



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**  
**JUDGMENT**

**Reportable**

Case no: 801/2022

In the matter between:

**BP SOUTHERN AFRICA (PTY) LTD**

**APPLICANT**

and

**COMMISSIONER FOR THE SOUTH  
AFRICAN REVENUE SERVICE**

**RESPONDENT**

**Neutral citation:** *BP Southern Africa (Pty) Ltd v Commissioner for the South  
African Revenue Service* (Case no 801/2022) [2024]  
ZASCA 2 (12 January 2024)

**Coram:** MOLEMELA P, NICHOLLS, MATOJANE and GOOSEN JJA  
and MUSI AJA

**Heard:** 07 November 2023

**Delivered:** This judgment was handed down electronically by circulation to the parties' representatives by email, published on the Supreme Court of Appeal website, and released to SAFLII. The date and time for hand-down is deemed to be 11h00 on 12 January 2024.

**Summary:** Tax law – Customs and Excise – interim interdict – requirements restated – demand by Commissioner for the South African Revenue Service – amount due not suspended by a request for reasons or an appeal.

Interlocutory ruling – appealability – ruling not to admit a supplementary founding affidavit before the filing of a record in rule 53 proceedings not appealable.

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## ORDER

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**On appeal from:** Gauteng Division of the High Court, Pretoria (Baqwa, Tolmay and Sardiwalla JJ sitting as court of appeal):

The application for special leave to appeal is dismissed with costs.

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## JUDGMENT

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**Musi AJA (Molemela P, Nicholls, Goosen and Matojane JJA concurring):**

### Introduction

[1] This is an application for leave to appeal, in terms of s 17(2)(d) of the Superior Courts Act 10 of 2013 against an order of the full court of the Gauteng Division of the High Court, Pretoria (the full court). The applicant, BP Southern Africa (Pty) Ltd (BP), launched two separate urgent applications for interim interdicts (Part A in both applications), seeking substantially similar relief, in the high court (per Mothle J), against the respondent, the Commissioner for the South African Revenue Service (SARS), pending review applications (Part B in both applications). Mothle J dismissed both applications. Leave to appeal to the full court was granted by this Court. In separate proceedings, BP unsuccessfully applied to file a supplementary founding affidavit in the high court (per Munzhelele AJ). Munzhelele AJ

granted BP leave to appeal to the full court against her ruling. The full court dismissed all three appeals.

## **Background**

[2] In Part A, BP sought the following orders:

- (a) an order truncating the time period in s 96 of the Customs and Excise Act 91 of 1964 (the Act); and
- (b) an order interdicting and restraining SARS from attaching and disposing of its property, and from proceeding with any execution proceedings against it, pursuant to the issuing of a certified statement filed in terms of s 114(1)(a)(ii) of the Act by SARS on 16 March 2020, pending the outcome of review applications brought under Part B.

[3] In Part B, it sought to review and set aside SARS' decisions to:

- (a) issue final demands and notices of the institution of legal proceedings;
- (b) to issue the debt management certificate on 16 March 2020;
- (c) proceed with the execution in respect of BP's property; and
- (d) SARS's failure to allow BP to submit an appeal in accordance with the Act.

In Part B of the second application, it sought an order reviewing and setting aside SARS' decision to dismiss its application for suspension of payment.

[4] After Mothle J dismissed Part A of BP's applications and its application for leave to appeal, it filed a supplementary founding affidavit in support of its review applications. SARS brought an application in terms of Uniform Rule 30(1) to declare the filing of the supplementary founding affidavit as an

irregular step and to set it aside. BP opposed the application and brought a counter application to be allowed to file the supplementary founding affidavit. Munzhelele AJ granted SARS' application and dismissed BP's application. She further ordered BP to pay the costs, including the costs of two counsel, on the attorney and client scale.

[5] The appeals against Mothle J's and Munzhelele AJ's orders were consolidated. The full court dismissed the appeals with costs, including costs of two counsel on an attorney and own client scale. BP applied to this Court for special leave to appeal against the order of the full court. The application for special leave to appeal was referred to this Court for oral argument with leave to argue the merits, if necessary.

