REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA

CASE NO: 81950/2019
DOH: 25 May 2023

(1)	REPORTABLE: **NO**
(2)	OF INTEREST TO OTHER JUDGES: **NO**
(3) [redacted]	REVISED
..... **SIGNATURE**	**05 October 2023** **DATE**

In the matter of:

MBALI COAL (PTY) LTD **APPLICANT**

and

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

JUDGEMENT

THIS JUDGMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE CIRCULATED TO THE PARTIES BY WAY OF EMAIL / UPLOADED ON CASELINES. THE DATE OF HAND DOWN SHALL BE DEEMED TO BE 05 OCTOBER 2023

Bam J

A. Introduction

1. This is an appeal in terms of the provisions of Section 47 (9) (e) of the Customs and Excise Act[1] (the Act) against the determination made by respondent on 3 November 2017, in which respondent disallowed applicant's diesel refund claims in the amount of R 20 968 160.21. Applicant's appeal before respondent's administrative appeal committee failed on 2 November 2018. On 31 October 2019, applicant lodged its papers instituting the present appeal. In terms of its Notice of Motion, applicant seeks an order setting aside the Commissioner's determination,

   '[t]hat the diesel refunds claimed by Applicant under rebate item 670.04… do not qualify…for the period April 2015 to May 2017' and substituting it with an order that the diesel refunds claimed qualify.'

2. Applicant's case may be summarised as follows:

   2.1 The diesel refund claims were in respect of qualifying or eligible mining activities. (Eligibility contestation)

[1] Act 91 of 1964.

2.2 Applicant had provided sufficient records, which meet the legislative requirements, to substantiate its quantification of the diesel refund claim. (Compliance contestation)

3. The appeal is opposed by respondent. They set out a three-pronged defence in their papers, and it reads:

   (i) The mining activities in respect of which the refund was sought included activities not covered by Note 6 (f) (iii).

   (ii) Applicant failed to provide sufficient records to demonstrate its use of diesel in respect of eligible activities, with specific reference to the requirements to maintain records, including logbooks.

   (iii) As against the relief sought by applicant, respondent contends, with reference to the circumstance[2] of this case, that this court should decline the invitation to assume the functions of an administrator. In simple terms, respondent says this court must observe judicial deference.

4. There is a further issue that must be decided. It relates to applicant's filing of a supplementary affidavit, without leave from this court, long after the parties had filed their written submissions and Practice Notes. Applicant thereafter applied for condonation. The application for condonation is opposed by respondent on the basis

[2] Here respondent points to (i) the nature of the proceedings, being motion proceedings; (ii) the failure by applicant to provide sufficient records to demonstrate not only its use of diesel but also its quantification.

of prejudice. I consider it appropriate to first dispose of the condonation application. But first, an introduction of the parties followed by a high-level setting of the background facts is necessary.

B. The Parties

5. Applicant, Mbali Coal (Pty) Ltd (Mbali) is a private company duly incorporated in terms of South African laws with its principal place of business at Gallagher Convention Centre, Midrand, Gauteng.

6. Respondent is the Commissioner for the South African Revenue Service (Commissioner). The Commissioner is charged with, *inter alia*, the administration of the Act. Respondent's principal place of business is at *Lehae la* SARS in Bronkhorst Street, Nieuw Muckleneuk, Pretoria. I use Mbali or applicant to describe the same person in this judgement. Likewise, SARS, the Commissioner, or respondent refer to the same person.

C. Background

7. Applicant conducts an opencast coal mining operation in Ogies, Mpumalanga. The original Mining Right was ceded to Mbali by HCI (Pty) Ltd, its holding company, on 9 September 2013. Mbali registered for diesel refund, with mining as its stated primary production. The effective liability date was recorded as 1 August 2013. Mbali appointed a contractor on a dry basis known as Diesel Power Opencast Mining (Pty) Ltd (DP) to

extract coal from the mine. Following registration, by way of VAT processes and VAT 201 declaration forms, Mbali claimed various amounts as diesel refund. In so claiming, Mbali claimed all the diesel it had purchased and used, including that used by DP. The refund claims were all based on fuel purchases and no non-eligible fuel was declared in its VAT returns.

8. An audit investigation carried out by respondent revealed the following outcomes listed here-below, as recorded in their letter of 3 November 2017:

   (i) DP used the same machines to undertake post mining activities, namely ore re-handling, moving discard and working at stockpiles after crushing, screening and washing of coal. In terms of Note 6 (f) (iii), these activities constitute secondary mining activities.

