IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Reportable

CASE NO: 20306/2022

In the matter between:-

ASTRON ENERGY (PTY) LTD **PLAINTIFF / RESPONDENT**

and

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE **DEFENDANT / EXCIPIENT**

Coram: **MOOSA AJ**

Heard: 26 MAY 2025

Delivered: 09 JUNE 2025 (delivered electronically to the parties)

Summary: Civil procedure – Customs and Excise Act 91 of 1964 – refund of R2,7 billion disallowed - taxpayer appeals by way of summons – as alternative remedy, action includes review of a decision by the Internal Appeal Committee – summons with particulars of claim incorporating tariff determination appeal and PAJA review is sui generis – proper approach to adjudicating exception that summons lacks necessary averments to sustain appeal and review - impact of *CSARS v Richard Bay Coal Terminal (Pty) Ltd* [2025] ZACC 3 on customs' tariff appeals and PAJA reviews

ORDER

Defendant's exceptions are dismissed with costs, such costs to include the cost of two counsel on Scale C (where two counsels have been employed).

JUDGMENT

Moosa AJ

Introduction

[1] This judgment relates to three exceptions raised by the defendant, being the Commissioner for the South African Revenue Service (the CSARS), against the particulars of claim filed by the plaintiff, being Astron Energy (Pty) Ltd (Astron).

[2] At first, only two exceptions were raised. However, on 9 May 2025, the CSARS gave notice of its intention to amend the grounds of its exception by introducing a third one. It did so pursuant to the judgment in *CSARS and Another v Richards Bay Coal Terminal (Pty) Ltd* (CCT 104/23) [2025] 3 (31 March 2025). Following Astron's consent to the amendment, same was effected in accordance with rule 28(7).

[3] Each exception raised is premised on an averment that certain of Astron's grounds of appeal and review did not include factual allegations necessary to sustain those causes of action. Counsel for CSARS, Mr Peter SC, requested that I strike out paragraphs 137 to 209 of Astron's particulars of claim, along with prayers 5 and 6.[1] He emphasised that the CSARS has no objections to any of the other pleaded paragraphs and prayers. He submitted further, that Astron should be afforded an opportunity to amend its impugned paragraphs and prayers.

[1] Prayer 5 reads: 'The Appeal decision dated 2 December 2021 is reviewed and set aside.' Prayer 6 reads: 'The Appeal decision is substituted with the following order: "The appeal is upheld."

[4] Astron's counsel, Mr Janisch SC, was critical of the CSARS's exceptions. He submitted that they reflect the adoption of what he called a 'holus-bolus' approach.

[5] Mr Janisch urged me to dismiss the exceptions with costs, which should include costs for two counsels. He added that even if I were inclined to find merit in any exception, I should dismiss same since the CSARS is not prejudiced by paragraphs 137 to 209, nor does the CSARS allege any prejudice, nor did its counsel argue that the CSARS is prejudiced by the particulars in question. I will revisit these submissions later.

[6] In order to evaluate the merits of the exceptions, (or lack thereof), it is necessary that I, first provide context regarding Astron's summons, and outline the salient averments in its particulars of claim for the relief it seeks in pursuit of its twin causes of action, namely, a customs' tariff appeal and a review under the PAJA.

Astron's summons with particulars of claim and relevant prayers

[7] The dispute between Astron and the CSARS has its genesis in a customs and excise audit conducted by SARS, which spanned from May 2015 to March 2017. The audit was conducted in terms of the Customs and Excise Act 91 of 1964 (the C&E Act).

[8] The audit revealed five significant findings. SARS alleges that Astron is liable for unpaid excise duties and levies pursuant to s 47 of the C&E Act. On this basis, SARS issued a notice dated 10 October 2019, indicating its intention to assess Astron, previously known as Chevron South Africa (Pty) Ltd, for R2 714 001 723,73 (including interest and penalties). Astron made representations in a letter dated 6 December 2019.

[9] Astron's representations that it was entitled to refunds on excisable or fuel levy goods in an amount at least equal to this sum failed. SARS issued a letter of demand (the LOD), a copy of which is annexed to Astron's summons as POC1. It includes SARS's determination that Astron is liable for a tax debt slightly exceeding R2,71 billion.

[10] On 21 February 2020, SARS issued a demand for payment in the LOD. Astron, in response, requested written reasons in terms of section 77D read with section 77H of the C&E Act, along with Rule 77H.02 related thereto. A copy of Astron's request, which includes its detailed grounds challenging SARS's determinations is annexed to the summons marked POC6.

[11] On 18 September 2020, Astron lodged its internal administrative appeal under s 77C read with s 77H against the bulk of SARS's determination in the LOD which disallowed the refund claims and the set off thereof against the tax debt.[2] A summary of the disputed refunds is annexed to the summons marked POC3. This internal appeal is regulated by Chapter XA of the C&E Act.[3] Astron's appeal, (comprising both factual and legal grounds), is annexed to the summons marked POC7. The appeal failed.

[12] On 2 December 2021, the Internal Appeal Committee (the IAC) handed down its final decision, which detailed the reasons for the dismissal of Astron's internal appeal (the Appeal Decision). A copy thereof is annexed to the summons marked POC2.

[13] In accordance with s 47(9)(*e*) of the C&E Act, Astron filed an appeal with this Division against the determination contained in both the LOD and the Appeal Decision, but only to the extent that the latter is considered to encompass a 'determination' within the contemplation of either s 47(9)(*a*) or (*d*).

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[2] In accordance with s 77B(1) of the C&E Act, a taxpayer is not obliged to exhaust the internal administrative appeal remedy before launching a wide appeal to a competent high court under s 47(9)(e). It may elect to launch the internal appeal remedy or proceed directly to the dedicated alternative (external) wide appeal remedy. In *Richard's Bay Coal Terminal* supra para 91, it was held: 'After all, the CEA provides the legislative choice in addressing tariff determination disputes. In addition, when one has regard to the nature of a wide appeal, then it may achieve much more than an internal remedy. Its ability to correct and redetermine through a rehearing may be significantly more potent than what an internal remedy can achieve – by and large an appeal on the merits of a determination.'

[3] Chapter XA makes provision for the resolution of disputes arising out of decisions made in terms of the C&E Act. It is divided into three parts: Part A provides for an internal administrative appeal; Part B provides for alternative dispute resolution; and Part C makes provision for the settlement of disputes.

