REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: NO (2) OF INTEREST TO OTHER JUDGES: NO (3) REVISED	
11 September 2020	**C.J. COLLIS**
DATE	SIGNATURE

CASE NO: 8420/18

In the matter between:

GRASPAN COLLIERY SA (PTY) LTD **APPLICANT**

and

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

JUDGMENT

COLLIS J

INTRODUCTION

[1] This is an Appeal in terms of Section 47(9)(e) of the Customs and Excise Act 91 of 1964 ("the Customs Act") or ("the Act"), wherein the applicant seeks the following relief:

1.1. That the Applicant's appeal against the determination by the Commissioner contained in Annexure "FA5" to the founding affidavit that the applicant does not qualify for diesel refunds claimed by the Applicant under rebate item 670.04 provided for in the Customs and Excise Act, 1964, is upheld and that the said determination is set aside.

1.2 The said determination is substituted with a determination that the diesel refunds claimed by the Applicant qualify under rebate item 670.04

1.3 In the alternative to paragraph 1.2 above, that it be declared that, at all relevant times prior to and after 27 May 2016 rehabilitation constituted primary production activities in mining as intended in note 6 (f)(iii) in part 3 of schedule 6 of the Act.

1.4 That it be declared that the proviso to section 44 (11) (a) of the Act is inapplicable to the refunds claimed by the Applicant in respect of diesel fuel used by Sandton Plant Hire (Pty) Ltd and that the Respondent is accordingly not entitled to reclaim refunds paid to the Applicant during the period February 2011 to August 2013.

1.5 That the refusal by the Commissioner to exercise the discretion conferred upon him by note 5 in part 3 to schedule 6 to the Act in respect of the Applicant's refund claims for the period 15 to 31 August 2013 be set aside and that the Respondent be ordered to pay the said refund claims to the Applicant.

1.6 Costs of suit.[1]

[2] The application is in the nature of a tariff appeal in terms of Section 47(9) (e) of the Act. An appeal of this nature constitutes a hearing *de novo.*

[3] The Applicant, is a company duly incorporated in terms of the company laws of the Republic of South Africa, which conducted business in the mining of coal pursuant to a mining right held by it in terms of section 23 of the Mineral and Petroleum Resources Development Act 28 of 2002. It conducted its business in, on, or under the Remaining Extent of Portion 1 27 Middleburg Town and Townlands 287 JS in the district of Middleburg, Mpumalanga.

[4] The Respondent is the Commissioner for the South African Revenue Service who is in terms of section 2(1) of the Customs and Excise Act 91 of 1964, charged with the administration of the Act.

ISSUES FOR DETERMINATION

[5] The issues to be determined as formulated by the applicant can succinctly be tabulated as follows:

5.1 Whether the Commissioner erred in holding that the applicant was not entitled to claim diesel refunds particularly in respect of its rehabilitation activities on its coal mines;

5.2 Whether the Commissioner applied section 44(11) (a) of the Act correctly;

[1] Notice of Motion Vol 1 p 1-5

5.3 Whether there was a proper exercise by the Commissioner of his discretion of note 5.

[6] The main issue that this court is called upon to determine, is whether the Commissioner correctly determined that the rehabilitation conducted at Granspan's mine does not qualify as "primary production activities in mining" as intended in note 6(f) (iii).

[7] The respondent however contends that the court is to determine the following issues:

7.1 The first relates to the proper interpretation of note 6 (f) (iii) in part 3 to schedule 6 of the Customs Act. That is whether the rehabilitation by the applicant at its mine, constituted at all relevant times, primary production activities in mining;

7.2 Secondly, misrepresentation on the part of the applicant whereby it had claimed refunds in respect of diesel used by a separate entity Sandton Plant Hire (Pty) Ltd and in this regard whether misrepresentation on the part of the applicant had taken place when it filled out its VAT forms and claimed refunds which would entitle the Commissioner to reclaim the refunds paid to the applicant;

7.3 Thirdly, whether the applicant was entitled to claim a diesel refund in circumstances where it had sold and ceded its mining right to Shanduka (Pty) Ltd; and

7.4 Fourthly, whether the applicant had furnished sufficient records in the form of its logbooks in support of its claim for the diesel refunds.