   (ii) Applicant's equipment was used only in post mining processes from stockpile to crushing, screening and washing. The equipment was also used after processing, at the discard stockpile where the coal is further reprocessed.

   (iii) Applicant kept two diesel dispensing tanks. A small tank with the capacity of 23 000 litres, which was used by applicant and contractors other than DP, and a big tank of 80 000 litres for the exclusive use of DP.

   (iv) The dispensing records kept in respect of both tanks were not an accurate recordal of fuel dispensed after each fill. The activity records did not describe the activity being undertaken by the various machines and vehicles. There was no record identifying the activity that qualified either as eligible or non-eligible.

(v) From the logbooks, it was not possible to determine how many litres of diesel were used for eligible and non-eligible activities. Applicant and/or DP did not record any non-eligible usage. As a consequence, applicant did not take into account non-eligible diesel when claiming the diesel refund.

(vi) Applicant and or DP did not keep individual logbooks for each of the machines/equipment or vehicles in order to accurately describe the activity applicable to that machine/equipment or vehicle or specify how many litres of diesel were used in eligible and non-eligible activities. As a result, the diesel refund claim of R 20 968 160 was disallowed.

9. The Commissioner's findings constitute a determination as provided for in Sections 47 (9) read with 47 (11) and 44 of the Act. Both parties accept that the present appeal is an appeal in the wide sense as envisaged in *Tickely & O* v *Johannes NO*[3].

Application for Condonation

10. The application for condonation must be viewed against the following background. On 31 October 2019 applicant instituted the present application. Respondent's answering affidavit was filed on 17 February 2020. In large part, the Commissioner's defence relies on the findings set out in paragraph 8 of this judgement. On 8 March 2021, applicant filed its replying affidavit followed by its written submissions on 19 July 2021 while respondent's were filed on 20 September 2021. To support its argument, the

[3] 1963 (3) SA 588 (T).

Commissioner relied on the authorities of, *inter alia*, *CSARS* v *Glencore Operations SA (Pty) Ltd*[4] (*Glencore)* and *Umbhabha Estates (Pty) Ltd* v CSARS[5] (Umbhabha).

11. On 23 December 2021, applicant submitted what it referred to as the Supplementary Affidavit. The premise for the filing the supplementary affidavit, according to applicant, was to deal with recent developments in South African law on diesel refunds, in particular what constitutes primary activities in mining and the interpretation of logbooks. During his address, counsel, advocating for the admission of the supplementary affidavit into evidence, submitted that the question of prejudice does not arise as respondent was invited to and had indeed filed its answer to the supplementary affidavit. The supplementary affidavit, according to applicant, does not introduce a new case or cause of action. It fortifies the case set out in applicant's founding papers. There was no *mala fides n*or unconscionable remissness. In fact, so it was submitted, Mbali should be applauded, not opposed, for bringing to the attention of the court recent developments in law. As a consequence of *Glencore*, Mbali trimmed its refund claim, submitted Counsel.

12. Counsel for respondent began by tracing the time line with specific reference to the status of the case was when applicant introduced its supplementary affidavit. At the time Mbali filed the supplementary affidavit, the pleadings had long closed, they said, and the parties had long exchanged their Heads of Argument and Practice Notes. This,

[4] 462/2020 [2021] ZASCA111 (10 August 2021).
[5] 6654/2017 [2021].

counsel said, was akin to re-opening a case that had already closed in order to lead further testimony. Counsel further submitted that neither *Glencore* nor *Umbhabha* introduced new law. The two cases merely re-affirmed what was always provisioned in the statutes. Mbali, according to counsel for respondent, had to show exceptional circumstances for this court to exercise its discretion on whether to allow their supplementary affidavit, which they failed to do, submitted counsel.