### **Architecture of the Act**

[6] The Act contains a myriad of regulatory provisions and rules made in terms thereof. The architecture of the Act is extensively discussed in *Gaertner v Minister of Finance*.<sup>1</sup> The sections of particular relevance to this matter are set out below. The Commissioner is charged with the administration of the Act.<sup>2</sup> The Commissioner may make rules relating to the storage and manufacture of goods in a customs and excise warehouse, including the removal of such goods from the warehouse.<sup>3</sup> In terms of s 19A(a)(iii), the Commissioner may, by rule, in respect of any specified excisable goods or fuel levy goods or any class or kind of such goods manufactured in the Republic, prescribe any procedures or requirements or documents relating to

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<sup>1</sup> *Gaertner v Minister of Finance* [2013] ZACC 38; 2014 (1) SA 442 (CC); 2014 (1) BCLR 38 (CC) paras 17-49.

<sup>2</sup> Section 2(1) of the Customs and Excise Act 91 of 1964 (the Act).

<sup>3</sup> Section 120 of the Act.

the entry and removal of goods from and to any such warehouse or for export or for the use under rebate of duty.<sup>4</sup>

[7] Only a licensee of a fuel warehouse, commonly known as a refinery, or licensed distributor,<sup>5</sup> may export distillate fuel (fuel).<sup>6</sup> Fuel may be stored at a warehouse for home consumption, re-warehousing, or for export purposes. When fuel is removed from a warehouse for any of the three purposes stated above, duty is payable. The licensee's obligation to pay duty is triggered by the removal of the fuel from the warehouse. This is called duty at source (DAS).<sup>7</sup> No duty is levied for fuel levy goods exported from South Africa.<sup>8</sup> When fuel levy goods are exported, and the exporter has complied with all the s 19A and rule 19A requirements, the DAS paid is refunded by way of set-off against any duty the exporter is permitted to pay monthly or quarterly.<sup>9</sup>

[8] When any fuel is transported by road for export purposes, the removal must be done by a licensed remover of goods in bond,<sup>10</sup> unless the licensee or a licensed distributor carries the goods.<sup>11</sup> After the exportation of the fuel, the exporter claims a refund based on all the documents relating to the movement of the fuel from South Africa to the foreign country. The final documents, the customs notification documents (CN1 and CN2), are referred to as acquittals. In terms of rule 19A.05, a licensee must keep books, accounts documents and

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<sup>4</sup> Section 19A(1)(a)(iii)(dd) of the Act.

<sup>5</sup> A licensed distributor is licensed in accordance with s 60 and s 64F.

<sup>6</sup> Rule 19A4.04(a)(iii).

<sup>7</sup> Section 20(4) of the Act.

<sup>8</sup> Section 18A (1) and (2) of the Act

<sup>9</sup> Section 77(a) of the Act.

<sup>10</sup> Goods in bond or bonded goods are goods for which customs and excise duties are not yet paid. See Cambridge Business English Dictionary © Cambridge University Press.

<sup>11</sup> Rule 19A4.04(a)(iv). The licensing of a remover of goods in bond is regulated by s 64D.

data relating to goods received, stored, used or removed as well as the contract of carriage entered into between the licensee and the licensed remover of goods in bond and the delivery instructions issued to such remover in respect of each consignment. When goods are declared for exportation to a particular destination, they may not be diverted to any other destination without the permission of the Commissioner.<sup>12</sup>

[9] If the Commissioner, purporting to act under the provisions of the Act, pays to any person by way of refund any amount which was not duly payable to that person, such amount shall be repaid by that person to the Commissioner upon demand, failing which it shall be recoverable as if it were the duty or charge concerned.<sup>13</sup> This applies to any amount set off in terms of s 77 of the Act.

### **The investigation**

[10] BP is a licensee of a warehouse and an exporter of fuel. BP represented to SARS that it had exported fuel to Zimbabwe. It claimed refunds of the DAS it had paid when the fuel left a Transnet storage facility at Tarlton, which is not a licensed warehouse. SARS investigated various consignments of fuel that BP alleged it had exported. SARS was of the view that the fuel had never been exported but consumed locally. SARS made the determination, inter alia, based on the following: none of the goods were exported from a licensed warehouse; the Zimbabwean consignees did not exist or were not importers of fuel; the vehicles purportedly used to transport the diesel never crossed the border since SARS' electronic records indicated that the vehicles did not reach

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<sup>12</sup> Sections 18A(9) and 18A(13)(a)(i) of the Act.