THE UNDISPUTED FACTS

[8] As mentioned the applicant conducted business in mining and processing of coal pursuant to a mining right held by it. During 2007, it sold its business to Shanduka as part of the rationalisation of the Glencore Group. The mining right which at the time was held by it, was however only ceded to Shanduka on 15 August 2013.[2]

[9] Thus prior to the right being ceded, the applicant remained the holder of the mining right and was legally entitled to the minerals mined until the mining right was ceded to Shanduka.

[10] In terms of the sale agreement concluded:[3]

> 10.1 the applicant sold its business (including the sale of assets) as a going concern and ownership of the business vested with Shanduka;[4]
>
> 10.2 the parties elected that the sale of business constituted an inter-group transaction;[5]
>
> 10.3 pending the conversion of the mining right to Shanduka, the applicant agreed to appoint Shanduka, as an independent contractor to mine for the minerals in and on the mining area and beneficiate the minerals for and on behalf of the applicant and the applicant, in turn, would sell those beneficiated minerals to Shanduka as an interim arrangement;[6]
>
> 10.4 Shanduka would be responsible for the overall management, operation and administration of mining activities on the applicant mine area;[7]

[2] Founding Affidavit para 33 Vol 1 p 25
[3] Founding Affidavit: FA "10" p 219
[4] Annexure "'FA 10" Clause 4.1
[5] Annexure "FA 10" Clause 4.2
[6] Annexure "FA 10" Clause 4.7.3
[7] Annexure "FA 10" Clause 8.3.1

10.5 It was also responsible for procuring consumables and equipment required for the conduct of the mining activities, applying, in the name of the seller;[8]

10.6 Shanduka was responsible for developing and implementing financial administrative and secretarial controls and processes as may be required for the mining activities on the applicant's mine area and the beneficiation of the minerals.[9]

[11] After the sale agreement was concluded, Shanduka carried out mining activities on the applicant's mine area and it continued to mine on behalf of the applicant until 31 August 2013, even though it did so without the applicant being the holder of the required mining right after 15 August 2013.

[12] The Applicant and Shanduka were only informed of the approval to cede its mining right by the Department of Mineral Resources ('DMR') on 20 August 2013.[10]

[13] Shanduka in turn had also entered into an agreement with Sandton to perform mining activities at Steelcoal Mine which belongs to Wakefield. The latter is a subsidiary of Shanduka,[11] which is a mine area adjacent to the applicants mine area.

[14] Sandton used diesel supplied by the Applicant in respect of its mining activities at Steelcoal Mine. The Applicant incorrectly claimed the refunds in respect of such diesel

[8] Annexure "FA 10" Clause 8.3.3.1
[9] Annexure "FA 10" Clause 8.3.3.7
[10] Founding Affidavit para 38.2 p 31
[11] Founding Affidavit "FA 3" and "FA 10" p 171

utilised by Sandton in respect of primary mining activities at Steelcoal, which is adjacent to the Graspan Mine.[12]

FACTS GIVING RISE TO THE DISPUTE

[15] The Applicant claimed that all diesel purchased by it for the period in question was used in its mining operation and it is for this reason that it submitted its diesel refund claim using the VAT system for the period February 2011 to August 2015 as part of its VAT self-assessment in terms of the VAT Act. The total amount claimed in refund for the period in question was an amount of R 10 651 637.64.

[16] Pursuant thereto the Respondent conducted an audit investigation and set out its findings in a letter of demand dated 1 April 2016.[13] The audit investigation so conducted was to ascertain whether the requirements of section 75 read with item 670.04 of Schedule 6 of the Customs Act have been met.

PRINCIPLES APPLICABLE TO THE INTERPRETATION OF STATUTES

[17] This court in order to make a determination as to whether rehabilitation of the application's mine constituted *primary production activities in mining,* it is important to have regard to the principles applicable when interpreting a statute and in addition to this, it is also important to have regard to the aim and purpose of the Customs Act.

[18] In this regard the **purpose of the Act** is to provide for the levying of customs and excise duties, fuel levy, Road Accident Fund levy, air passenger tax and environmental

[12] Founding Affidavit para 33.3 p 25
[13] Founding Affidavit Annexure "FA 5" p 126

levy, the prohibition of and control of importation, export, manufacture or use of certain goods and for matters incidental thereto. It is against this backdrop that the sections contained in the Act and the relevant note is question needs to be considered.

