THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 6 August 2024

Status: Immediate

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

Today the Supreme Court of Appeal (SCA) handed down judgment in an appeal by Tholo Energy Services CC (the appellant), against an order of the Gauteng Division of the High Court, Pretoria (the High Court), sitting as court of appeal in terms of section 47(9)*(e)* of the Customs and Excise Act 91 of 1964 (the Act). The High Court upheld a determination by the Commissioner of the South African Revenue Service (the Commissioner), refusing the appellant's claims for a refund of fuel and Road Accident Fund (RAF) levies under the Act (the refund claims). The SCA dismissed the appeal with costs.

The appellant is a licensed distributor of fuel (LDF). In March 2017 it submitted the refund claims totalling some R4.25 million, related to 25 consignments of diesel exported to Lesotho. The appellant bought and collected the fuel from depots of the Petroleum Oil and Gas Corporation of South Africa (SOC) Ltd (PetroSA). The fuel was not transported to Lesotho by a licensed remover of goods as required by the Act.

The Commissioner disallowed the refund claims, essentially on the grounds that the fuel was not obtained from stocks of the licensee of a customs and manufacturing warehouse (a refinery), also known as a 'VM'; that the fuel was not wholly and directly removed from a VM to Lesotho; and that the fuel had been exported without an International Trade Administration Commission (ITAC) permit, required in terms of the International Trade Administration Act 71 of 2002 (the determination).

The appellant appealed the determination to an internal appeal committee of the South African Revenue Service, which dismissed its appeal. The appellant then appealed to the High Court, without success.

In upholding the High Court's decision, the SCA held that an appeal under section 47(9)*(e)* of the Act is an appeal in the wide sense, involving a complete rehearing and determination of the merits of the matter. Consequently, and contrary to the appellant's submissions, the High Court

was entitled to decide the appeal on additional grounds advanced by the Commissioner for the rejection of the refund claims.

The SCA found that the High Court had correctly dismissed the appeal. In terms of section 64F of the Act, its rules and the requirements of Schedule 6, to claim a refund of the fuel and RAF levy, a LDF must obtain the fuel directly from stocks of a licensed warehouse (not a depot), and produce an invoice from the licensee of the VM to the LDF. The appellant obtained the fuel from unlicensed depots of PetroSA. The appellant also exported the fuel without an ITAC permit. The appellant also did not qualify for a refund on the additional grounds advanced by the Commissioner. It failed to show that the fuel had been manufactured in South Africa. The fuel was not removed from a storage tank at a licensed warehouse. It was not wholly and directly removed from a VM to Lesotho. The fuel was not transported by a licensed remover of goods as required by section 64D of the Act, and it was not delivered by a LDF in Lesotho in terms of Schedule 6 to the Act.

As a result, the SCA dismissed the appeal with costs, including the costs of two counsel.

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