THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1354/2018

In the matter between:

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

and

LANGHOLM FARMS (PTY) LTD **RESPONDENT**

Neutral citation: *Commissioner for the South African Revenue Service v Langholm Farms (Pty) Ltd (*1354/2018) [2019] ZASCA 163 (29 November 2019).

Coram: Cachalia, Wallis and Saldulker JJA

Heard: 08 November 2019

Delivered: 29 November 2019

Summary: Revenue – diesel fuel rebate – interpretation of s 75(1C)*(a)*(iii) of the Customs and Excise Act 91 of 1964 – exercise of court's discretion in terms of s 21 of the Superior Courts Act 10 of 2013 – whether court appropriately exercised its discretion in circumstances where Commissioner for the South African Revenue Service had not issued a final assessment.

ORDER

On appeal from: Eastern Cape Division of the High Court, Grahamstown (Smith J sitting as court of first instance):

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the court a quo is set aside and is replaced with the following order: 'The application is dismissed with costs.'

JUDGMENT

Saldulker JA (Cachalia and Wallis JJA concurring)

[1] The respondent, Langholm Farms (Pty) Ltd (Langholm) operates a pineapple growing enterprise that is located about 27 km from Grahamstown in the Eastern Cape. It is a successful concern producing between 13,500 and 16,000 metric tons of raw pineapples annually. It sells its pineapples to Summerpride Foods (Pty) Ltd (Summerpride), to be processed into various juice products for export. Summerpride's factory is situated approximately 147 km away from Langholm, in East London.

[2] Langholm delivers its pineapples to the Summerpride factory mainly using its own trucks. The pineapples are transported in loading bins specifically designed to facilitate the loading and offloading of such produce. When the trucks deliver the pineapples to Summerpride, they fill up with diesel fuel at the Bathurst Co-Operative dispenser, a depot located at the Summerpride factory, before returning to Langholm with the empty bins. The trucks that are used for the transportation to Summerpride are not refuelled on the respondent's farm.

[3] Langholm is registered as a VAT vendor and as a recipient of a diesel rebate as envisaged in terms of s 59A[1] of the Customs and Excise Act 91 of 1964 (the Act). In or around October and November 2016, Langholm submitted to the appellant, the Commissioner for the South African Revenue Service (SARS), a claim for diesel rebates for the period October 2015 to August 2016. On 18 November 2016, Langholm received a notification from SARS that it intended to conduct an audit of the diesel rebate claimed by the respondent for that tax period.

[4] After completing the audit, on 13 February 2017, SARS furnished Langholm with a 'Notice of Intention to Assess' which stated in relevant parts that:
(a) the diesel used in transporting the pineapples and obtained from the Bathurst Co-Operative, was a 'non-eligible usage' because SARS was of the opinion that in terms of s 75(1C)*(a)*(iii) of the Customs and Excise Act 91 of 1964 (the Act) a rebate could only be claimed in respect of diesel delivered, stored and dispensed from storage tanks situated on Langholm's premises;
(b) SARS was of the opinion that the carting of the storage bins on the return journey from Summerpride's premises was not a primary production activity as defined in the relevant item of Schedule 6 to the Act;
(c) SARS said that Langholm's claims for diesel rebates were, as a result, excessive.

[5] SARS said that in light of its view, there were ineligible purchases for diesel in the amount of R 328 250.66, and an assessment was to be raised in this amount. Langholm was invited by the appellant to respond to the Notice of Intention to Assess, specifically by providing evidence that it had complied with the Act. Langholm did not take up the appellant's offer. It took the view that the approach adopted by SARS was not in accordance with the relevant statutory provisions. This was understandable given an exchange between Ms Roestoff, the accountant representing Langholm, and Mr van Deventer of SARS. In an e-mail sent on 15 April 2016 Ms Roestoff queried SARS' interpretation of s 75(1C)*(a)*(iii) of the Act, and on 21 April 2016, Mr van

[1] '59A Registration of persons participating in activities regulated by this Act
(1)*(a)* Notwithstanding any registration prescribed in terms of any other provision of this Act, the Commissioner may require all persons or any class of persons participating in any activities regulated by this Act, to register in terms of this section and its rules.'

Deventer replied saying that SARS had sought the view of its legal section and its approach was dictated by the response of the legal section. On 6 June 2016 Mr Tilney from Summerpride was told by a SARS representative, Mr La Fontaine that their main issue was that the fuel should have been delivered to the claimant's premises. On 13 March 2017, Langholm launched the present proceedings in the high court seeking declaratory orders confirming its understanding of s 75(1C)*(a)*(iii) of the Act. SARS opposed the application.

[6] On 28 August 2018, the high court per Smith J delivered judgment in favour of Langholm and granted the following declaratory orders:

'1.1 Section 75(1C)(a)(iii) of the Customs and Excise Act 91 of 1964 as amended, is to be interpreted and is properly interpreted, that diesel fuel used in the course and scope of the registration of the Applicant as user, is eligible for diesel rebate claims under the Customs and Excise Act when the Applicant's trucks are refuelled at the Bathurst Co-op at Summerpride Foods in East London.