[19] In National Joint Municipal Pension Fund v Endumeni Municipality[14] the Supreme Court of Appeal summarized the legal principles of interpretation as follows:

> "[18] Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weight in light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document……
>
> The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and background to the preparation and production of the document."

[14] 2012 (4) SA 593 (SCA) at [18]; Bothma-Batho Transport v S Bothma and Seun Transport 2014 (2) SA 494 (SCA) para [10]-[12].

[20] In Bastian Financial Services 2008 (5) SA 1 (SCA) the Court noted that “the aim of statutory interpretation is to give effect to the object or purpose of the legislation in question”.

[21] In Dube v Zikalala 2017 (4) All SA 365 (KZP) it was said that “words must be read in light of their context and with reference to its scope and purpose”.

[22] It should be borne in mind that while it is permissible to consult authoritative dictionaries in order to ascertain the ordinary meaning of words, such dictionary meanings can never be decisive and can be used as a guide only, because words must be interpreted in their context.[15]

[23] The applicable section, namely section 75 of the Customs Act provides that payment of the refund or set off is deemed to be provisional and subject to verification.

[24] The set off does not absolve the applicant of its VAT liability. The refund claimed by the applicant and the applicant’s VAT liability is separate. The VAT System is just a mechanism to claim and pay a refund.[16]

[25] The legislative purpose of Section 75 of the Customs Act is therefore to grant a refund in respect of applicants who purchased and used diesel in strict compliance with the requirements as provided for in section 75, Item 670.04 and note 6 thereto.

[15] Monsanto Co v MDB Animal Health (Pty) Ltd 2001 (2) SA 887 (SCA) par [9].
[16] Answering Affidavit para 37 p 350

[26] Section 75 of the Customs Act regulates diesel refunds read with item 670.04 thereto. The relevant item is found in part 3 schedule 6 of the Act.

[27] In terms of these provisions, an applicant for a diesel refund must satisfy the Commissioner that the following requirements have been met:

27.1 That the person claiming the refund must be registered as a VAT vendor in terms of the Valued Added Tax Act 89 of 1991 (the "VAT Act");[17]

27.2 the fuel must be distillate fuel as defined, which includes diesel;[18]

27.3 the person making the claim must have purchased and used such fuel in accordance with the provisions of section 75 and item 670.04;[19]

27.4 the purchase must be an eligible purchase which for the purposes hereof means that the fuel must have been purchased by the user for the use as fuel for own primary production activities in mining;[20]

27.4.1 own primary production activities in mining are more carefully defined in note 6 (f) (iii) (aa) to (tt);

27.4.2 the equipment and vehicles regarded as forming an integral part of the mining process are set out in note 6(f) (iii) (uu);

27.5 the user must be in possession of the necessary authorisation granted in terms of the Minerals & Petroleum Resources Development Act 28 of 2002 (the "MPRD Act");[21]

27.6 the purchase must be evidences by a tax invoice.[22]

[17] Section 75 (1A)(b)(ii)
[18] Section 75 (1C)(b)(ii)
[19] Section 75(1A)(b)(i)
[20] Note 6 (a)(iii) read with 6(b) (i) (aa), (ii) and (iii)
[21] Note 6 (b)(ii) (cc)
[22] Section 75 (4A)(c) read with Note 6 (d)(i)

[28] In terms of Section 75(14) SARS can only pay out a refund upon receipt of a duly completed application, which application should be supported by the necessary documents and other evidence to prove that the refund due, is received within a specified period.

[29] Note 6(q) specifically states that it is for an applicant to provide sufficient records to prove and support is claim for a diesel refund. It is only upon receipt of same by the Commissioner that a determination can be made. In this regard an applicant must show the following:

29.1 In respect of each claim, how the quantity of diesel on which the refund was claimed, was calculated;[23]

29.2 if the applicant carries on business in more than one of the categories of eligible activities or in any ineligible activity, the records regarding each activity must be kept separately;[24]

29.3 the applicant must show how the diesel purchased was used, sold or otherwise disposed of;[25]

29.4 the applicant must keep records of all purchasers or receipts of fuel, storage and use of fuel reflecting the date or period of use, the quantity and purpose of use, the full particulars of any fuel supplied on a dry basis to any contractor or other person who renders qualifying services to the applicant and the applicant's capacity of each tank in which fuel is stored and the receipt and removal from such tanks;[26]

[23] Note 6(q)(c)(iii)
[24] Note 6(q) (c)(iv)
[25] Note 6(q) (c)(v)
[26] Note 6(q) (c)(vi)

29.5 the applicant must further provide logbooks in respect of fuel supplied to each vehicle and or equipment used in on-land mining activities and specify how the vehicles and equipment was used.