<sup>13</sup> Section 76A of the Act.

the port of exit; BP could not provide the necessary documents to prove exportation; most of the documentation purportedly proving exportation to Zimbabwe were falsified; the transporters were not licensed removers of goods in bond.

[11] BP's version is that it sold diesel to different intermediaries who, in turn, sold it to importers in Zimbabwe. It acted as an 'exporter of record' of the diesel because the intermediaries are not licensees of warehouses or licensed distributors of fuel, and would therefore not be entitled to refunds of excise duty, fuel levy and road accident fund levy paid by BP in terms of the DAS policy. BP sold the fuel to the intermediaries, excluding DAS, and claimed refunds of the DAS that it had paid, after the fuel was exported by the intermediaries. It denied that it committed fraud, or that it was a party to any fraudulent scheme.

[12] On 13 February 2020, SARS issued BP with four letters of demand. BP did not pay the amounts demanded by SARS. The payments became due and payable upon demand.<sup>14</sup>

[13] On 24 February 2020, SARS issued a final demand and notice of the institution of legal proceedings against BP. It informed BP that the amounts in the letters of demand were due and payable and that those amounts constituted a debt which was due and payable to the State. It further advised

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<sup>14</sup> Section 44(10) of the Act reads:

'Any duty for which any person is liable in terms of this section shall be payable on demand by the Commissioner.'



BP that any objection to the demand lodged by it in terms of the Act would not suspend payment.

[14] On 16 March 2020, SARS filed a certified statement with the registrar of the Gauteng Division of the High Court, Pretoria, in terms of s 114(1)(a)(ii) of the Act for an amount of R49 978 544.06. This section reads as follows:

‘If any person fails to pay any amount of any duty, interest, fine, penalty or forfeiture incurred under this Act, when it becomes due or is payable by such person, the Commissioner may file with the clerk or registrar of any competent court a statement certified by him as correct and setting forth the amount thereof so due or payable by that person, and such statement shall thereupon have all the effects of, and any proceedings may be taken thereon as if it were a civil judgment lawfully given in that court in favour of the Commissioner for a liquid debt of the amount specified in the statement.’

[15] On the same day, SARS attempted to execute the judgment. On 17 March 2020, BP requested SARS to give it an undertaking that it would stay execution of the judgment pending the outcome of a review application to be launched by BP. On 18 March 2020, BP served a notice in terms of s 96(1) on SARS. Section 96(1)(a)(i) provides:

‘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 ... and the name and address of his or her attorney or agent, if any.’

SARS may, on good cause shown, reduce or extend the period in s 96(1)(a)(i) by agreement with a litigant.<sup>15</sup> A high court may, upon application made to it, reduce or extend the aforementioned period.<sup>16</sup>

[16] On 19 March 2020, SARS gave an undertaking that it would not continue with any collection steps until BP's application for suspension of payment had been considered. On 23 March 2020, BP launched the first urgent application, which it subsequently removed from the roll. On 26 March 2020, BP applied for suspension of payment, which was rejected on 19 May 2020. On 24 May 2020, BP launched the second urgent application.

### **Litigation history**

[17] Mothle J found that neither application was urgent, but he nevertheless considered it expedient to deal with the merits of the applications. He further found that BP failed to prove that it would suffer any prejudice because it could afford to pay the amount claimed and that it would be able to recover the money after submitting the necessary documents to SARS.

[18] The full court found that the high court exercised its discretion against BP in terms of s 96. It further found that BP failed to prove any of the requirements for an interim interdict. Regarding the supplementary founding affidavit, the full court found that there is no procedural basis, in rule 53 proceedings, for the filing of such affidavit before the record had been filed.

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<sup>15</sup> Section 96(1)(c)(i) of the Act.

<sup>16</sup> Section 96(1)(c)(ii) of the Act.

## Mootness

[19] SARS argued that the appeal would have no practical effect since the debt had already been collected in terms of s 114AA, which entitles SARS to declare any person to be the agent of a debtor and require such person to make payment on behalf of such debtor. SARS further argued that because the interim interdict sought to interdict and restrain the recovery of the money in terms of s 114(1)(a)(ii), a recovery in terms of s 114AA was therefore beyond the ambit of the relief sought.