13. The legal principles dealing with filing additional sets of affidavits that are out of sequence are discussed here below: In *James Brown & Hamer (Pty) Ltd (previously named Gilbert Hamer & Co Ltd)* v *Simmons* NO it was said that:

> 'It is in the interests of the administration of justice that the well-known and well-established general rules regarding the number of sets and proper sequence of affidavits in motion proceedings should ordinarily be observed. That is not to say that those general rules must always be rigidly applied:…Where, as in the present case, an affidavit is tendered in motion proceedings both late and out of its ordinary sequence, the party tendering it is seeking, not a right, but an indulgence from the Court: he must both advance his explanation of why the affidavit is out of time and satisfy the Court that, although the affidavit is late, it should, having regard to all the circumstances of the case, nevertheless be received.'[6]

14. In *Independent Examinations Board* v *Umalusi and Others*:

> '…Umalusi filed its application for permission to file a further affidavit after both parties had already filed their written submissions and even after both parties had filed their respective practice notes. In this respect, the circumstances in this case are akin to an application during a trial to reopen a case already closed and more in particular at the stage where legal argument has commenced…. [18] …Where argument has already begun, such as in

[6] 1963 4 SA 656 (A) At 660 D-H.

this case where both parties have filed their written submissions and where it is the very submissions that alerted Umalusi to a potential problem, the court in Du Plessis v Ackerman pointed out that —

> "[a] special danger of abuse lies in the opportunity for the deliberate colouring or manufacture of testimony to suit some specific need which may be apparent only after opposing counsel's argument has revealed where the emphasis of his claim is placed and what conclusions he founds on the evidence already presented."[7]

15. The circumstances of this case have partly been set out early on in paragraph 10 and 11 of this judgement. What has not been mentioned is the content of the supplementary affidavit. I have carefully considered the supplementary affidavit. It comprises three headings, *viz*, 'Applicant's own primary production activities'; 'Logbooks'; and 'Leave to file supplementary affidavit'. The deponent starts by mentioning the three steps involved in primary production and later discusses the general theory of the steps in detail along with the definition of minerals with reference to the dictionary. He then revisits various averments in the founding papers, including the details of the agreement between applicant and DP and follows with identification of the various vehicles involved in applicant's primary production activities. He argues against respondent's answers and later, under the topic dealing with 'Logbooks', identifies some activities as applicant's primary activities, and isolates those carried out by DP from the activities he says are not carried out by DP.

[7] (83440/19) [2020] ZAGPPHC 362 (14 July 2020), paragraph 17.

16. Finally, under the topic 'Leave to file supplementary affidavit', the deponent tangentially refers to *Glencore* and mentions some paragraphs from the judgement and does the same with *Umbhabha* in a manner that seeks to advance legal argument. There is no attempt to meaningfully engage the developments in law with reference to applicant's averments as set out in the founding papers to show how the *ratio* in G*lencore* and *Umbhabha* influences applicant's case. The cases are mentioned in a random and confusing fashion. There is also an attempt to make out a new case that the list set out in Note 6 (f) (iii) is an exhaustive one. This is antonymous to the averments in applicant's founding papers.

17. During argument Counsel for applicant submitted that the SCA decision in *Mostert* v *Firstrand Bank t/a RMB Private Bank* supports their case. That must be determined by whether one can draw any parallels between the circumstances in *Mostert* and the present case. *Mostert* dealt with the appellant's (applicant's) insertion of a new matter in the replying affidavit, not the filing of a supplementary affidavit after a party has been alerted by the written submission of another that there may be a challenge with their case. Canvassing the development in the interpretation of Section 129 of the National Credit Act, with particular relevance to the facts set out in the founding papers, *Mostert* averred in his replying affidavit that the payment of arrears re-instated the credit agreement as espoused by the Constitutional Court in the *Nkatha* judgement. This is what the court had to say regarding the issue:

> '[14] I now consider whether the appeal should be dismissed for the sole reason that the appellants raised reinstatement of the loan agreement only in reply. It appears that only

after the judgment of the Constitutional Court in *Nkata v Firstrand Bank Ltd* [2016] ZACC 12; 2016 (4) SA 257 (CC), did the appellants contend that the loan agreement had been reinstated despite the fact that judgment had been granted and the property declared specially executable. I do not think that that was unreasonable or indicative of carelessness…., this meaning of s 129(3) and 129(4) was explained only in the judgment that went on appeal in *Nkata*,...

[15] The appellants did not raise new facts in their replying affidavit. What they said in reply was that the payments referred to in the founding affidavit had reinstated the loan agreement by operation of law…'[8]

18. In short, the circumstances in *Mostert* can be distinguished from the present case both with regard to how *Mostert* applied the developments in the law, that is, with a clear reference to the averments in his founding papers and how the developments influenced his case, and to the stage of the proceedings. In the present case, as was the case in *Umalusi*, it is the very written submission by respondent, which relies on the SCA's ratio in *Glencore* and that of *Umbhabha* that alerted applicant that there may be a problem with the overall approach to its case. What did applicant do upon being presented with this golden opportunity? It seized it, and rehashed the averments in its founding papers, which are replicated in its replying affidavit. The real prejudice facing respondents, in the event the supplementary affidavit is admitted, is exactly what the court identified in *Umalusi*[9].'