[30] It will thus follow that to the extent that an applicant for a refund cannot provide SARS with the required record of proof for the refund claimed or where the claim relates to activities which are not own production activities of the applicant, the Commissioner cannot allow a refund and where a provisional refund has been allowed, it will have to be recovered by SARS.

[31] The provisions of section 75(1A) further provides as follows:

"Notwithstanding the provisions of subsection (1A), the Commissioner may investigate any application for a refund of such levies on distillate fuel to establish whether the fuel has been-

(i) duly entered or is deemed to have been duly entered in terms of this Act;

(ii) purchased in the quantities stated in such return;

(iii) delivered to the premises of the user and is being stored and used or has been used in accordance with the purpose declared on the application for registration and the said item of Schedule 6."

[32] Section 44(11) provides as follows:

"44 **Liability for duty**-

…..

(11) (a) Notwithstanding anything to the contrary contained in this Act, but subject to the provisions of section 47(10) and (11), 65(7) and (7A) and 69(6) and (7) and

subsection (12) of this section, except where this subsection otherwise provides in respect of any matter to which any of such provision relate, there shall be no liability for any underpayment of duty on any goods-

(i) after a period of two years from the date of acceptance of the bill of entry; or

(ii) where such underpayment was discovered as a result of, during the course of, or following upon, and inspection and underpayment occurred on a date earlier than two years prior to the date on which such inspection commenced:

Provided that such liability shall, subject to paragraph (c), not cease even if underpayment is discovered after an earlier assessment and payment of an amount in respect of any inspection during the period concerned, where such underpayment is the result of-

(aa) fraud;

(bb) misrepresentation;

(cc) non-disclosure of any material facts; or

(dd) any false declaration for the purposes of the Act.

(b) Where any period is prescribed in this Act for books, accounts or other documents in whatever form to be kept available for production to or inspection by an officer, any such period shall, subject to the provisions of paragraph (c), be calculated from a date on which production is demanded or the inspection commences.

(c) Except where the Commissioner may otherwise determine in exceptional circumstances, where any underpayment arises from the circumstances, contemplated in the proviso to paragraph (a), there shall be no limitation on the period

of liability for underpayment of duty or the period for which any books, accounts or any other documents, in whatever form available, are required to be produced to or may be inspected by an officer."

[33] Section 44(11) (a) provides that the applicant would not incur a liability for any underpayment of duty where such underpayment was discovered as a result of an investigation and the underpayment occurred earlier than two years prior to the date on which the investigation commenced.

[34] Section 44(11) (a) is subject to the proviso that an applicant will be liable for any underpayment which occurred earlier than two years prior to the date on which the investigation commenced, if such underpayment is as a result of (i) fraud, (ii) misrepresentation; (iii) non-disclosure of any material facts; or (iv) any false declaration for the purposes of the Customs Act.

[35] Section 44(11) (c) states that there will be no limitation on the period on an applicant's liability for any underpayment of duty under the circumstances listed above.

[36] In respect of the relief sought in in prayer 5 of the Notice of Motion, the relevant portion for consideration is Note 5 in Part 3 of Schedule 6 which provides as follows:
"Except where the Commissioner authorises on good cause shown payment of a refund of duty granted in terms of any item of this Part to any other person on complying with such conditions as the Commissioner may reasonably impose in each case, such refund shall only be paid to-

(a) ……

(b) ……

(c) a user as contemplated in this Part."

[37] As mentioned, the main issue for determination by this court, relates to the interpretation and application of note 6(f) (iii) which provides guidance regarding the interpretation of "own primary production activities in mining" which qualify for the refund.

[38] The relevant note reads as follows:

"Own primary production activities in mining include the following:

(aa) The exploration and prospecting for minerals.

(bb) The removal of over burden and other activities undertaken in the preparation of a site to enable the commencement of mining for minerals.