[20] It is now well established that an appeal may be entertained even when there are no live issues to settle, if it is in the interests of justice to do so.<sup>17</sup> In my view, the issues between the parties have not yet been finally settled. In the review, BP seeks to declare SARS' decisions, from the issuance of the final demands to the rejection of its suspension application invalid and to have it set aside. If it succeeds, the recovery in terms of s 114AA would also be affected. This Court held in *Seale v Van Rooyen NO and Others; Provincial Government, North-West Province v Van Rooyen NO and Others* that:

‘ . . . acts performed subsequent to a decision which is set aside and which can no longer depend upon the mere existence of that decision for their own validity, are invalid once the decision is set aside, irrespective of whether those acts were performed before or after the court order invalidating the decision.’<sup>18</sup>

[21] There are still ongoing disputes between the parties based on similar issues. A determination of the issues in this matter will have a practical effect

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<sup>17</sup> *Normandien Farms (Pty) Limited v South African Agency for Promotion of Petroleum Exploration SOC Limited and Others* [2020] ZACC 5; 2020 (6) BCLR 748 (CC); 2020 (4) SA 409 (CC) paras 46-50.

<sup>18</sup> *Seale v Van Rooyen NO and Others* [2008] ZASCA 28; [2008] 3 All SA 245 (SCA); 2008 (4) SA 43 (SCA) para 14.

in limiting the disputes in the subsequent matters between these parties. The appeal is therefore not moot, and, even if it were, it is in the interests of justice to entertain it.

### **Issues**

[22] The first issue to be determined is whether the high court refused the s 96 application. Secondly, whether the applicant made out a proper case for an interim interdict. Lastly, whether the refusal to admit the supplementary founding affidavit is appealable and, if it is, whether the refusal to admit it was proper. Before discussing these issues, I propose to deal with a preliminary issue.

### **Adducing evidence**

[23] Before us, BP moved an application to adduce evidence, in the form of two affidavits, on appeal. It sought to find justification for the request in a decision of this Court in *Community of Grootkraal v Kobot Business Trust (Grootkraal)*.<sup>19</sup> SARS objected and pointed out that it disputed the contents of the affidavits in question as they are the subject of a dispute in another matter between the same parties. Reliance on *Grootkraal* is misconceived. In *Grootkraal*, this Court took judicial notice of historical material that is readily available and reliable. BP did not seek to present documents that contained material of the kind admitted in *Grootkraal*.

[24] Further evidence on appeal should only be admitted in exceptional circumstances: it must be weighty material; there must be a reasonable

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<sup>19</sup> *Community of Grootkraal v Botha NO and Others* [2018] ZASCA 158; 2019 (2) SA 128 (SCA) para 21.

explanation for its lateness; and there should not be substantial disputes of fact militating against its admission.<sup>20</sup> BP did not satisfy any of the three requirements. Consequently, we decided not to admit the evidence.

## **Section 96**

[26] As mentioned before, Mothle J found that the applications were not urgent but decided to deal with the merits. SARS contended that he refused the s 96 application by implication. BP contended that Mothle J did not deal with its s 96 application, at all, and therefore failed to properly exercise his discretion. The fact that Mothle J neither referred to, nor discussed s 96 is of no moment. This is because he dealt with the merits of the matter. If he had refused the s 96 application, that would have spelt the end of the matter. The ineluctable inference is that he granted the truncated times in terms of s 96 as a pathway to considering the merits.

## **Interim interdicts**

[27] The requirements for interim relief have been succinctly restated in *SA Informal Traders Forum v City of Johannesburg* as follows:

‘Foremost is whether the applicant has shown a prima facie right that is likely to lead to the relief sought in the main dispute. This requirement is weighed up along with the irreparable and imminent harm to the right if an interdict is not granted and whether the balance of convenience favours the granting of the interdict. Lastly, the applicant must have no other effective remedy.’<sup>21</sup>

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<sup>20</sup> *P A F v S C F* [2022] ZASCA 101; 2022 (6) SA 162 (SCA) para 9; see also *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) para 41-43.

<sup>21</sup> *South African Informal Traders Forum and Others v City of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg and Others* [2014] ZACC 8; 2014 (6) BCLR 726 (CC); 2014 (4) SA 371 (CC) 2014 (4) SA 371 (CC) para 24.