[14] Astron, in paragraph 28.2 of its particulars of claim, refuted the notion that the Appeal Decision constitutes an appealable 'determination'. Its view that it lacks this status is predicated on the interpretation of the relevant statutory provisions accorded by this Division in *Tunica Trading 59 (Pty) Ltd v CSARS* 85 SATC 185 (WCC). The Full Court's judgement in *CSARS v Tunica Trading 59 (Pty) Ltd* [2024] All SA 1 (SCA) on this aspect was not overturned on appeal. SARS's view on this interpretive question is that a decision by the IAC has the status of a 'determination' under s 47(9). Owing to this interpretive dispute, paragraph 28.2 is articulated in the way it is. In his heads and at the hearing, Mr Peter emphasised that this disputed point on a matter of law is not before me for adjudication. Mr Janisch agreed. Consequently, I refrain from addressing that interpretive issue in this judgment.

[15] In the light of the denial pleaded in paragraph 28.2, Astron's particulars of claim includes an alternative remedy, namely, a review of the Appeal Decision under the Promotion of Administrative Justice Act 3 of 2000 (the PAJA). This is contingent on a court of law determining that the Appeal Decision does <u>not</u> constitute an appealable 'determination', but rather a decision involving the exercise of public power pursuant to s 77E of the C&E Act and, as such, is reviewable 'administrative action'. The trial court will be called upon to resolve this interpretive dispute.

[16] The alternative remedy is pleaded as follows:

> '30. In the alternative to paragraph 28.2 above, and in any event, the appeal decision falls to be reviewed and set aside in terms of PAJA.'

[17] Subsequently, at paragraph 31 of its particulars of claim, Astron identified three 'further decisions on the part of the Commissioner, as detailed in the letter of demand and maintained in the appeal decision' which 'fall to be reviewed and set aside in terms of PAJA'. As noted above in paragraph 3, the CSARS does not take issue with these paragraphs for purposes of its exceptions. The exceptions outlined in terms of rule 23 do not impact Astron's appeal or the alternative review of the determinations specified in the LOD itself.

[18] The extracts referenced above ex paragraphs 30 and 31 of Astron's particulars of claim align with the relief sought in prayer 5. As referenced above in footnote 1, it reads: 'The Appeal decision dated 2 December 2021 is reviewed and set aside.'

[19] The phrasing of prayer 5 should be understood within its appropriate context, considering both this prayer and the rest of the prayers viewed as a cohesive whole, taking into account also the pleadings preceding the prayers.[4] This leads to my finding that prayer 5 is, contrary to Mr Janisch's submissions, not couched sufficiently broadly to include within its remit Astron's tariff appeal. Prayer 1 addresses the tariff appeal concerning the LOD and the Appeal Decision, as may be applicable.[5] However, given that the exceptions do not extend to Astron's review concerning the LOD, it is not permissible for the CSARS to pursue, as it currently does, the striking out of prayer 5. On this basis alone, the striking out of prayer 5 is unjustified and is refused.

[20] Under these circumstances, it follows that prayer 6 can also not be struck out either (see quote above in footnote 1). Prayer 6 seeks a substitution of the Appeal Decision so that '[t]he appeal is upheld'. When interpreted correctly within its context, the order sought in prayer 6 applies to the tariff appeal referred to in prayer 1 which is noted against the LOD and the Appeal Decision. This is contingent upon the Court's finding that the latter, in law, includes a 'determination' under s 47(9)(*a*) or (*d*) of the C&E Act, as contemplated in *Tunica Trading 59 (Pty) Ltd v CSARS* supra para 85.

[21] The following dicta in *Richard's Bay Coal Terminal* supra fortifies my view that prayer 6 relates to Astron's wide tariff appeal and <u>not</u> to its review:

> '[116] … A wide appeal as a de novo hearing is structured to determine the correctness of the determination. If the determination is found to be incorrect, a wide appeal court will substitute it with the correct determination which will, subject to possible further appeals, bring finality to the dispute. In that event

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4 See *Kevin John Eke v Charles Henry Parsons* 2016 (3) SA 37 (CC) paras 29 -30.
5 Prayer 1 reads: 'The Plaintiff's tariff appeal is upheld.'

there may be nothing left to review, as the Court observed in *BP Southern Africa*, where it asked, in the context of a review and a wide appeal brought simultaneously against the same decision, "[o]nce that appeal has been determined, the question was what, if anything, was left of the review?"

[117] On the other hand, if a review court finds a reviewable irregularity before considering an appeal, it must declare the decision unlawful and then generally set it aside and remit the matter to the decision-maker, *as substitution is a power utilised only in exceptional circumstances.*' (Emphasis added) (Authorities omitted)

Astron has not pleaded 'exceptional circumstances' for substitution as a remedy in its review. Therefore, having regard to the structure and formulation of its pleaded case, the substitution sought in prayer 6 must logically pertain only to the statutory tariff appeal concerning the LOD and the Appeal Decision (to the extent applicable).

[22] According to my findings in paragraphs [19] to [21], striking out of prayers 5 and 6 would infringe upon Astron's constitutional right of access to the court for an effective remedy concerning its appeal or, at the very least, the LOD review.[6] In the context of this case, prayers 5 and 6 provide Astron with a remedy if it were to prevail in the case pleaded, to which the CSARS has not raised an exception under rule 23.

[23] The CSARS fails to recognise that Astron may elect to pursue its appeal against, or its review of, the LOD. The grounds pleaded in paragraph 31 of Astron's particulars of claim (see quote above in paragraph [17]) indicate that its review of the LOD is founded on grounds that extend beyond those in its appeal against the LOD. If Astron pursues its appeal first, the review against the LOD cannot proceed. This accords with the following dictum in *Richard's Bay Coal Terminal* supra para 143(c):

'The taxpayer may simply pursue an appeal, in which case, the appeal will proceed as usual and the right to review at a later time is lost, since a review

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[6] Section 34 of the Constitution, 1996 (the Constitution) reads: 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

must logically precede an appeal. This is so, because an appeal presupposes the existence of a lawful decision.'

[24] Under the heading 'APPEAL AGAINST THE DETERMINATION (LETTER OF DEMAND)', paragraphs 33 to 134 of the particulars of claim enumerates various factual and legal grounds for the appeal against the LOD. None of the exceptions relate to that appeal or to these paragraphs, nor to paragraphs 135 to 136 under the heading 'SECTION 75(11A) OF THE CUSTOMS ACT'. They are all unchallenged.