(cc) Operations for the recovery of minerals being mining for those minerals including the recovery of salts but not including any post-recovery or post mining processing of those minerals.

(dd) Searching for ground water solely for use in a mining operation or construction or maintenance of facilities for the extraction of such water.

(ee) The pumping of water solely for use in a mining operation if the pumping occurs at a place where the mining operation is carried on or at a place adjacent to that place.

(ff) The supply of water solely to the place where the mining operation is carried on, from such place or place adjacent to such place.

(gg) The construction or maintenance of private access roads at the place where the mining operation is carried on.

(hh) The construction or maintenance of-

(A) tailings, dams for use in a mining operation;

(B) dams, or other works, to store or contain water that has been used in, or obtained in the course of carrying on a mining operation.

(jj) The construction or maintenance of dams, at the place where the mining operation is carried on, for the storage of uncontaminated water for use in a mining operation.

(kk) The construction or maintenance of buildings, plant or equipment for the use in a mining operation.

(ll) The construction or maintenance of power stations or power lines solely for use in a mining operation.

(mm) Coal stockpiling for the prevention of the spontaneous combustion of coal as part of primary mining operation.

(nn) The reactivation of carbon for use in the processing of ores containing gold if the reactivation occurs at a place where mining for gold is carrying on.

(oo) The removal of waste products of a mining operation and the disposal thereof, from the place where the mining operation is carried on.

(pp) The transporting by vehicle, locomotive or other equipment on the mining site of ores or other substances containing minerals for processing in operations for recovery of minerals.

(qq) The service, maintenance or repairs of vehicles, plant or equipment by the person who carries on the mining operation, at the place where the mining operation is carried on.

(rr) The service, maintenance or repair of transport networks for use in a mining operation, to the extent that the service, maintenance or repair is performed at the place where a mining operation is carried on.

(ss) Quarrying activities necessary solely for obtaining, extracting and removing minerals from the quarry, but excluding any secondary activities to work or process such minerals (including crushing, sorting and washing) whether in the quarry or at the place where the mining operation is carried on.

(tt) The transport of ores or other substances containing minerals from the mining site to the nearest railway siding.

(uu) The following equipment and vehicles are regarded as forming part of the mining process:

(A) Agitators.

(B) Drilling rigs.

(C) Hammer mills.

(D) Smelters.

(E) Tunnelling machines.

(F) Specially manufactured underground equipment.

(G) Front-end loaders.

(H) Excavators.

(I) Locomotives for carriage by rail of minerals or equipment.

[39] It is important to note that with effect from 27 May 2016, Note 6 (f)(iii) was amended by inserting therein sub-note (vv) which reads as follows:

“Rehabilitation required by environmental management programme or plan approved in terms of the MPRDA but excluding such activities performed beyond the place where mining operations are carried on or after a closure certificate has been issued

in terms of the MPRDA." Prior to the amendment rehabilitation was not expressly listed in note 6.

RELIEF IN RESPECT OF PRAYERS 1 and 2 of the NOTICE OF MOTION - REHABILITATION

[40] In respect of the relief sought in prayers 1 and 2 of the Notice of Motion, the arguments advanced by the applicant were the following:

40.1 The point of departure in respect of the relief sought in terms of these prayers is the determination embodied in the letter of demand issued by the Commissioner on 1 April 2016.[27]

40.2 That the dispute in relation to rehabilitation falls to be evaluated within the context of the undisputed facts in relation to how mining activities were conducted by the applicant.

40.3 That on the factual finding conducted by the Commissioner during an *inspection in loco* conducted at Graspan mine on 19 June 2015, it was observed and confirmed by the mine engineer/manager that on-going rehabilitation activities such as vegetation of mined areas in respect of the mined areas are being performed.

40.4 Furthermore, if one has regard to the dictionary meaning of the word mining i.e. *"to dig in the earth for the purpose of extracting ores, coal or the like from a mine"* that this dictionary meaning of the word is restrictive and could not have been intended by the legislature under the current legislation. The same argument is proffered in respect of the dictionary meaning of the word primary namely *"first or highest in rank of*

[27] Founding Affidavit Annexure "FA5" Vol 2 p 126

importance; chief; principal. [28] In this regard the argument advanced by counsel for the applicant, is that the Commissioner erred when it ignored the context within which the words quoted above are used in note 6 and instead the respondent elevated the dictionary meanings of the words to be the decisive criterion when interpreting the note.