19. Apart from the opening statement in applicant's supplementary affidavit — that its filing was prompted by the recent developments in law — applicant made no attempt to

[8] (198/2017) [2018] ZASCA 54 (11 April 2018).
[9] Refer to paragraph 14 of this judgement.

demonstrate, with reference to its case in the founding papers, the impact of the law. An examination of the supplementary affidavit leads one to the conclusion that there is no case made for its filing. I conclude that the interests of justice are better served by refusing the admission of the supplementary affidavit. I now turn to the main issues between the parties.

D. Merits

20. The issues are:

(i) Whether the mining activities in respect of which applicant claimed the refund were all qualifying activities.

(ii) Whether applicant provided the Commissioner with necessary and sufficient records to substantiate its calculation of the diesel refund claimed; and

(iii) The appropriate remedy. Owing to the view I take of the matter, there is no need to address the third issue.

21. Before I consider the relevant statutory provisions, I should mention the salutary rule in motion proceedings as encapsulated in the passage below from *National Director of Public Prosecutions* v *Zuma*:

> '[26] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special, they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the

facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers…'[10]

22. In short, absent clear demonstration that the Commissioner's version is an uncreditworthy or fictitious denial, in every instance where there is a dispute of fact, their version must prevail.

(i) Legislative provisions

23. Diesel refunds are regulated by Chapter X, Section 75[11] of the Act, read with item 670.04 and Part III of Schedule 6. In summary, an applicant for diesel refund must satisfy the Commissioner that the following requirements have been met:

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[10] (573/08) [2009] ZASCA 1; 2009 (2) SA 277 (SCA); 2009 (1) SACR 361 (SCA) ; 2009 (4) BCLR 393 (SCA) ; [2009] 2 All SA 243 (SCA) (12 January 2009), paragraph 26.

[11] 75. Specific rebates, drawbacks and refunds of duty - (1) Subject to the provisions of this Act and to any conditions which the Commissioner may impose-

…

(d) in respect of any excisable goods or fuel levy goods manufactured in the Republic described in Schedule 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 item 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:

(1A) Notwithstanding anything to the contrary contained in this Act or any other law-
(a) (i) a refund of the fuel levy leviable on distillate fuel in terms of Part 5A of Schedule No. 1; and
(ii) a refund of the Road Accident Fund levy leviable on distillate fuel in terms of Part 5B of Schedule No. 1; or
(iii) only a refund of such Road Accident Fund levy, shall be granted in accordance with the provisions of this section and of item 670.04 of Schedule No. 6 to the extent stated in that item;

(b) such refunds shall be granted to any person who-
(i) has purchased and used such fuel in accordance with the provisions of this section and the said item of Schedule No.6.

(i) The applicant must be registered as a VAT vendor in terms of the VAT Act, Act 89 of 1991.

(ii) Once the applicant qualifies as a user and claims a refund of diesel that qualifies as distillate fuel, which includes diesel, then:

(a) Applicant must have purchased the diesel and the diesel purchase must qualify as an 'eligible purchase'.

(b) Applicant or the contractor must use the diesel for the user's own primary production activities in mining as provided for in note 6 (f) (iii).

(c) Own primary production activities in mining are set out in note 6 (f) (iii) (aa) to (tt) and the equipment and vehicles regarded as forming an integral part of the mining process in note 6 (f) (iii) (uu).

24. An applicant for diesel refund must provide the necessary documents to substantiate its claim for diesel. Only then can the Commissioner make a determination. For present purpose, the following provisions apply:

(i) An applicant must show, in respect of each claim, how the quantity of diesel purchased and used on which the refund is claimed, was calculated.

(ii) If applicant carried on business in more than one…

(iii) Applicant must show how the diesel was used, sold or otherwise disposed of.

(iv) Applicant must keep records of all purchases or receipts of diesel, storage and use of diesel, reflecting the date or period of use, the quantity and purpose of use, the full

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(c)…
(d) the Commissioner may-
pay any such refund upon receipt of a duly completed return from any person who has purchased distillate fuel for use as contemplated in the said item of Schedule No. 6.