[28] A prima facie right may be established by showing prospects of success in the review.<sup>22</sup> BP must therefore show that there is a probability that the court hearing its review application would find that it is entitled to the relief sought. BP contended that the prima facie right that it asserts in its claim for an interim interdict is sourced from the Constitution, which is its right to fair administrative action that is lawful, reasonable, and procedurally fair as guaranteed by s 33(1) of the Constitution and embodied in ss 3 and 6 of the Promotion of Administrative Justice Act (PAJA).<sup>23</sup> It is therefore, superfluous to enquire whether the right exists.<sup>24</sup>

[29] It is common cause that the Commissioner's decisions to file a certified statement and the refusal of the application to suspend payment constitute administrative action. The applicant's two main contentions with regard to SARS' action were, first, that it unlawfully filed the certified statement and, second, that the decision to reject the suspension application was influenced by an error of law and that relevant considerations were ignored.

### **The certified statement**

[30] It is common ground that BP became aware of the letters of demand on 13 February 2020. The certified statement was filed on 16 March 2020. BP's contention is that it had 30 days after it became aware of the letters of demand to request reasons, and a right to be notified of the reasons within 45 days from the date on which SARS acknowledged receipt of the request.<sup>25</sup> BP filed

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<sup>22</sup> Ibid para 25.

<sup>23</sup> Promotion of Administrative Justice Act 3 of 2000. Regrettably the applicant did not delineate which subsection of the two sections it relied on, however, it crystallised during argument.

<sup>24</sup> *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) (6) SA 223 para 46.

<sup>25</sup> Subrules 77H.02(4) and (5) read as follows:

a request which it styled as a request for information on 26 March 2020, which was exactly 30 days after it became aware of the demand. According to BP, SARS had no right to file the certified statement before the 30 days had lapsed. I will accept for present purposes that it was a proper request for reasons.

[31] The separate letters of demand each constitute a determination in terms of s 47(9)(a)(i)(bb).<sup>26</sup> Section 47(9)(b)(i) provides that:

‘Whenever any determination is made under paragraph (a). . . any amount due in terms thereof shall, notwithstanding that such determination is being dealt with in terms of any procedure contemplated in Chapter XA of the Act, remain payable as long as the determination remains in force: provided that the Commissioner may suspend the payment, on good cause shown, until the date of any final judgment by the High Court or a judgment by the Supreme Court of Appeal.’

Chapter XA regulates internal administrative appeals, alternative dispute resolution and dispute settlement procedures.

[32] Section 77G provides that notwithstanding anything to the contrary in the Act, the obligation to pay to Commissioner and the right of the Commissioner to receive and recover any amount demanded in terms of any provision of the Act shall not, unless the Commissioner so directs, be suspended pending finalisation of any procedure contemplated in Chapter XA or pending a decision by a court.

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‘(4) A person that requested reasons must be notified of such reasons in writing within 45 days from the date of acknowledgement of receipt referred to in subrule (3)(a).

(5) If an aggrieved person intends to submit an appeal against a decision in terms of rule 77H.04 and wishes to request reasons for such decision, a request referred to in subrule (1) must be submitted within 30 days from the date the aggrieved person became aware of the decision.’

<sup>26</sup> Section 47(9)(a)(i)(bb) reads:

‘The Commissioner may in writing determine whether goods so classified under such tariff headings, tariff sub-headings, tariff items or other items of Schedule No. 2, 4, 5 or 6 may be used, manufactured, exported or otherwise disposed of as provided in such tariff items or other items specified in any such Schedule’

[33] Section 77G engages two powers of the Commissioner. First, the right to receive and recover any amount due and payable and, second, the power to suspend payment of an amount. The amount is not automatically suspended by a request for reasons, an internal administrative appeal, or a court application. It remains due and payable until the Commissioner decides to suspend it. Absent a suspension by the Commissioner and regardless of a Chapter XA procedure or court proceedings, SARS may file a certified statement. SARS is not obliged to wait until the lapsing of the 30 days within which reasons may be requested, or the filing of an internal administrative appeal. SARS' filing of the certified statement before 26 March 2020 was lawful. It had the right to do so from 13 February 2020 – when BP became aware of the demand.