The exceptions raised by the CSARS to Astron's particulars of claim

[25] The grounds of the CSARS's exceptions relate to Astron's tariff appeal and its review of the Appeal Decision. This is clear from the Notice of Exception quoted below. The grounds of exception challenge paragraphs 137 to 209 of the particulars of claim, all of which appear under the heading 'APPEAL AGAINST AND REVIEW OF THE APPEAL DECISION'.

[26] The Notice of Exception formulates the three exceptions in the following terms:

'**FIRST EXCEPTION**

4 In paragraph 138 the plaintiff pleads that to the extent that the letter of demand is set aside, as the plaintiff has pleaded in its cause of action for an appeal against the determination in the letter of demand, the appeal decision of the Committee, being a subsequent act which depends for its validity on the validity of the letter of demand, is of no force or effect.

5 Paragraph 139 pleads that both the appeal against the Committee's decision and the review are conditional on the Court not finding that the appeal decision is of no force and effect on the above basis.

6 By reason of what the plaintiff has pleaded, the only circumstances in which the Court will not find that the appeal decision is of no force and

effect on the above basis, will be where the Court does not set aside the said letter of demand and dismisses the plaintiff's appeal against the tariff determination, refusing the relief sought in prayers 1 – 3, thereby confirming and validating the determination in the letter of demand.

7 That being so, irrespective of the merits of the plaintiff's criticisms [of the] Committee's decision, the summons and particulars of claim lack averments necessary to sustain the action for the relief in prayers 5 and 6, given the premise on which the causes of action [are] based.

SECOND EXCEPTION

8 In paragraph 140 the plaintiff pleads a legal contention that, in an appeal envisaged in section 77E, the Committee was not empowered to extend beyond the ambit of the Commissioner's findings and grounds for his determination set out in the letter of demand.

9 In paragraphs 141 – 143, the plaintiff pleads that the basis of both the cause of action for the appeal and the alternative cause of action for review are premised on factual allegations that the Committee based its decision on findings and/or factors which had not formed the basis of the determination in the letter of demand; such additional findings and/or fact being enumerated in the succeeding paragraphs.

10 The plaintiff's cause of action are premised on the legal contention pleaded in paragraph 140 together with the factual allegations of additional findings and factors.

11 The plaintiff's legal premise is incorrect. As a matter of law, the Committee was permitted to base its decisions on findings or factors which had not formed the basis of the determination in the letter of demand, the nature of the appeal being a wide appeal encompassing a hearing de novo with additional evidence and consideration being permitted.

12 That being so, the summons and particulars of claim lack averments necessary to sustain an action for the relief in prayers 5 and 6.

THIRD EXCEPTION

13 The effect of appeal decision by the High Court, on the plaintiff's anterior cause of action, would be to either affirm the correctness of both the determination and the decision on the internal administrative appeal or overturn and replace both the determination and the decision on the internal administrative appeal.

14 In pursuing the relief of a review in prayers 5 and 6, the plaintiff purports to exercise unlimited and unhindered choice of remedy, of both an appeal to the High Court against the tariff determination and subsequently thereafter a review.

15 In seeking to pursue review relief the plaintiff does not:

15.1 make any allegation that the Court has made an order directing that a review may be pursued;

15.2 make averments or allege facts that advance a proper basis, or any basis at all, why it is in the interests of justice that review relief be pursued in circumstances where not only is the remedy of a statutory wide appeal available, but such statutory wide appeal has been pursued as an anterior cause of action.'

[27] Since there is a measure of overlapping between the exceptions, I summarise their essence collectively. Shorn of all frills, the exceptions are to the following effect: they request that paragraphs 137 to 209 of the particulars of claim be struck out *en masse*, as it is alleged to lack factual averments necessary to sustain a cause of action in relation to Astron's appeal against, or alternatively review of, the Appeal Decision (excluding the appeal, alternatively review, of the LOD). These exceptions remain alive for resolution, notwithstanding my decision not to strike out prayers 5 and 6 for the reasons explained previously in this judgment (see above in paragraphs [19] to [23]).

Proper approach to resolving the exceptions to Astron's appeal cum review

[28] Rule 23 permits a defendant to challenge a pleading through exception if a plaintiff pleads its cause of action deficiently. In relevant part, rule 23(1) reads:

> 'Where any pleading is vague and embarrassing, *or lacks averments which are necessary to sustain an action* or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto …' (Emphasis added)

[29] In law, context is of paramount importance. See *Aktiebolaget Hässle and Another v Triomed (Pty) Ltd* 2003 (1) SA 155 (SCA) para 1. To understand how rule 23 is to be applied to Astron's tariff appeal, or alternatively review of the Appeal Decision, which involves statutory causes of action, it is necessary to start with a discussion of the relevant legal framework. This aspect has not yet received thorough judicial scrutiny.

[30] Applications for reviews under the PAJA are typically brought on application by notice of motion pursuant to rule 6. See *Distell Ltd and Another v CSARS and Another* [2007] 69 SATC 15 (T); *Tunica Trading 59 (Pty) Ltd v CSARS* supra. Rule 53 also provides for reviews on notice of motion concerning decisions or proceedings of individuals or entities engaged in judicial, quasi-judicial, or administrative functions. In reviews brought by petition on motion, rule 23 does not provide a respondent with a remedy to weed out a bad application. At best, a respondent may use rule 6(15) to apply for a striking out from an affidavit of 'scandalous, vexatious or irrelevant' material.

[31] Appeals usually follow judgments. Generally, appeals commence with the filing of a notice outlining the appellant's factual and legal grounds for the intended appeal. Civil appeals in the high courts are regulated by rule 49 (civil appeals from the high court) and rule 50 (civil appeals from magistrate's court). In a post-judgment appeal proceeding under rule 49 or 50, a respondent is unable to use rule 23 to challenge a defectively pleaded appeal.

[32] A statutory appeal envisaged by s 47(9)(*e*)[7] of the C&E Act and a review under the PAJA regarding a decision made under s 77E of the C&E Act, both relevant to this case, are processes affected by s 96(1)[8] of the C&E Act. Under the Uniform Rules, these processes follow a distinct procedural regime when instituted by summons under rule 17, in contrast to when they are commenced as applications under rule 6.

[33] A taxpayer's entitlement to launch a tariff appeal through either a notice of motion or summons is consistent with s 96(1)(*a*)(i) of the C&E Act which provides considerable flexibility. Within its context, and to give effect to its underlying purposes, the concept of an 'action' encompasses both motion and summons proceedings. The extensive scope of s 96(1) corresponds with the breadth of the following phrase in it: '[n]o 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 …'.