1.2 In instances where the Applicant hired transport contractors on a dry basis, i.e. without diesel, the diesel purchased being to the account of the Applicant, that the diesel fuel purchased from the Bathurst Co-op at Summerpride Foods in East London for purposes of transporting of pineapples to or of farming requirements from Summerpride Foods in East London to the Applicant's farming property, such diesel purchases are eligible for diesel rebate under the Custom and Excise Act 91 of 1964 as amended.'

[7] This appeal by SARS is with the leave of the court below. Before us, counsel for SARS submitted that the application was academic, and that the declaratory orders did not fall within the ambit of s 21 of the Superior Courts Act 10 of 2013 (the Superior Courts Act).[2] Simply put, no dispute had arisen as yet between the parties concerning the interpretation of s 75(1C)*(a)*(iii) and, as such, the application was premature. In the

[2] '21. Persons over whom and matters in relation to which Divisions have jurisdiction. - (1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power—
(*a*) to hear and determine appeals from all Magistrates' Courts within its area of jurisdiction;
(*b*) to review the proceedings of all such courts;
(*c*) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.'

alternative SARS contended that the high court should not have exercised its discretion in favour of granting declaratory orders. In contrast, the respondent contended that SARS had completed its audit, and made its *prima facie* views known on the interpretation of the provisions of s 75(1C)*(a)*(iii), which was that distillate fuel obtained from any storage other than the diesel storage on the Langholm farm, precluded a claim for the refund of any rebate. This raised a clear legal dispute the resolution of which by way of a declaratory order was appropriate.

[8] In terms of s 21(1)*(c)* of the Superior Court Act, the court has the power:

'In its discretion and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such a person cannot claim any relief consequential upon the determination.'

[9] The question thus is whether this was an appropriate case for the exercise of the judge's discretion. In the opening paragraph of the appellant's Notice of Intention to Assess, SARS stated:

'The purpose of this letter is to inform you of the status and *prima facie* findings of our inspection to establish whether the use of diesel was contrary to the provisions of the Customs and Excise Act, No 91 of 1964 (the C&E Act), to afford you the opportunity to respond thereto and to advise you of the steps that will be taken after receiving your response'.

Under the heading 'Non-eligible usage', SARS stated:

'The fuel used by the trucks for carting empty crates from Summerpride Foods to the farm is not regarded as primary production activity.

Furthermore the fuel used by the contractors for the delivery of the produce (pineapples) to Summerpride Foods (Pty) Ltd was not delivered to the premises of Langholm Farm (Pty) Ltd and thus not dispensed from their bulk storage on the farm.'

Later in the notice SARS stated again under 'Non-Eligible usage' the following:

'In applying this statutory law Schedule 6 Part 3 Note 6(a). . . the carting of the empty crates from Summerpride Foods to Langholm Farms do not qualify as a primary production activity.

Furthermore in applying the statutory law, Section 75(1C)*(a)*(iii) of the C & E Act, rebates may only be claimed on fuel delivered, stored and dispensed from storage facilities located on Langholm Farm's (Pty) Ltd's premises.

It is our intention to adjust the litres claimed for the delivery of the produce by the contractors to the Summerpride Foods (Pty) Ltd as well as the litres claimed for the non-primary production activities

. . .

Based on the aforesaid, the Commissioner is therefore of the *prima facie* view that the diesel in question were dealt with contrary to the made it clear that refunds provisions of the C & E Act as explained above and intends to issue a letter of demand for all refunds which was not duly payable to Langholm. . . .'

[10] SARS made it clear that refunds may only be claimed on fuel that was delivered, stored and dispensed from storage facilities on the premises of Langholm. In so doing SARS expressed a clear view as to the proper construction of s 75(1C)(a)(iii). Langholm disagreed and responded with the application, in an effort to resolve this dispute. It is true that Langholm could have waited and provided SARS with the documents it required for a revised assessment, and then challenged such an assessment, and argued the point of law at that stage. The issue is whether it was obliged to do so. In my view there was nothing objectionable in Langholm seeking clarity on an issue of statutory interpretation that would clearly influence the outcome of SARS' audit. If the court accepted Langholm's view of the proper interpretation of s 75(1C)*(a)*(iii) of the Act, SARS would have had to return to the audit and re-assess its position in the light of any further information and debate with Langholm. There was little point in Langholm entering into a debate or providing further information when none of it would be at all relevant given SARS' legal view. That Is exactly the situation for which declaratory orders are made and seeking one in the context of a taxing statute was endorsed by the Constitutional Court in *Metcash*.[3]

The Statutory Provisions

[3] *Metcash Trading Limited v Commissioner South African Revenue Services & another* [2000] ZACC 21; 2001 (1) SA 1109 (CC) para 44

[11] A statute must be interpreted in line with ordinary rules of grammar and syntax taking cognisance of the context and purpose thereof.[4] That approach is equally applicable to a taxing statute.[5]

[12] I turn to consider the interpretation of the relevant parts of s 75. Section 75(1A) of the Act provides that:

*'*Notwithstanding anything to the contrary contained in this Act or any other law –

(a) (i) A refund of the fuel levy leviable on distillate fuel in terms of Part5 A of Schedule I…shall be granted in accordance with the provisions of this section and of item 670.04 of Schedule No. 6 to the extent stated in that item.'

