



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

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Commissioner for the South African Revenue Service v Tunica Trading 59 (Pty) Ltd (Case no 1252/2022) [2024] ZASCA 115 (24 July 2024)

Today the Supreme Court of Appeal (SCA) handed down judgment in an appeal by the Commissioner of the South African Revenue Service (the Commissioner), against an order of a full court of the Western Cape Division of the High Court, Cape Town (the Full Court), which reviewed and set aside the Commissioner's decision refusing a claim by the respondent, Tunica Trading 59 (Pty) Ltd (Tunica), for the refund of excise duty and fuel levy. The SCA upheld the appeal with costs.

Tunica is a licensed distributor of fuel (LDF) in terms of the Customs and Excise Act 91 of 1964 (the Act). It supplies fuel to foreign-going ships. In 2014 Tunica bought diesel from Masana Petroleum Solutions (Pty) Ltd (Masana), which sources fuel from BP Southern Africa (Pty) Ltd (BP), a licensee of a customs and excise manufacturing warehouse (a refinery). The fuel was obtained from BP's depot in Montague Gardens, Cape Town, and delivered to an Indian naval vessel in Simon's Town harbour. Tunica applied to the South African Revenue Service (SARS) for a refund of the excise duty and fuel levy.

SARS rejected the refund application on the basis that Tunica did not acquire the fuel directly from BP, the licensee of a customs and excise manufacturing warehouse, as required by s 64F(1)(b) of the Act, but from an intermediary, Masana, which allegedly had obtained the fuel from BP. Tunica unsuccessfully appealed the decision to an internal administrative appeal committee of SARS.

Tunica then applied to the Western Cape High Court (the High Court) for an order reviewing and setting aside the decision refusing its application for a refund of the customs duty and fuel levy, essentially on the ground that it was materially influenced by an error of law. Tunica argued that s 64F(1) does not require a LDF to acquire fuel directly from the licensee of a customs and excise manufacturing warehouse, and that obtaining fuel from an intermediary meets this requirement.

The High Court dismissed Tunica's application with costs. It held that the fuel was not obtained from the licensee of a Customs and Excise manufacturing warehouse, and that there was no evidence that the transporter who had collected it from BP's depot was a licensed remover of goods under the Act. Tunica was granted leave to appeal to a full court.

The Full Court upheld Tunica's appeal with costs. It held that s 64F(1) of the Act requires a LDF to obtain – not purchase – fuel from stocks of a licensee of a customs and excise manufacturing warehouse, and that the LDF could purchase the fuel from an intermediary. Consequently, the Full Court reviewed and set aside the High Court's decision refusing Tunica's application for a refund of the customs and excise duty and remitted the matter to the Commissioner for the decision to be taken afresh.

The SCA set aside the Full Court's order. It held that the High Court's interpretation of s 64F(1)(b) of the Act is incorrect. The LDF must obtain the fuel directly from the licensee's inventory at a customs and excise manufacturing warehouse to qualify for a refund of customs duty and fuel levy. The fuel may not be acquired from an intermediary. The clearest pointer to this is customs and excise rule 64.06(c), which requires the claimant for a refund to furnish to SARS the invoice issued by the licensee to the LDF, which must reflect the rate and amount of duty included in the price to the LDF. This interpretation is reinforced by rule 64F.06(d), which requires any load of fuel obtained from the licensee to be wholly and directly removed from a licensed customs and excise manufacturing warehouse, before a refund may even be considered. The interpretation is also consistent with the purpose of the Act – to control the importation, export and manufacture of certain goods. The purpose of licensing storage and manufacturing warehouses is to enable the Commissioner to control the entry to, storage at and removal of goods from such warehouses.

For these reasons, the SCA upheld the appeal with costs.

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