[34] The words 'no process … may be served' significantly broadens the scope of s 96(1) regarding the types of processes included. This interpretation promotes the realisation of the aims underpinning s 96(1). Its objects are described as follows:[9]

> '[33] The purpose of s 96(1) is self-evident: to allow SARS, the organ of state charged with the administration of the Act, to investigate or review the merits of the intended legal proceedings and decide what position to adopt in relation thereto. It may, for example, in an appropriate case decide to resolve the

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[7] Section 47(9)(*e*) reads: '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.'

[8] The relevant portion of s 96 reads: '**Notice of action and period for bringing action.**— (1) (*a*) (i) No process by which any legal proceedings are instituted against the State, the Minister, the Commissioner or an officer for anything done in pursuance of this Act may be served before the expiry of a period of one month after delivery of a notice in writing setting forth clearly and explicitly the cause of action, the name and place of abode of the person who is to institute such proceedings (in this section referred to as the "litigant") and the name and address of his or her attorney or agent, if any.' Section 96(1) applies to tariff appeals by virtue that s 47(9)(*f*) stipulates that every appeal prosecuted pursuant to s 47(9)(*e*) is 'subject to section 96(1)'.

[9] *CSARS and Others v Dragon Freight (Pty) Ltd and Others* 85 SATC 289. For the purpose of the C&E Act generally, see *Nu Africa Duty Free Shops (Pty) Ltd v Minister of Finance and Others* 2024 (1) SA 567 (CC) paras 109 - 110.

dispute before the institution of legal proceedings, so as to avoid unnecessary and costly litigation at public expense.

[34] SARS is a large and complex institution with extensive administrative responsibilities and high workloads. Its functions are not confined to the levying of customs and excise duties under the Act, but include the recovery of taxes under the Income Tax Act 58 of 1962 and the administration of the Value-Added Tax Act 89 of 1991. The s 96(1) notice enables SARS to ensure that a matter is brought timeously to the attention of the appropriate official for investigation or review. In my opinion, s 96(1)*(a)* of the Act promotes the efficient and economic use of resources, in accordance with the basic values and principles governing public administration set out in s 195 of the Constitution.'

[35] A review of a decision by the IAC, brought under the PAJA on notice of motion qualifies as an 'action' as defined by s 96(1) of the C&E Act. See *CSARS v Tunica Trading 59 (Pty) Ltd* supra paras 40 - 49. For a review to be initiated, the factual event that led to its cause must have taken place. In other words, there must be a completed 'administrative action' as defined in the PAJA which can be subject to review. If not, then the review lacks a proper foundational basis (ie, cause) for the 'action' brought.[10]

[36] The use of a summons to institute a tariff appeal is consistent with s 96(1) applying to action proceedings. An 'action' is typically launched by summons. Although the SCA, in *Distell Ltd v CSARS* 2012 (5) SA 450 (SCA), stated (at footnote 5) that, in terms of s 47(9)*(e)*, 'an appeal against a determination … is heard as a de novo *application*' (emphasis added), the appeal may occur as a trial. This happens routinely in tax court appeals under the Tax Administration Act 28 of 2011 (the TAA).

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[10] This principle is stated in *CSARS v Dragon Freight* supra para 36 as follows: 'What is more, when the February notice was delivered, no 'administrative action' as defined in the Promotion of Administrative Justice Act … had been taken. That definition includes a decision taken by an organ of state when exercising a public power or performing a public function in terms of any legislation "which adversely affects the rights of any person and which has a direct, external legal effect". This merely reinforces the absence of any cause of action when the February notice was delivered.' Also, see *CSARS v Prudence Forwarding (Pty) Ltd* 2015 JDR 2545 (GP) para 28.

See *CSARS v Massmart Holdings Ltd* (IT14294) [2018] ZATC 2 (11 July 2018) para 4.

[37] Tax appeals, whether in a tax court (see *Poulter v CSARS* (A88/2023) [2024] ZAWCHC 178 (28 June 2024) paras 11, 20) or in a high court under s 47(9)(*e*) (see *Richard's Bay Coal Terminal* supra paras 91 - 94, 116), involve an appeal in the wide sense. It involves conducting a hearing from the beginning. A fresh evaluation is conducted on the merits of the impugned decision or determination. New evidence or information that was not included in the record of SARS's internal processes may be adduced on appeal.

[38] The reasons for this salutary practice in the context of a wide tariff appeal are usefully explained in *Pahad Shipping CC v CSARS* [2010] 2 All SA 246 (SCA) paras 13 - 14. The rationale is grounded in fairness. This represents a core component of a taxpayer's fundamental right entrenched in s 34 of the Constitution (see quote in footnote 6).

[39] Section 47(9)(*e*) of the C&E Act guarantees a substantive right of appeal to every taxpayer aggrieved by a final determination. The appeal is directed to a High Court simpliciter. It hears the appeal as a court of first instance. The taxpayer bears the onus of proof. Oral evidence may be presented. This is one of the distinguishing features of appeals within this genre. Compare appeals governed by rules 49 and 50.[11] Within this context, rule 23 serves as an effective procedural instrument. It may be used to weed out bad tariff appeals instituted against legally sound tariff determinations. See *Telematrix (Pty) Ltd v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) para 3. Rule 23 applies to appeals held in tax courts as well. See *Massmart Holdings Ltd* supra paras 6 - 7.

[40] A key benefit of the remedy in rule 23 is that it can facilitate the expeditious disposition of a tariff appeal through the avoidance of unnecessary evidence being

[11] Ordinarily, oral evidence is not heard on appeal. Appellate courts decide appeals with reference only to the record of evidence a quo, save when leave is granted for new evidence to be adduced in exceptional circumstances. See *Gumbo NO v Spruyt* 2020 JDR 1761 (GP) para 12.

led at the trial. This not only reduces costs for the protagonists in the appeal but also safeguard limited judicial resources from being wasted.

[41] Astron combined its review under the PAJA with the summons that included particulars of claim containing its tariff appeal under s 47(9)(*e*). This unusual amalgam is procedurally acceptable. See *Richard's Bay Coal Terminal* supra para 143(a).[12]

[42] A particulars of claim embodying a tariff appeal and PAJA review is a sui generis pleading. It does not conform to the conventional mould of a particulars of claim, as rule 17(2)(*a*) and 18(4) only permit 'material facts' to be pleaded. These are facts that establish a specific cause of action (ie, the facta probanda which a plaintiff must allege and prove at trial to sustain a cause and, consequently, prove a right to judgment).