(1C) (a) Notwithstanding the provision of subsection (1A), the Commissioner may investigate any application for a refund of such levies on distillate fuel to establish whether the fuel has been-
(i) duly entered or is deemed to have been duly entered in terms of this Act;
(ii) purchased in the quantities stated in such return;
(iii) delivered to the premises of the user and is being stored and used or has been used in accordance with the purpose declared on the application for registration and the said item of Schedule No. 6.

Section 75 (4) (d) Any user shall complete and keep such books, accounts and documents and furnish to the Commissioner at such times such particulars of the purchase, use or storage of such fuel or any other particulars as may be prescribed in the notes to item 670.04.

particulars of any diesel supplied on a dry basis to any contractor or other person who renders qualifying services to the applicant and the capacity of each tank in which fuel is stored and the receipt and removal from such tanks.

(v) Applicant must provide logbooks in respect of diesel supplied to each vehicle and or equipment used in on-land mining activities and specify how the vehicles and equipment was used for each trip travelled or for each hour used, including a full audit trail.

25. Section 75 (14) provides in peremptory language that SARS is prohibited from paying any refund under the provisions of Section 75 unless it receives an application within a specified period, duly completed and supported by the necessary documents.

26. To the extent that an applicant cannot provide SARS with the required record of proof for the refund, or that the claim relates to activities which are not own primary production activities of applicant, the Commissioner cannot allow a refund and any provisional refund allowed must be recovered by SARS.

(ii) Eligibility claim

27. At the core of applicant's case is the assertion that activities which are not listed in Note 6 (f) (iii) but are integral to applicant's mining operations, qualify for diesel refund. Applicant's case was built on the back of the word 'include' in the opening sentence of Note 6 (f) (iii) in Part III of Schedule 6, which it was said, suggests that the list is non-exhaustive. The result, properly understood, would be that all activities that are not listed in Note 6 (f) (iii) but which an applicant for diesel refund, such as applicant, considers integral to its mining operations, would qualify.

28. The arguments relied on by applicant in both its founding papers and its written submissions go a little further than I have chosen to confine in this judgment. They include various definitions. But these arguments need not detain one any longer for the SCA in *Glencore*[12] has long sounded the death knell for such arguments. The real issue, it said, is whether the activities fall within the words primary activities for the recovery of minerals being mining for those minerals, but not including any post recovery or post mining processing of those minerals. In the next two paragraphs I set out, to the extent necessary, the activities carried on by applicant and DP as set out in applicant's founding papers. I follow on with respondent's response.

29. The following activities were carried out by DP:

(a) topsoil removal - hauled and placed initially on stockpiles, at a later date re-handled and hauled for direct placement on rehabilitation areas;

(b) sub-soil - hauled and placed initially on stockpiles, at a later date re-handled and hauled for direct placement on rehabilitation areas;

(c) drilling, blasting, loading and hauling of the box cut hard overburden;

(d) drilling and blasting coal;

(e) removal of coal to plant tip. This includes stockpiling as well as tipping into applicant's primary crusher;

(f) stockpiles of coal for re-handling in the tip area[13];

(g) drilling and blasting;

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[12] Note 3 *supra.*

[13] Applicant further explains the re-handling of the coal stockpiles as involving the collection of from the stockpile by way of frontend loaders and dump trucks which is then fed into an electrically powered crushing, washing and sorting plant that crushes the material, washes it and sorts it into sizes required by the applicant's supply agreements. The plant according to applicant, belongs to and is operated by applicant. The crushed, washed and sorted coal is stock-piled by making use of frontend loaders and dump trucks from where it is loaded onto delivery trucks.

(h) rehabilitation;

(i) Diesel Power was also contracted to remove the discard after the coal had been crushed, washed and sized (sorted) by applicant and to remove the dry slurry form the slurry dams. The discard and slurry were taken back as part of Mbali rehabilitation commitments.

30. It is applicant's case that all the activities mentioned in paragraph 29 constitute qualifying activities, not post mining processing of minerals. In particular, applicant submits that the activity of crushing, washing and sorting coal is not excluded from primary production activities.

31. Respondent submits with reference to sub-note (cc) of Note 6 (f) (iii) which excludes any post recovery or post mining processing of those minerals, along with sub-note (ss) which excludes any secondary activities to work or process such minerals, (including crushing, sorting) that the activities carried on by applicant and some activities carried on by DP include activities that take place after the mineral (coal) has been extracted from the ground and therefore do not constitute primary production activities in mining. Accordingly, applicant can never be entitled to a diesel refund for mining activities conducted after the mineral has been extracted.