[34] BP argued that the certified statement is unlawful because the amount set forth as due and payable is wrong. It contends that SARS acted unlawfully by claiming an amount of R14 866 726.00, which was not due to it. Section 114(1)(a)(iii)(cc) of the Act provides that:

‘Pending the conclusion of any proceedings, whether internally or in any court, regarding a dispute as to the amount of any duty, interest, fine, penalty or forfeiture payable, the statement filed in terms of subparagraph (ii) shall, for purposes of recovery proceedings contemplated in subparagraph (ii), be deemed to be correct.’

This provision creates a *prima facie* right in SARS' favour.

### **Rejection of the suspension application**

[35] BP argued that SARS' reasons for rejecting its suspension application were influenced by errors of law and that the relevant considerations were not



considered. SARS gave three reasons for rejecting the application: first, that there were no pending internal procedures as required by s 77G as the 30 days, within which reasons may be requested or an appeal filed, had lapsed; second, that fraudulent acquittal documents for the entries in question were supplied to SARS; and thirdly, that BP would not suffer financial hardship if it paid the amount.

[36] BP's submissions are without merit. It did not file a request for reasons, but a request for information stating that its representatives wished to visit Beit Bridge and familiarise themselves with the processes followed there. It also requested all the documents and information that SARS had relied on, in order to issue the letters of demand. It stated that it required the information in order to prepare its appeal. SARS cannot be faulted for not accepting the request for information as a request for reasons. It is therefore not surprising that SARS did not respond to the request for information.

[37] SARS did not suggest that BP committed fraud. It stated that fraudulent documents relating to the consignments were presented to it. BP could not dispute that, because it did not possess all the documents required in terms of the Act and the rules. For that reason, it sent countless requests to its intermediaries for the necessary information. So desperate was BP for the information that it litigated against at least one such intermediary.

[38] The difficulty for BP is that in terms of s 101 of the Act, any person carrying on business in the Republic shall keep such books, accounts and documents relating to the relevant transactions. Furthermore, s 102(4)

provides that in any dispute in which the Commissioner is a party and the question arises whether any books, accounts, documents, forms, or invoices required to be completed and kept, exist or have been duly completed and kept or have been furnished to an officer, it shall be presumed that such books, accounts documents, forms or invoices do not exist or have not been duly completed and kept, until the contrary is proved. BP has failed to show, in these proceedings, that it has completed and kept all the required books, accounts, documents, forms or invoices. BP will have to surmount this hurdle in the review application.

[39] SARS had regard to BP's relevant financial statements, which BP submitted as part of its application for suspension. SARS relied on such statements when it concluded that BP would not suffer financial hardship if it paid the due amount.

[40] It is not our task to usurp SARS' functions. We must determine whether SARS' decision falls within the bounds of reasonableness. I am of the view that SARS did not commit an error of law and that it considered all the relevant information before it. Having considered that information, it reached a reasonable and fair conclusion not to grant the application for suspension.<sup>27</sup>

### **The determination**

[41] BP submitted that SARS' determination that the fuel was not exported was wrong and asserted that the fuel was exported. In terms of s 102(5) of the

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<sup>27</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) paras 42 - 49.

Act, if in any dispute in which the Commissioner is a party, it is alleged that goods have not been exported, it shall be presumed that such goods have not been exported unless the contrary is proved. SARS, in any event, put up two reasons for its determination that the goods were not exported. The first reason was that, on SARS' electronic system, the consignments were reflected as 'ready to mark for arrival' because they had not yet arrived at the border post. The second reason was that there was no indication on the Department of Home Affairs' electronic system that the vehicles mentioned in the demand crossed the border. BP could not dispute SARS' assertions. The presumption creates a prima facie case in SARS' favour.

### **Irreparable harm and balance of convenience**

[42] BP contended that because it would not be entitled to any pre-judgment interest and that it suffered an immediate loss of R69 836 907.04 in liquid funds, the balance of convenience favoured it and not SARS. It must be remembered that SARS claimed back money unduly paid to BP. That being the case, the amount became due on demand, in terms of s 76A.<sup>28</sup> The Act is part of fiscal legislation that assists the State in collecting money in order to fulfil its socio-economic mandate towards the citizenry. The balance of convenience therefore favours SARS. Furthermore, I agree with the full court that BP's audited financial statement belies its assertion that it would suffer irreparable harm. Its annual turnover was R47 billion and it had access to credit facilities in excess of R4 776 billion. BP argued that it will suffer irreparable harm because it now has a civil judgment against it and that SARS misused the wide powers that the Act gives it. It is true that SARS has wide

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<sup>28</sup> Op cit fn 12.

powers, however, the constitutionality of those powers were neither challenged before the high court nor in this Court.

