another customs and excise warehouse or removal in bond as provided in section 18; [Para. (b) substituted by s. 6 (a) of Act 84 of 1987.]

(c) ..... [Para. (c) deleted by s. 6 (b) of Act 84 of 1987.]

goods stored or manufactured in a customs and excise warehouse must be entered and which provides mainly for a distinction to be drawn between entry for home-consumption and entry for "*export from customs and excise warehouse (including supply as stores for foreign-going ships or aircraft)*".

[93] If that purpose is taken into account, it seems unlikely that fuel used by a foreign- owned and registered vessel, which must of necessity return to its registered port could ever be treated as fuel used for home-consumption. This includes the situation where a foreign vessel consumes some of the fuel in South African waters. A foreign vessel must of necessity sail through South African waters to depart. It would not be a reasonable interpretation to hold that the fuel would only be for export if the foreign vessel did not consume any of it until it was in international waters. The latter approach is fortified by the definition of "foreign-going ship" in Rule 38A.01[18], although

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(d) export from customs and excise warehouse (including supply as stores for foreign-going ships or aircraft.) [Sub-s. (4) amended by s. 14 (a) of Act 45 of 1995.]

(4) bis No person shall, without the written permission of the Controller, divert any goods entered for removal from or delivery to a customs and excise warehouse, except goods entered for payment of the duty due thereon, to a destination other than the destination declared on entry of such goods or deliver or cause such goods to be delivered in the Republic except in accordance with the provisions of this Act. [Sub-s. (4)bis inserted by s. 4 (d) of Act 95 of 1965 and substituted by s. 14 (b) of Act 45 of 1995.]

[18] "*(a) a ship at a seaport, harbour or other place in the Republic if that ship–*

(i) has arrived at that place in the course of a voyage from outside the common customs area to a destination or destinations inside the Republic, whether that place is that destination or one of those destinations or a stopover on its way to that or any of those destinations and is scheduled to depart from the Republic to a final destination outside the common customs area; or

not relevant for present purpose but it is still instructive. It contemplates that a ship that is in the territorial waters of the Republic will still be a foreign-going vessel if is scheduled to depart from there in the course of a voyage to a final destination outside the common customs area, whether that place is its place of departure to that final destination or a stopover or one of several stopovers in the Republic or the common customs area from where it departs in the course of that voyage. In the present instance the ship would of necessity be returning to its registered port and would clearly be "foreign-going".

[94] In the present instance SARS relied on the reasoning in De Beers Marine (Pty) Ltd v Commissioner, South African Revenue Service[19] for authority that a naval ship performing naval exercises on the coast of South Africa would not be foreign-going. The

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(ii) is scheduled to depart from that place in the course of a voyage to a final destination outside the common customs area, whether that place is its place of departure to that final destination or a stopover or one of several stopovers in the Republic or the common customs area from where it departs in the course of that voyage;

(b) a ship in the territorial waters of the Republic on a voyage referred to in paragraph (a)(i) or (ii); or

(c) a ship on a voyage from a place outside the Republic or from any other country in the common customs area to a final destination outside the common customs area–

(i) passing through the territorial waters of the Republic; or

(ii) making a stopover at any place in the Republic; and

(d) a ship contemplated in paragraph (a), (b) or (c) that is used in the transport of persons for remuneration or the industrial or commercial transport of goods, whether or not for remuneration";

[19] 2002 (5) SA 136 (SCA) para 10

matter concerned a vessel belonging to a South African company, De Beers, and operating out of a South African port. The SCA in the context of considering the meaning of "export", held that "*supply to a foreign-going vessel may conceivably be regarded as delivery to a foreign destination*".

[95] SARS reliance on the decision of De Beers is misplaced as that matter concerned a vessel belonging to a South African company, operating out of a South African port which is not the case in the present instance.

[96] The court *a quo* also found that 'the documentation submitted and introduced by the applicant does not include the specified documents and/or does not contain the prescribed information; the diesel was not obtained and collected from the manufacturing warehouse of the licensee from which it was bought; there was no evidence that the remover who collected the diesel from the depot was a licensed remover of goods as provided for in section 64(d) of the Act; and there was no evidence linking the diesel collected from the depot to the diesel delivered to the vessel'.[20]

[97] The abovementioned were all new reasons and also factually incorrect, the high water mark by SARS for refusing the application was the alleged non-compliance by Tunica with section 64F(1)(b) of the Customs Act, read with rule 64F.06(d), in that the fuel had not been purchased from the stocks of a licensed manufacturing warehouse. The true facts are however that Tunica obtained the fuel from the BPSA depot which

[20] Judgment, page 12 – 13.

obtained it from Chevron. The fact that BPSA obtained the fuel from Chevron cannot detract from the fact that Tunica directly exported the fuel after it obtained it from such a licensee. Tunica's application for a refund can therefore not be dependent on where BPSA sourced the fuel as SARS acknowledges that BPSA is a licensee of a manufacturing warehouse. The statutory provisions and rules to qualify for a refund require that the licensed distributor of fuel, like Tunica, must obtain fuel from stocks of a licensee of a customs and excise manufacturing warehouse anywhere in South Africa, and then wholly and directly export it. Tunica provided extensive documents in respect of the delivery of the fuel and is it not clear what additional proof was required. Tunica has indeed shown the purchase and upliftment via transporter from the licensee of a manufacturing warehouse, namely BPSA. It has shown delivery of the same quantity of fuel by the transporter to the ship. It has shown receipt of the same quantity of fuel by the ship. It is therefore unclear what other evidence or documentation could possibly be provided that would meet SARS requirements. The provisions of s 64D of the Customs Act as alluded to by the court *a quo* is simply not applicable in the present instance.

Conclusion

[98] For all the above stated reasons it follows that the relief sought by Tunica must succeed. In the result the following order is made:

1. The Appeal is upheld with costs, including costs of two counsel.
2. The order of the court *a quo* is set aside and substituted with the following order:

2.1 The decisions taken on 17 February 2017 and 28 September 2015 by the Respondent to refuse the application made by the Applicant on 4 November 2014 for a refund of excise duty and fuel levy paid in terms of the Customs and Excise Act 91 of 1964 ("the application") are declared invalid and reviewed and set aside;

2.2 The application is remitted for reconsideration by the Respondent, and the Respondent is directed to take a decision within thirty (30) days of the date of this order;

2.3 The Respondent is directed to pay the costs of the application, including the costs of two counsel.

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LE GRANGE, J

I agree,

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CLOETE, J

I agree,

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KUSEVITSKY, J