32. With reference to its letter of 3 November 2017[14], the details of which are incorporated in its answering affidavit, respondent submits that applicant claimed for all its diesel

[14] See summary in paragraph 3 of this judgement.

purchases, which were used by applicant and DP. Applicant did not identify any non-eligible activities. DP used the vehicles, machinery and equipment to undertake post recovery or post mining activities, namely, ore re-handling, hauling, moving discard, and working at other stockpiles for and after crushing, screening, washing of the coal and deliver coal to the plant tip for tipping into the crushers. Applicant's vehicles / machinery were used in post recovery and post mining activities from the stockpile for crushing, screening, and washing and delivery of coal to its clients in terms of supply agreements. The equipment is also used after processing and at the discard stockpile where the coal is further processed.

E. The law

33. In *Canyon Resources (Pty) Ltd* v C*ommissioner for South African Revenue*[15], the applicant argued for an interpretation of 'own primary production' activities which sought to favour its business model but the court rejected the arguments stating:

> '8.1 Although it appears that Minopex was contracted on a "dry" rate basis, the question is whether scope of its operations fell inside or outside the qualifying condition of "own primary production" of "mining on land" contained in note 6(f)(iii)(cc) which exclude "any post-recovery or post-mining processing of ... minerals";i.e. only diesel used in primary recovery of minerals can qualify or be eligible for diesel refunds….
>
> .8.7 …..ROM coal is a saleable mineral. It is recovered during mining operations on land. Washing thereof clearly then constitutes "post-recovery or post-mining processes of those minerals" as contemplated in Note 6(f)(iii)(cc) which are excluded from the definition of "eligible purposes….8.8 Accordingly, the claim for a diesel refund in respect of use by Minopex as a contractor must fail…'

[15] 82 SATC 315.

34. More recently in *Glencore* the distinction between what constitutes own primary production activities in mining was made clear in these terms: (It is a slightly longish quote but I have no reservation in setting it out):

> '[59] The lawmaker did not intend all mining activities to benefit from the scheme, only 'own primary production activities'. Due weight must be given to the word 'primary', of which the natural antonym is 'secondary'. In my view, 'primary production activities' in mining mean activities associated with extracting minerals from the ground as distinct from activities which occur after minerals have been extracted from the ground, such latter activities being 'secondary'. …..
>
> [60] …The 'coal' is crushed to size in various operations and transported by conveyor belt to a plant where it is washed, stockpiled and taken to a railway siding. Since all these operations take place after the mineral (coal) has been extracted from the ground, they are not within the ordinary meaning of 'own primary production activities'….
>
> [62] Certain minerals, typically metals such as gold, silver, copper and the like, are embedded in ore. Extracting mineral-bearing ore from the ground is only part of the process of extracting the mineral, since further processes have to be performed to extract the mineral from the ore. In such cases, 'primary production activities in mining' can sensibly include those further processes, i.e. all processes until one has extracted the mineral for which one is mining….
>
> [67] Item (mm) refers to '[c]oal stockpiling for the prevention of spontaneous combustion of coal as part of primary mining operations'. Since this item expressly refers to 'primary mining operations', it cannot encompass coal stockpiling as part of secondary mining operations. …
>
> [70] The attention devoted by the high court and by counsel to the meaning of 'include' was, in my view, misdirected. Glencore's argument was that if its activities do not fall within any of the listed activities, the introductory word 'include' is non-exhaustive, so that its activities could nevertheless be held to be covered. The argument is misconceived. The only effect of giving 'include' a non-exhaustive interpretation is to allow Glencore to fall back on ordinary meaning of 'primary production activities in mining'. A non-exhaustive interpretation of 'include' does not permit one to travel beyond (a) the meaning of the defined term (here 'own primary production activities in mining') and (b) the meaning of the definition (here,

items (aa) – (uu)). What the high court seems to have done is to insert non-primary activities into the definition by analogy with those activities contained in the list. That was not permissible.'

35. The activities for which applicant claimed a refund clearly encompass activities carried out after the mineral had been extracted from the ground[16]. Such activities, on the authority Note 6 (f) (iii) and the authorities quoted in this judgement, are excluded from the meaning of own primary production activities. The Commissioner's decision can thus not be faulted. I now consider the case of records and log books.