40.5 It is on this basis that counsel had argued that the Commissioner interpreted the note as if the word “include” does not form part of the note.

[41] In contrast the arguments advanced by the respondent in respect of the relief sought in terms of prayers 1 and 2 of the Notice of Motion were the following:

41.1 Prior to the amendment to the note on 27 May 2016 the legislature did not intend to include rehabilitation as a primary production activity. If this indeed had been the intention of the legislature, the word rehabilitation prior to the date of amendment of the note, would have been included in the note.

41.2 Furthermore, that the use of the word including in the preamble to Note 6(f)(iii) cannot mean an open ended lists but rather that it makes reference to the activities explicitly made mentioned for in the note. As these activities are mining or production related activities, it therefore excludes *rehabilitation.*

41.3 In addition to the above, a more compelling reason as to why rehabilitation was never contemplated as a primary production activity is that removal of waste material and the disposal of such waste from a mining site is specifically provided for in Note 6 (f)(iii) (oo) and as such it was argued that had the legislature intended for the Note to include rehabilitation, it would have included same.

41.4 The last argument advanced under the relief sought in terms of prayers 1 and 2 is that it was argued that in terms of the MPRDA and the Minerals Act that rehabilitation

[28] Dictionary.com

is in any event compulsory for any holder of a mining authorisation. As such it was argued that if it was intended that diesel costs associated with rehabilitation to fall within the primary production activities of mining, it could and would have done so.

[42] The word 'Including' is generally used to widen the meaning of words or phrases in the body of a statute and when so used "these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include".[29]

[43] In the decision De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Other 2004 (1) SA 406 (CC) at p 421 the Constitutional Court noted that the most common sense of includes; is non-exhaustive, signifying that the lists extends the meaning of the term being defined.[30] For present purposes, the term being defined to be "own primary production activities" and it follows that in interpreting the word 'include', that such interpretation cannot be devoid of the phrase within which the word 'include' is used.

[44] In the De Reuck matter, the Court held as follows:

"The correct sense of 'includes' in a statute must be ascertained from the context in which it is used. R v Debele provides useful guidelines for this determination. If the primary meaning of a term is well known and not in need of definition and the items in the lists introduced by **'includes**' go beyond that primary meaning, the purpose of that

[29] Footnote 115; Certification of the Amended text of the Constitution of the Republic of South Africa, 1996- Case CCT 37/96

[30] This was also the finding in R v Debele 1956 (4) SA 570 (A)

lists is then usually taken to be to add to the primary meaning so that "includes" is non-exhaustive. If, as in this case, the primary meaning already encompasses all the items in the lists, then the purpose of the lists is to make the definition more precise. In such a case 'includes' is used exhaustively. Between these two situations there is a third, where the drafters have for convenience grouped together several things in the definition of one term, whose primary meaning- if it is a word in ordinary, non-legal usage-fits some of them better than others. Such a list may also be intended as exhaustive."

[45] In employing the reasoning of the cases law listed above, I am persuaded that the use of the word 'include' in the phrase own primary production activity in the note is to give the phrase a more precise meaning by **listing** what will encompass own primary production activities in mining. The word '*include'* is therefore, aimed at illustrating that the list is exhaustive of the meaning of primary production activities in mining.[31] To hold otherwise, would render the usage of the word ' include' nugatory and it will bring about a superfluous usage of the word in the phrase which could not have been what was intended by the legislator. Differently put, the legislator would not have embarked on the exercise to list twenty activities [Note 6(f)(iii) (aa)-(uu)] which expanded what the phrase own primary production activities in mining would include and after 27 May 2016, add an additional activity by amending the note with the addition of note 6(f)(iii) (vv), if the legislator had no intention of having a list which is exhaustive and whereby rehabilitation was already provided for in the activities prior to the amendment.

[31] CSARS v De Beers Consolidated Mines Ltd 2012 (5) SA 344 (SCA).

[46] The most logical and most reasoned conclusion to draw, is that rehabilitation only qualified as an own primary production activity as from 27 May 2016 and that prior thereto, that no refund could have been qualified for and payable under the Customs Act.