[43] In each case, the character of the facta probanda is determined by considering the particular type of action involved, the issue(s) presented, and any overarching legal principles of law that emerge from the facts that have been pleaded. See *Du Toit NO and Others v Steinhoff International Holdings (Pty) Ltd and Others* [2020] 1 All SA 142 (WCC) paras 33.2 - 33.3.

[44] Tariff appeals operate in a distinct manner. A tariff appeal may be based on factual matters that necessitate evidence, or it may be based on matters of law which depend on legal rules or principles, rather than witness testimony. Additionally, it can also involve a blend of both factual and legal considerations. The same is true under tax court rule 32(2)(*c*). It provides that an appellant's statement of the grounds of appeal must set out 'the material facts and the legal grounds upon which the appellant relies for the appeal and opposing the facts or legal grounds in the statement under rule 31'.

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[12] Paragraph 143(a) reads: 'The taxpayer may institute *a review and appeal in the same process*, in which case the court will first need to be persuaded to exercise its review jurisdiction. If it decides to do so, the record must be made available. The court may in such a case hear argument and give judgment on the review before dealing with the appeal. If the review is successful, the decision is set aside and the need for the appeal falls away. If the review is unsuccessful, the court may consider the appeal.' (Emphasis added)

[45] Therefore, the general rule of procedure that particulars of claim encompass facts and not law cannot be rigidly applied to tariff appeals (or to statements of appeal for use in a tax court). Similar to notices of appeal in general, a tariff appeal may be grounded on the application of rules or principles derived from a legal source in tax administration (such as, legislation; a SARS interpretation note or explanatory note; a practice generally prevailing; and/or judicial precedent). An appellant taxpayer may even challenge a provision in a law or advance a novel principle that a court is then called upon to endorse to support the outcome which the taxpayer seeks. Any law-based ground of appeal must be pleaded as a taxpayer is restricted to the grounds pleaded, whether in original form or as amended. See *CSARS v Free State Development Corporation* 2024 (2) SA 282 (SCA) para 39.

[46] Deviating from the strict observance of rule 17(2)(*a*) and 18(4) is in the interests of justice (*Eke v Parsons* supra paras 39 - 40), considering the unique context in which a taxpayer's summons functions. It is utilised to initiate an appeal. By accommodating the factual and legal grounds of appeal, greater expression is given to the fact that high courts regulate their own proceedings and that rules exist for the courts (not courts for the rules).[13] Also, relaxation of the rules will bring an appeal under s 47(9)(*e*) of the C&E Act on par with an appeal to the tax court heard in terms of the TAA.

[47] As a result, a taxpayer's constitutional right to access a high court for the fair resolution of a contested tariff appeal under s 47(9)(*e*) will not be undermined nor eroded through rigid adherence to the dictates of rule 17(2)(*a*) and 18(4).

[48] The discussion in paragraphs [10] to [15] above indicates that Astron's tariff appeal against the Appeal Decision is grounded partly upon facts leading to certain conclusions of law, and partly on fundamental legal principles. In this context, what must the CSARS prove to succeed with its exceptions on the basis that Astron's particulars of claim lack the necessary averments to support its appeal against the Appeal Decision? In other words, what is required for me to uphold the CSARS's

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[13] In *Federated Trust Ltd v Botha* 1978 (3) SA 645 (A) at 654D, it was held: 'The court does not encourage formalism in the application of the Rules. The rules are not an end in themselves to be observed for their own sake. They are provided to secure the inexpensive and expeditious completion of litigation before the courts.' Also, see *Eke v Parsons* supra para 40.

exceptions against Astron's stated grounds of appeal based on factual and legal matters concerning the Appeal Decision?

[49] The dilemma highlighted by these questions were foreshadowed by Selikowitz J in *Ideal Fasteners Corporation CC v Minister of Finance* [1996] 1 All SA 373 (C) at 375 where, in relation to an appeal under s 47(9)(*e*) of the C&E Act, he held as follows:

> 'A "cause of action", as it is commonly known, is, to quote the words of Lord Esher, a Master of the Rolls in *Read v Brown* 22 QBD 131, "Every fact which it would be necessary for the plaintiff to prove if traversed in order to support his right to the judgment of the Court, it does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."
> *The idea of legal proceedings based on a cause of action focuses upon what can be described as first instance jurisdiction rather than appellate jurisdiction. In an appeal the appellant no longer relies upon a "cause of action" properly so-called. In particular in this Act the appeal is granted as a substantive right in terms of subsection 47(9)(e) and needs to be prosecuted not instituted.*' (Emphasis added)

[50] The context of this decision requires elucidation. The crisp issue which arose for adjudication in *Ideal Fasteners Corporation CC* supra was whether the taxpayer's appeal under s 47(9)(*e*) constituted an 'action' as defined by s 96(1). In accordance with the provisions of s 47(9) of the C&E Act as it read at the time, Selikowitz J responded to this question in the negative. In the succeeding year, s 47(9) was amended by the Customs and Excise Amendment Act 44 of 1996. Section 47(9)(*f*) was amended to reflect that an appeal under s 47(9)(e) is subject to s 96(1), a position that continues to hold true today.

[51] Accordingly, by the proverbial stroke of a pen, the legislature established that appeals under s 47(9)(*e*) are actions whose cause must be 'clearly and explicitly' articulated in the pre-litigation notice as envisaged by s 96(1)(*a*)(i). See *Distell Ltd v CSARS* supra para 10.2; *Baking Tin (Pty) Ltd v Minister of Finance NO and Another*

69 SATC 171 at 174. The legislature enacted this as law even though, as pointed out by Selikowitz J, appeals under s 47(9)(*e*) are not truly based 'upon a "cause of action" in the proper sense. This creates practical problems when rule 23 is applied thereto.

[52] Nevertheless, our rules-based constitutional order obliges high courts to adjudicate every tariff appeal as an 'action' which, to be sustainable, must be founded on properly formulated grounds of appeal (i.e., causes). I reiterate, such grounds may be entirely fact laden, or entirely founded on law. or a combination of both (as is the position in casu). This brings me back to the questions posed above in paragraph [48].