Section 75(1C)*(a)*(iii) reads as follows:

'Notwithstanding the provision 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)- (ii) . . .

(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 No 6.'

[13] There is no dispute that Langholm is a 'user' as defined in the aforegoing section and that diesel fuel is included in the expression distillate fuel. Item 670.04 of Schedule No 6, paragraph (h) in Part Three of that Schedule, deals with farming activities that enjoy a right to a refund of levies. In relevant part it reads:

'Farming: Refund of levies on eligible purchases of distillate fuel for farming as specified in paragraph (b)(i) to this Note.

(i) In accordance with the definition of 'eligible purchases', the distillate fuel must be purchased by the user for use and used as fuel for own primary production activities in farming as provided in paragraphs (h)(ii)(cc), (h)(ii) and (h)(iv) to this Note. . .'

[14] SARS has interpreted s 75(1C)*(a)*(iii) to mean that the respondent only qualifies for the diesel rebate on diesel fuel that has been delivered to its premises, Langholm Farms, and is being stored and used or has been used there. Its view is that the applicant is precluded in terms of the provisions of s 75(1C)*(a)*(iii) from claiming diesel

[4] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA).

[5] *Commissioner, South African Revenue Services v Bosch & another* [2014] ZASCA 171; 2015 (2) SA 174 (SCA) para 9.

rebates for fuel purchased at Summerpride's factory site, a diesel depot owned by Bathurst Co-operative, because the factory is a distance from the farm where the respondent operates. On the other hand, the central submission made on behalf of the respondent is that it would be absurd to hold that the taxpayer could not claim for diesel fuel that is not stored on the farm and is stored offsite. Langholm's submissions laid great stress on the word 'or' in the section.

[15] On Langholm's construction of the section, 'used' in the section means either 'used' on the premises or used elsewhere under schedule 6. Simply put the whole case of Langholm is that 'stored and used' or 'has been used' refer to two different usages. The one usage they contend is usage on the premises and the other is usage off the premises. But that is not how the section plainly reads. The section reads: 'is being stored and used or has been used'. The word 'used' is used twice. One usage is present use ('is being stored and used') and the other is historic use ('has been used'), but both refer to use of diesel on the taxpayers' premises. That is what the plain language of the section says. What the respondent misconstrues is that the word 'used' is both in the present tense, ie, current use and in the past tense, historic use. This is the ordinary grammatical meaning. It is clear from the ordinary language of the section 'used' and 'has been used' relate to the premises of the taxpayer, whether it is in the past or in the present, and not to any other premises.

[16] Langholm contended that it would be absurd to interpret s 75(1C)*(a)*(iii) in the manner SARS does, because it would mean that even if diesel was procured elsewhere, the purpose was nevertheless to grant a rebate. Langholm may consider this absurd, but that is not what is in the language and the context of the section. It refers to present or past use but on the premises of the taxpayer. The premises remain the premises of the taxpayer. The issue is put beyond doubt when one considers the effect of Langholm's interpretation on the broader language of the section. The enquiry mandated by the section is 'whether the fuel has been . . . delivered to the premises of the user and is being stored and used or has been used'. Langholm's approach would result in the enquiry being:

'. . . whether the fuel has been:

(a) delivered to the premises of the user and is being stored and used;
or
(b) has been used.'

The repetition of language involved in asking whether the 'fuel has been . . . has been used' makes it plain that this cannot be the correct construction.

[17] Thus Langholm's complaint of absurdity must fail. A plain reading of the statute does not allow for the interpretation that Langholm seeks. The language of the section is clear and unequivocal. And there is nothing in the context to suggest that any departure is warranted from the words used. The section affords a rebate to taxpayers and defines the terms upon which the rebate is given. That reflects the policy adopted by the legislature and courts may not, under the guise of absurdity, depart from that policy. Words used in a statute must be given their ordinary grammatical meaning unless they lead to absurdity. In *City of Johannesburg v Cantina Tequila & another* [2012] ZASCA 121, this court warned that the clear language of a provision could not be ignored under the guise of absurdity merely because the result may be unpalatable, stating at para 8:

'A court is entitled to find that an interpretation is absurd if an omission is so glaring or out of kilter with the overall purpose of the scheme that the result could simply not have been contemplated. But a court may not, under the guise of a concern to avoid absurdity, ignore the clear language of a provision simply because of any perceived harshness or lack of wisdom. Nor may it construe the provision in a manner that the language does not permit, for in so doing it is improperly substituting its will for that of the lawmaker.'

[18] Section 75(1C)(*a*)(iii) means that a taxpayer can only claim for the diesel fuel stored and used on its own premises. In the result the declaratory orders were granted on a mistaken view of the law. Accordingly, the appeal must succeed.

[19] The following order is made:

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the court a quo is set aside and is replaced with the following order:

‘The application is dismissed with costs.’

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H K Saldulker
Judge of Appeal

APPEARANCES:

For Appellant:	J Peter SC with K Magano
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