[47] In support of the arguments further proffered on behalf of the applicant in respect of the interpretation of this note, reliance was also placed on the unreported decision of this Division of Glencore Operations SA (Pty) Ltd v The Commissioner for the South African Revenue Service delivered 24 October 2019, wherein the court concluded that the usage of the word 'include' in note 6(f)(iii) are not exhaustive and therefor that an activity which is not specifically listed therein, can still qualify as a primary production activity in mining. In this regard counsel had argued, that this court is bound to follow the Glencore decision unless this court is satisfied that the Glencore decision was clearly wrong.[32] Furthermore, that although in the Glencore decision the court was not called upon to consider whether rehabilitation constituted primary production activities, the court in Glencore did consider the meaning to be attributed to the word 'include' in note 6(f)(iii).

[48] In contrast the respondent on point had submitted, that the Glencore decision is distinguishable from the present matter as in Glencore, the court did not consider as to whether rehabilitation constituted primary production activities in mining. In the Glencore matter what was considered by the court was whether Glencore's mining activities constituted either post mining processing and consequently secondary mining activities or whether they constituted primary production activities in mining. In

[32] True Motives 84 (Pty) Ltd v Mahdi 2009 (4) SA 153 (SCA) par [100]

determining this issue, the court considered the word ‘include’ as used in note 6(f)(iii) and in particular whether the word should be considered in a narrow (exhaustive) or wide (non-exhaustive) sense.

[49] In the present matter, this court was not just called upon to determine the phrase own primary production activities in mining, but more specifically whether this phrase included rehabilitation as an activity which constituted primary production activities in mining. The facts of the present matter are thus distinguishable from the Glencore matter, as in the Glencore matter the court was not called upon to consider whether rehabilitation constituted primary activities in mining. It is for this reason that the decision in the Glencore matter is not persuasive for this court.

[50] As regards the argument for placing reliance on ordinary dictionary meaning of individual words, this could find applicability where the individual words used were not defined in the statute. In the present instance, it is not the individual words used in the phrase which calls for interpretation, but indeed, interpretation should be given to the phrase itself.

RELIEF SOUGHT IN TERMS OF PRAYER 4 OF THE NOTICE OF MOTION: SECTION 44(11) (a) OF THE ACT

SANDTON

[51] As per the founding affidavit the applicant asserts that Steelcoal Mine is a mine operation that was conducted by Wakefield up until late 2013.[33] Wakefield together

[33] Founding Affidavit para 35.2

with the applicant were subsidiaries within the Shanduka Group of Companies and the two mines were situated next to each other.[34]

[52] Since Sandton was engaged to work at Steelcoal Mine within Wakefield, Wakefiled incurred the service charges charged by Sandton.[35]

[53] Diesel was supplied to Sandton *via* the applicant's depot on the applicant's mine area.[36]

[54] It is common cause that Graspan had incorrectly claimed diesel refund in respect of diesel utilised not by itself, but by Sandton. The manner in which the error arose is set out by the applicant.[37]

[55] The applicant conceded that the mining activities performed by Sandton at Steelcoal Mine did not qualify as its own primary production activities as such activities were not conducted in respect of the applicants own primary product,[38] albeit that the applicant claimed for its own benefit the diesel refund in its VAT return.[39]

[56] The applicant having submitted a VAT return claiming such refund whether as a result of an oversight by the finance accountant at Shanduka or not deliberate is immaterial. By the applicant's own admission, it was not entitled to such refund as it did not qualify for it in terms of the legislation. The VAT forms so completed for the

[34] Founding Affidavit para 35.2
[35] Founding Affidavit para 35.3
[36] Founding Affidavit: Annexure "FA2" p 81
[37] Founding Affidavit para 35.1 to 35.7 p 27-29
[38] Founding Affidavit para 33.4 p 28; Annexure "FA3" p 95
[39] Founding Affidavit "FA5" p 126

refund contained incorrect information submitted by it with the result that the *fiscus* had suffered a loss.

[57] The provisions of section 44(11) (a) provides as follows:
Section 44(11) (a) is subject to the proviso that an applicant will be liable for any underpayment which occurred earlier than two years prior to the date on which the investigation commenced, if such underpayment is as a result of (i) fraud, (ii) misrepresentation; (iii) non-disclosure of any material facts; or (iv) any false declaration for the purposes of the Customs Act.