[53] When pleading fact laden grounds of appeal, the facta probanda for every fact intensive ground must be pleaded completely and 'framed in a form that is lucid, logical and intelligible, with the cause of action clearly evident from the factual allegations made' (*Steinhoff International Holdings* supra para 27). At exception stage, a decision is to be made regarding whether, upon considering every conceivable reading of the particulars of claim as a whole, the facts pleaded are sufficient to sustain an appeal based on a particular factual narrative. If a taxpayer lacks the right to judgment on appeal owing to essential factual averments being absent from any pleaded fact-based ground of appeal, then a rule 23 challenge based on an allegation that the particulars of claim lack necessary averments to sustain the appeal, may be upheld. See *Theunissen v Transvaalse Lewende Hawe Koöp Bpk* 1988 (2) SA 493 (A) at 500.

[54] When pleading law-based grounds of appeal, cognisance must be taken that grounds falling into this category are rooted in legal rules or principles derived from sources (such as, the Constitution, statute, court rules, case law, interpretation notes, and the like). A law laden ground of appeal does not involve a so-called 'jury question'. Thus, no evidence is led thereon. The issue involves a court deciding what the law is in relation to a specific legal question(s) raised by an appellant taxpayer. See *CSARS v Tunica Trading 59 (Pty) Ltd* supra para 50; *Potters Mill Investments 14 (Pty) Ltd v Abe Swersky & Associates and Others* 2016 (5) SA 202 (WCC) para 11.

[55] Accordingly, a law-based ground of appeal, whether pleaded by a taxpayer expressly or by implication (see *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd 1982 (4) SA 371* (D) at 377 - 378), is not excipiable on the basis that it lacks factual averments necessary to sustain the appeal. The question of whether a law intensive ground of appeal is excipiable on another basis recognised under rule 23(1) is not an issue before me based on the specific exception grounds relied on by the CSARS.

[56] For all these reasons, if an appellant taxpayer, as is the case with Astron, pleads a combination of fact-based and law-based grounds of appeal, then an exception thereto under rule 23 must be examined with a view to determining whether it challenges an identifiable deficiently pleaded fact-based and/or a law-based ground of appeal. Challenges to the latter category of grounds should not lead to an exception being upheld under the rubric that the particulars pleaded in relation thereto lack factual averments necessary to sustain the intended tax appeal. Grounds of appeal based purely on a matter of law lack facta probanda. Therefore, they do not require witness' evidence for them to be sustained at an appeal trial.

[57] On the other hand, challenges under rule 23 to a fact-based ground of appeal may lead to an exception being upheld, but only in relation to such a ground that, by itself, could potentially be dispositive of the appeal as a whole, or a self-contained part thereof. See *Shoprite Checkers (Pty) Ltd v Premier of Western Cape Province and Another* (17531/2022) [2023] ZAWCHC 185 (1 December 2023) para 8.5.

[58] The foregoing discussion indicates that the approach adopted to adjudicate an exception to a pleading delivered in a statutory tariff appeal (or statutory appeal in a tax court under the TAA) ought to be appropriately adapted to address the somewhat unusual demand of an appeal noted and prosecuted in a court of first instance. This is a sensible approach to an exception. See *Telematrix (Pty) Ltd* supra para 3. Without any adaptation, rule 23 may be a blunt instrument used to knock out legally sound tax appeals, rather than being used as an effective procedural tool to weed out those tax appeals that lack merit.

[59] Concerning reviews launched under the PAJA, such 'action' under s 96(1) of the C&E Act is largely fact-based. A review is sought with reference to impugned conduct qualifying as 'administrative action'. However, the possibility cannot be excluded that instances may arise where a ground of review is entirely law-based (i.e., it does not originate from any fact which requires evidence). If that occurs, and an exception is raised thereto on lines similar to those advanced by the CSARS in this case, then the adjudicative process ought to be in a similar vein to that discussed above in paragraphs [54] to [57], subject to any necessary contextual change(s).

[60] Having laid the edifice for my adjudication of the CSARS's three exceptions which go to the heart of Astron's causes of action in relation to the Appeal Decision, I now proceed to apply the relevant principles to the impugned particulars of claim.

Application of legal principles on exception to Astron's pleaded case

[61] As excipient, the CSARS bears the onus of establishing that, based on the grounds averred in its notice of exception, the pleaded causes of action '*is* (not may be) bad in law'. (my emphasis) See *Ocean Echo Properties 327 CC and Another v Old Mutual Life Assurance Company (South Africa) Ltd* 2018 (3) SA 405 (SCA) para 9.

[62] Astron's summons and particulars of claim comprise 74 pages. When adjudicating the exceptions, they were considered in their entirety. The pleadings provide a detailed exposition of the decisions taken, as well as the factual and legal grounds for Astron's appeal against, or alternatively, the review of the Appeal Decision. In addition, the annexures to the summons, spanning some 255 pages, were considered. They are relevant documents upon which Astron's two causes of action under s 96(1) of the C&E Act (ie, an appeal and a review) are based. The annexures shed light on Astron's pleaded case and are relevant to the analysis at hand. See *Jugwanth v Mobile Telephone Networks (Pty) Ltd* [2021] 4 All SA 346 (SCA) para 3; *Telematrix (Pty) Ltd* supra para 2*; First National Bank of Southern Africa Ltd* supra para 6.

[63] Astron's annexure POC6 outlines its multiple fact-based and law-based grounds on which it claims entitlement to the disallowed refunds in respect of excisable or fuel levy goods. Likewise, annexure POC7 details Astron's fact-based and law-based grounds for its appeal which served before the IAC. The various grounds were contained in correspondence by Astron's attorneys forming part of SARS's internal processes. Their contents are repeated in the particulars of claim on appeal under s 47(9)(*e*), albeit in a refined form to comply, as far as possible, with rules 17(2) and 18(4).

[64] Astron's representations regarding the points of fact and matters of law enumerated in POC6 and POC7 mirror, for the most part, that pleaded in its particulars of claim on appeal to this Court. It is difficult to comprehend how the CSARS can seriously contend that it should not be required to plea to those same grounds which now underpin Astron's appeal against, or alternatively review of, the Appeal Decision. CSARS is simply being called on to defend its decisions and/or determinations made internally in the light of the same facts and law presented to it on behalf of Astron.

[65] It is in this context that I viewed Mr Janisch's submissions (see above in paragraph [5]) regarding the absence of prejudice to the CSARS. His argument on this matter bolstered a crucial thesis advanced on behalf of Astron, namely, that the exceptions are designed purely as a delaying tactic. To this end, Mr Janisch pointed to the objective fact that the CSARS raised its first two exceptions as far back as March 2023, and yet failed to take the necessary steps to set them down for hearing as a conscientious litigant ought to do. In 2025, Astron's attorneys took steps to enroll the exceptions. At the hearing, Mr Peter offered no response to this matter whatsoever. That deafening silence speaks volumes.