(iii) Compliance claim

36. Applicant provided a series of annexes, namely, FA12, 13, 14, 15, 16, 17, 18. It then invites the court with the submissions that FA12 read with 15 and 16 meet the requirements of a log book. The difficulty for applicant was already identified by the Commissioner on 3 November 2017 when it turned down the claim for refunds on the basis that applicant failed to maintain logbooks for each vehicle, evidencing the full audit trail. Now, in motion proceedings, applicant produces the annexes claiming they stand up to the definition of a log book without source documents to demonstrate where the information derives. In its pursuit of the case on eligibility, applicant's case was that all the activities carried out by it and DP were eligible, which is not the case. Given the approach adopted by applicant on its eligibility claim, it is no surprise that it

[16] See in this regard, paragraphs 64,66, 68, 72 and 76 of FA.

did not maintain the necessary books, including logbooks. Applicant could thus not take into account any non-eligible use for purposes of calculating the diesel refund.

37. In the relevant parts of their letter, the Commissioner noted that applicant had failed to maintain the appropriate records and logbooks. See paragraph 8 of this judgment. With regard to FA 12, a key pillar of applicant's claim of maintaining a logbook, respondent submitted that FA 12 depicts diesel purportedly purchased by applicant. There is no narration and/or proof to demonstrate for what purpose the diesel was purchased and how the diesel was used. Applicant was required to demonstrate which fuel was used for eligible and non-eligible activities and not simply claim all fuel purchases irrespective of use. FA 12, according to respondent, was provided only at the time applicant lodged its DA51 application. It had failed to provide the information when it was requested to do so by respondent.

38. In respect of Annexure FA13, the Commissioner submits that the record is a vague description of the activity relating to various vehicles and or machinery. With reference to annexure FA13, the Commissioner argues that it is impossible to determine how applicant accounted for diesel use by the various vehicles and/or machines and/or equipment. It is also impossible to determine whether the various vehicles and/or machinery were involved in primary activities, especially because the mining activities encompassed post mining activities.

39. It is plain from examining the annexes provided by applicant that the requirements of a logbook cannot possibly be met. The source documents themselves, ie, diesel refill slips, do not identify the activity that is being undertaken and do not label whether the activity is eligible or non-eligible. In *Canyon*[17], the court, dealing with the issue of logbooks remarked**:**

> '…Having regard to the particularity required in Note (q), it is immediately apparent that, in order to qualify for a refund in respect of any litre of diesel, the prescribed particulars must be furnished in respect of every such litre so that the Commissioner can discern between eligible and non-eligible usage.
> 9.5 In the present case "the injunction" to users was that those who wish to claim rebates had to demonstrate with sufficient particularity "the journey the distillate fuel has travelled from purchase to supply" and then with equal particularity indicate the eventual use of every litre of such fuel in eligible purposes. Should the eventual use not be stated or sufficiently indicated, the claim fails. Should the volume of diesel used not be clearly determinable, the claim should also fail. Should the "journey" of every litre not be particularized, the claim would, once again, fail.'

40. In *Umbhaba Estates*, with reference to *Canyon*:

> 'It is also so that no individual logbooks were kept for individual vehicles.….The system adopted by the Plaintiff does not provide a full audit trail of the fuel used from purchase to use as required. While the dispensing records exist, they fail to show the usage to which the fuel was put.'[18]

[17] Note 14 *supra*, paragraphs 9.3 and 9.5.
[18] (66454/2017) [2021] ZAGPPHC (10 June 2021), paragraph 84.

F. Conclusion

41. Based on all the reasons set out in this judgement, applicant's claim for diesel refunds cannot succeed. The Commissioner's determination stands.

G. Order

42. The following order is made:

(i) The appeal is dismissed.

(ii) Applicant must pay the costs of the appeal together with the costs of opposing the condonation application. Such costs include the costs of two counsel where so employed.

NN BAM

JUDGE OF THE HIGH COURT,

PRETORIA

Date of Hearing: **25 May 2023**

Date of Judgement: **05 October 2023**

Appearances:

Applicant's Counsel:	**Adv A.P Joubert SC**
	Adv L Frank
Instructed by:	Edward Nathan Sonnenberg Inc.
	c/o Gerhard Botha & Partners Inc.
	Erasmusrand, Pretoria
Respondent's Counsel:	**Adv P Mokoena SC**
	Adv L Haskins
Instructed by:	Gildenhuys Malatji Inc.
	Groenkloof, Pretoria