[58] Having regard to the section it thus follows that even where an erroneous claim was made, it still constitutes a false declaration as contemplated in section 44(11) (a).

[59] It matters not whether a false communication was made due to a miscommunication by the finance department at Shanduka.

[60] Furthermore, the VAT Act with reference to section 16 there rests an obligation on a vendor to calculate the tax payable by him and to furnish the Commissioner with a return reflecting such information to enable the Commissioner to calculate its tax liability in terms of section 28. Furthermore, 25 of the Tax Administration Act, 28 of 2011 regulates the submission of returns in terms of a Tax Act, which includes the VAT Act and prescribes that a return must be a full and true return.

[61] Given the concession by the applicant that the return rendered in the present instance was incorrect, this is a classic example where a return is not a true return.

RELIEF SOUGHT IN TERMS OF PRAYER 5 OF THE NOTICE OF MOTION: COMMISSIONER'S DISCRETION IN TERMS OF NOTE 5

MINING RIGHT

[62] Note 5 has been quoted in paragraph 36 above. It is quoted hereunder again for ease of reference.

"Except where the Commissioner authorises on good cause shown payment of a refund of duty granted in terms of any item of this Part to any other person on complying with such conditions as the Commissioner may reasonably impose in each case, such refund shall only be paid to-

(a) ……

(b) ……

(c) a user as contemplated in this Part."

[63] In the present instance as mentioned, the applicant was the holder of a mining right to mine coal. This mining right was converted on 4 November 2010.

[64] Prior thereto, the applicant sold its business to Shanduka in 2007. This sale included the sale of assets and the applicants converted mining right. The applicant applied to the DMR for approval towards the end of 2007 and the DMR only approved such cession on 15 August 2013 with the applicant only being informed of such decision on 20 August 2013.[40]

[40] Founding Affidavit para 38.2 Vol 1 p 31

[65] As the applicant needed to give effect to the practical way of implementing the transfer, i.e. to transfer assets, to inform suppliers and the transfer of accounting records, the applicant continued to conduct mining operations until 31 August 2013. As the applicant continued to consumed diesel up until 31 August 2013, it also claimed the relevant refunds.[41]

[66] In answer the respondent asserts that the applicant having been informed of the cession of the mining right as at 15 August 2013, it should have desisted form continuing with mining as from this date. The rationale being that, it by then was no longer a holder of mining right.[42] It as such follows, that the applicant continued to perform its mining operations in contravention of the MPRDA and in non-compliance with the Customs Act.

[67] In reply the applicant further avers that it continued with its mining operations as they faced economic realities and commercial implications if they had ceased to mine for a period of approximately 11 days.[43]

[68] The applicant in the present instance places reliance on Note 5 and contends that the Commissioner should have exercised his discretion in terms of Note 5 and that such a refusal is materially influenced by an error in law in terms of section 6 (2)(d) of PAJA.

[41] Founding Affidavit para 38.4 and 38.6 Vol 1 p 32
[42] Answering Affidavit para 63.2 & 63.3 Vol 7 p 368
[43] Replying Affidavit para 63 Vol 8 p 730.

[69] Note 5 envisages an instance where any refund due to a user is to be paid to another person, other than the user on good cause shown. It as such follows, that in order for the Commissioner to be called upon to exercise his discretion in terms of Note 5, the registered user should have been entitled to the refund. In the present instance this was not the position. The applicant was not entitled to a refund as it was not the holder of a mining right as from 15 August 2013. As such, it follows, that no reliance can be placed on the Commissioner to have exercised his discretion in terms of Note 5.

ORDER

[70] In view of the foregoing, I am not persuaded that the appeal under the circumstances can succeed.

[71] Consequently, the following order is made:

71.1 The application is dismissed with costs, including the costs consequent upon the employment of two counsel.

C.J. COLLIS
JUDGE OF THE HIGH COURT

Appearances

Counsel for the Applicant	: Adv. J.P Vorster SC
Attorney for the Applicant	: MACROBERT Attorneys
Counsel for the Respondent	: Adv. M.A. Chohan SC and Adv. L.Haskins
Attorney for the Respondent	:The State Attorneys PRETORIA

Judgment transmitted electronically.