[66] I am satisfied that the CSARS will not be prejudiced if Astron's particulars of claim were allowed to stand in its current form. In the premises, I agree with Mr Janisch that the CSARS must make out a 'very clear, strong case before the exception can succeed' (*Jugwanth* supra para 10). For the ensuing reasons, I find that the CSARS failed to overcome this hurdle.

[67] Astron's primary pleaded position is that the legal status of the IAC's decision is that it is not a 'determination' within the contemplation of either s 47(9)(*a*) or (*d*) of the C&E Act. Instead, it should be regarded as reviewable administrative action under the PAJA. This is an important distinction within the overall scheme under the C&E Act. As a matter of substantive law, the appeal remedy in s 47(9)(*e*) only applies to a decision which is a final tariff 'determination' made by the CSARS under s 47 of the C&E Act.

[68] Consequently, Astron's remedy of first resort is a statutory tariff appeal in the wide sense., This appeal extends to the Appeal Decision if, as a matter of substantive law, the IAC's decision is declared to have binding force and effect, even after the setting aside of the LOD if so ordered by the trial court, but then also only if that court holds, as SARS asserts (and as argued by Mr Peter), that the IAC's decision constitutes an appealable 'determination', a legal position that Astron has contested.

[69] In these circumstances, unless the CSARS concedes the legal position pleaded by Astron, it's appeal, or alternatively review, of the Appeal Decision raises two distinct law-based issues that will require adjudication in due course, namely: (i) whether the *Oudekraal* principle established in *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) para 36 applies in relation to the LOD;[14] and (ii) whether, based on a Full Court decision of this Division in *Tunica Trading 59 (Pty) Ltd v CSARS* supra para 85, the IAC's decision carries the legal status of an appealable 'determination' under s 47(9) of the C&E Act. The grounds of appeal referred to here are not fact-based – no facta probanda is involved. Thus, no evidence needs to be led thereon.

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[14] In *Seale v Van Rooyen N.O and Others; Provincial Government, North-West Province v Van Rooyen N.O and Others* 2008 (4) SA 43 (SCA) para 13, the court applied the *Oudekraal* principle which is to the effect that if a prior legal act is set aside, then any subsequent act which depends for its validity on the substantive validity of the prior, invalid act, must itself be invalid. In the taxpayer's particulars of claim, Astron caters for the possibility that the Oudekraal principle may be found to apply. If so, then the Appeal Decision would be invalidated as a matter of course if the LOD is itself set aside. Astron's particulars of claim also caters for the possibility that a court may find that the Oudekraal principle does not apply in casu, in which event the Appeal Decision would operate as a matter of law, even if the LOD is set aside.

[70] I find that Astron's stand-alone challenge to the Appeal Decision, regardless of the LOD's fate, cannot be faulted. This approach aligns with that suggested in *Wings Park Port Elizabeth (Pty) Ltd v MEC, Environmental Affairs, Eastern Cape and Others* 2019 (2) SA 606 (ECG) paras 33 - 34, which was approved in *South Durban Community Environmental Alliance v MEC for Economic Development, Tourism and Environmental Affairs: KwaZulu-Natal Provincial Government* 2020 (4) SA 453 (SCA) paras 5 - 9.

[71] In *South Durban Community Environmental Alliance* supra para 6, the following dictum by Plasket J in *Wings Park Port Elizabeth* supra para 34 was embraced:

> 'When an applicant has suffered an unfavourable decision at first instance and it is confirmed on appeal, the situation is somewhat different. Both decisions must be taken on review and, for the applicant to achieve success, usually both decisions will have to be set aside . . . In these circumstances, had only one decision been attacked, whether at first instance or on appeal, the other would have remained in place.'

[72] In these circumstances, Astron correctly pleaded its review of the Appeal Decision as an alternative to the appeal thereof. Astron's intended review of the IAC's decision is formulated as a remedy of last resort, to be invoked only if the Appeal Decision is determined, as a matter of law, to be reviewable administrative action, and the *Oudekraal* principle is, in law, found not to be applicable in the context of Astron's tariff appeal, alternatively review, so that the IAC's decision retains the force of law, even if the LOD is set aside as sought in Astron's appeal against, or alternatively review of, the LOD.

[73] In the light hereof, I find that the CSARS's first exception must fail. There are no factual averments lacking from Astron's particulars of claim concerning the entirely law-based grounds of appeal and review concerned. In other words, I conclude that there are no factual averments lacking which are of the kind submitted by Mr Peter, namely, a factual basis 'that could possibly support a result of the Court

not finding that the IAA decision is of no force or effect'.[15] This is a pure matter of law which the trial court is tasked to determine. It must decide what the law is on the issue at hand. See paragraphs [54] to [57] above. The grounds of appeal and review concerned are pleaded with sufficient particularity that CSARS can plead thereto. It has consistently refused to do so for more than 24 months now.

[74] For similar reasons, the CSAR's second exception lacks merit. That exception acknowledges that Astron pleaded a ground of appeal, or alternatively review, in paragraph 140 of its particulars of claim, which is an entirely 'legal contention' pertaining to s 77E of the C&E Act. See the contents of paragraph 8 of the CSARS's Notice of Exception quoted above in paragraph [26].

[75] At paragraph 11 of its Notice of Exception, the CSARS then states that Astron's 'legal premise recorded in paragraph 140 is incorrect'. It proceeds to aver:

> '*As a matter of law*, the Committee was permitted to base its decisions on findings or factors which had not formed the basis of the determination in the letter of demand, the nature of the appeal being a wide appeal encompassing a hearing de novo with additional evidence and consideration being permitted.' (Emphasis added)

[76] The trial court will determine what the true legal position is. This too is a law laden issue. It is not a so-called 'jury question' for witnesses. Therefore, no evidence will be led thereon. In these circumstances, the averment at paragraph 12 of the Notice of Exception that Astron's particulars of claim are excipiable due to a lack of factual averments necessary to sustain the appeal and/or review on the pleaded ground in paragraph 140 is unfounded. Therefore, I dismiss the second exception as well.

[77] Before addressing the third exception, it bears stating that nowhere in its Notice of Exception (see quote in paragraph [26]) does the CSARS deal with the individual fact-based grounds of appeal against, or alternatively review of, the Appeal

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15 The CSARS's heads of argument: pg 10 (para 21).