### **Alternative remedy**

[43] SARS contended that BP will be repaid if it proves that SARS' determination that it did not export the diesel is incorrect. BP would be able to do this, if it submits all the documents to SARS or if it can satisfy the review court that it has an acceptable explanation for why it could not produce the required documents in a timely manner. It is correct that BP would not be paid interest if the review application succeeds. That is unfortunately part of the unchallenged legislative scheme.

[44] I agree with Mothle J and the full court that BP failed to prove any of the requirements for an interim interdict. An interim interdict pending an action or a review is an extraordinary remedy within the discretion of the Court.<sup>29</sup> Courts grant interim interdicts against the exercise of statutory power only in the clearest of cases.<sup>30</sup> Mothle J exercised his discretion properly when he dismissed both applications.

### **The supplementary founding affidavit**

[45] BP brought Part B in terms of rule 53. Rule 53(1)(b) triggered a duty on SARS to despatch the record and its reasons to the registrar of the high court. It is only after the record is made available to BP in terms of rule 53(4) that it may file, as of right, a supplementary founding affidavit. BP contended

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<sup>29</sup> *Eriksen Motors Ltd. v Protea Motors and another* 1973 (3) SA 685 (AD) at 691B-C.

<sup>30</sup> *National Treasury and Others v Opposition to Urban Tolling Alliance* [2012] ZACC 18; 2012 (11) BCLR 1148 (CC); 2012 (6) SA 223 (CC) para 47.

that it filed the supplementary founding affidavit because SARS failed to file the record timeously.

[46] The antecedent question to consider is whether Munzhelele's AJ's ruling is appealable. In *Zweni v Minister of Law and Order*,<sup>31</sup> it was pointed out that there was a difference between a judgment or order and a ruling. Harms AJA, as he then was, held:

'In the light of these tests and in view of the fact that a ruling is the antithesis of a judgment or order, it appears to me that, generally speaking, a non-appealable decision (ruling) is a decision which is not final (because the Court of first instance is entitled to alter it), nor definitive of the rights of the parties nor has the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.'<sup>32</sup>

[47] In *United Democratic Movement and Another v Lebashe*,<sup>33</sup> it was held that in deciding whether an order is appealable, not only the form of the order must be considered but also, and predominantly, its effect and that the appealability test is the interests of justice. Munzhelele AJ's decision is a ruling that has no final effect, it is not definitive of the rights of the parties and it does not dispose of any part of the main proceedings. In fact, BP will in due course, in terms of rule 53(4), after the record has been filed, as of right, have an opportunity to file a supplementary founding affidavit. SARS' dilatoriness in filing the record can hardly be justification for BP's irregular step. It could have approached the high court with an application to compel SARS to file

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<sup>31</sup> *Zweni v Minister of Law and Order of the Republic of South Africa* [1992] ZASCA 197; [1993] 1 All SA 365 (A); 1993 (1) SA 523 (A).

<sup>32</sup> *Ibid* at 536A-B.

<sup>33</sup> *United Democratic Movement v Lebashe Investment Group (Pty) Ltd and Others* [2022] ZACC 34; 2022 (12) BCLR 1521 (CC); 2023 (1) SA 353 (CC) paras 41 and 43.

the record and its reasons. In my view, it is not in the interest of justice that an interlocutory ruling of the kind made by Munzhelele AJ be appealable.

[48] This matter presents no special circumstances why special leave to appeal should be granted. The application ought to be dismissed.

### **Costs**

[49] SARS requested us to make a punitive costs order. BP has neither abused the court process nor committed misconduct. Costs should however follow the result.

### **Order**

[50] In the result the following order is made:

The application for special leave to appeal is dismissed with costs.

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C J MUSI  
ACTING JUDGE OF APPEAL

## Appearances

For the appellant: AP Joubert SC with LJ du Bruyn  
Instructed by: Edward Nathan Sonnenbergs, Sandton  
Webbers Inc., Bloemfontein

For the respondent: J Peter SC  
Instructed by: MacRobert Inc, Pretoria  
Lovius Block attorneys, Bloemfontein.

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