Decision which are outlined in Astron's particulars of claim at paragraphs 146 to 209. Despite this omission, and the CSARS's concomitant failure to aver in what respects the various fact-based grounds of appeal or review of the Appeal Decision lack facta probanda, Mr Peter argued that these paragraphs ought to be struck out (in the words of Mr Janisch) 'holus bolus'. No proper foundation for such relief has been established.

[78] In paragraphs 146 to 209 of its particulars of claim, Astron pleads the minutiae of its factual and legal grounds for challenging the correctness of several key findings of fact made by SARS during its customs audit. These findings informed the CSARS's decision to, inter alia, disallow Astron's various refund claims particularised in POC3, which in turn, formed the basis of the final determination in the LOD and demand for payment exceeding R2,71 billion.

[79] In the Appeal Decision, the IAC confirms the CSARS's disallowance of Astron's refund claims and upholds the factual determination that Astron owes a debt to SARS. In paragraphs 146 to 209, Astron challenges the correctness of the factual findings. There is nothing in the CSARS's Notice of Exception containing an iota of a basis to sustain a finding that Astron's grounds for its challenges, both on appeal and review, lack essential averments to sustain either one or both of its disclosed causes of action.

[80] Concerning Astron's fact-based grounds of appeal against, and review of, the Appeal Decision enumerated in paragraph 146 to 209, for the CSARS to prevail, I must be satisfied that it demonstrated that any conclusions of law for which Astron contends in its particulars of claim cannot be supported on every reasonable interpretation that may be put on the facts pleaded when considered in its entirety.[16]

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[16] In *Venator Africa (Pty) Ltd v Watts and Another* 2024 (4) SA 539 (SCA) para 20, it was held:
'It is trite that it is for an excipient to show that on every reasonable interpretation of the facts, the pleading is excipiable. On interpretation, "the question is not whether the meaning contended for by the [plaintiff] is necessarily the correct one, but whether it is a reasonably possible one". The excipient must satisfy the court that the conclusion of law set out in the particulars of claim is unsustainable on every interpretation that can be put on those facts. It is important to note that "the facts are what must be accepted as correct; not the conclusions of law". What is before us is a question of law. Either s 218(2), read with s 22(1), permits what is contended for by the plaintiff, or it does not.'

See *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) para 10. I am not satisfied that this has been shown.

[81] I am fortified in my conclusion that the striking out of paragraphs 146 to 209 must fail by reason that it is trite that, at an exception, the correctness of facts alleged by a plaintiff in its particulars of claim is assumed (not the conclusions of law). *See Stewart and Another v Botha and Another* 2008 (6) SA 310 (SCA) para 4; *Venator Africa (Pty) Ltd* supra para 20. Consequently, the CSARS's prayer that paragraphs 146 to 209 be struck out can succeed only if the factual averments made by Astron, which are in this exception assumed to be correct, cannot result in a favourable ruling on its fact-based grounds of appeal against, or review of, the Appeal Decision on any basis permitted in law. See *First National Bank of Southern Africa Ltd v Perry NO and Others* [2001] 3 All SA 331 para 6. I conclude that no such finding is justifiable in the matter before me.

[82] In the third exception, the CSARS attacks Astron's particulars of claim on the basis that it does not allege facts necessary to sustain a finding that exceptional circumstances exist. Facts of such a nature would warrant the court, in accordance with s 7(2)(*c*) of the PAJA, to approve the invocation of its review jurisdiction in the interests of justice without first requiring Astron to exhaust its appeal remedy catered for in s 49(7)(*e*) of the C&E Act. It is procedurally permissible to enroll an application envisaged by s 7(2)(*c*) of the PAJA into the same 'action' used for suing a tariff appeal. This flows logically from *Richard's Bay Coal Terminal* supra para 143(a) (see quote above in footnote 12).

[83] Applications under s 7(2)(*c*) of the PAJA for an exemption are grounded in factual circumstances. See *N.R and Others v Director General: Home Affairs and Another* (21762/2024) [2025] ZAWCHC 189 (5 May 2025) paras 33 - 35. It is common cause that Astron has not made factual averments of the kind envisaged by s 7(2)(*c*). The absence thereof is understandable, as the decision of the apex court in *Richard's Bay Coal* supra had not yet been handed down when Astron's summons was drafted.

[84] However, I agree with Mr Janisch that the third exception raised lacks merit. Astron does not have, what he aptly termed, a '*Richard's Bay Coal* problem' (i.e., an intention to pursue a review remedy under the PAJA as a primary option instead of first exploring an available appeal remedy under s 47(9) of the C&E Act).

[85] The CSARS misconstrues Astron's pleaded position. As pointed out above in paragraphs [67] to [68], Astron pleads its appeal as an anterior cause of action to its review cause of action. It expressly pleads that it seeks a review of the Appeal Decision only if the trial court holds that, as a matter of substantive law, the Appeal Decision is not an appealable 'determination' for purposes of s 47(9) of the C&E Act.

[86] If the eventuality foreshadowed in Astron's particulars of claim materialises, the legal consequence would be that Astron lacks access to the statutory appeal remedy. The review of the Appeal Decision would be the only remedy then available to Astron for purposes of having it set aside. In that context, Astron would not be seeking to invoke this Court's review jurisdiction while not exhausting its appeal remedy. The latter remedy would simply not exist in the circumstances described here.

Costs

[87] Both counsels argued that costs ought to follow success and that costs should include costs for two counsels where so employed, and that counsel's fees ought to be on scale C of the tariff catered for in rule 69(7). I agree and will order same.

[88] In exercising my discretion regarding costs, I took into consideration the factors listed in Uniform Rule 67A(2) and (3)(b). Importantly, both sides appointed silks to argue the exception. This is an indication of their acknowledgement that the issues involved had complexity that required advanced levels of knowledge and technical expertise of senior practitioners with specialist skill sets in the field of customs and excise law.

Order

[89] In the result, the Defendant's exceptions are dismissed with costs, such costs to include the cost of two counsel on Scale C (where two counsels were employed).

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FAREED MOOSA

ACTING JUDGE OF THE HIGH COURT

Appearances

For Plaintiff:	M Janisch SC and E Muller
(the heads of argument prepared by K Pillay SC, M Janisch SC, E Muller, and L Harilal)	
Instructed by:	Webber Wentzel
For Defendant:	J Peter SC
Instructed by:	Macrobert Attorneys