IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED

2018.11.06
DATE

SIGNATURE

CASE NUMBER: 42716/15
DATE: 6 November 2018

PETROLEUM OIL AND GAS CORPORATION OF SOUTH AFRICA (SOC) LIMITED — Applicant

V

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE — Respondent

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JUDGMENT

MABUSE J:

[1] By notice of motion issued by the Registrar of this Court on 29 August 2016 the Applicant seeks the following order:

"1. That the Respondent's decision of 11 December 2014 refusing to refund the Applicant the sum of R229,905,821.15 in respect of duty paid on unmarked Kerosene on the basis that the Customs and Excise Act 91 of 1964 does not provide for the retrospective licensing of special storage warehouses, be reviewed and set aside.

2. That the Respondent be directed to refund to the Applicant the amount of R229,905,821.13 with interest, a tempore morae, at the legal rate from date of payment.

3. Further and/or alternative relief."

[2] These are review proceedings. The target of these proceedings is the decision taken by the Respondent on 11 December 2014. Relying on the provisions of the Customs and Excise Act 91 of 1964 ("the Act"), the Respondent contends that the Act does not provide for the retrospective licensing of the special storage warehouses ("SOS's"). This application is therefore opposed by the Respondent not only on the aforesaid ground but on further other grounds that I will set out later in the judgment. For purposes of convenience, I shall refer to the Applicant as "Petrosa" and the Respondent as "the Commissioner".

[3] The principle question in this application for review is whether the Commissioner was correct in refusing to refund Petrosa the sum R229,905,821.15 on the basis that he did not have the power to licence the oil companies' storage warehouses retrospectively.

OVERVIEW

[4] The nature and extent of the present issues between the parties and the background against which they are to be decided appear from what follows. Petrosa is a state-owned oil company that produces, *inter alia*, oil and natural gas products, such as unleaded petrol,

diesel and kerosene. It manufactures unmarked kerosene at its licensed manufacturing warehouses and performs all the aforementioned activities at its warehouse, in Mossel Bay.

[5] Before 2 April 2003, kerosene was held duty-free at Petrosa's bonded warehouses. Duty was payable only when kerosene moved out of the bonded warehouses as invoiced sales to the market.

[6] Initially, Rule 19A 4.09 to s 19 of the Act permitted Petrosa to remove kerosene from its warehouses to be marked in the licensed warehouses of the oil companies. In this way Petrosa would not be liable to pay duty. In 2003 the Commissioner introduced an administrative system for levying of duties on kerosene. In the first place, in terms of the new system, duty on unmarked kerosene would be levied at source, hence the name "das", the acronym for "duty at source". This meant that Petrosa would have to pay duty on unmarked kerosene when it leaves its Mossel Bay manufacturing warehouse, this would mean, under normal circumstances, the unmarked Kerosene that was destined to be delivered to the oil companies.

[7] Secondly, by law the oil companies who purchased unmarked kerosene from Petrosa were required to license the warehouses in which they marked the kerosene. Section 19A(3) of the Act provides as follows:

"(3)(a) When this section comes into operation the exercisable or fuel levy goods concerned shall not be removed to any customs and excise warehouse unless such warehouse is another such manufacturing warehouse or a storage warehouse licensed for any special or limited purpose as contemplated in subsection (1)."

[8] In the meantime subsection (1) of section 19A of the Act provides that:

"Notwithstanding anything to the contrary contained in this Act the Commissioner may by rule, in respect of any excisable goods specified in Section A of Part 2 of Schedule No. I or fuel levy goods or any class or kind of such goods manufactured in the Republic –

(i) determine whether any such goods specified in such rule shall be entered or deemed to have been entered for home consumption at the time of issuing any prescribed document and removal from, or on receipt in, or at any time determined in such Rule in respect of –

(aa) any customs and excise manufacturing warehouse;

(bb) any customs and excise manufacturing warehouse to which the goods have been removed from any other such warehouse after a particular stage of manufacture during the process of manufacture of any such goods; or

(cc) any customs and excise storage warehouse licensed by the Commissioner for any special or limited purpose to which such goods are allowed to be removed by the Commissioner after manufacture;

(ii) restrict the licensing of customs and excise storage warehouse in respect of such goods or any class or kind of such goods to such persons and for such special or limited purposes as may be specified in such rule;

(iii) prescribe –

(aa) the time and manner of payment of duty in respect of goods so entered or deemed to have been so entered;

(bb) any deferment of payment of duty, the conditions on which such deferment is granted and the period, or differentiated periods of deferment, in respect of any licencee or any class or kind of such goods;

(cc) the accounts to be kept and the accounts and other documents to be submitted with such payments;

(dd) any procedures or requirements or documents relating to the entry and removal of goods from any and to such customs and excise warehouses or for expert or for use under rebate of duty;

(ee) all other matters which are required or permitted in terms of this section to be prescribed by the rule;

(ff) any other matter which the Commissioner may consider necessary and useful to achieve the effective and efficient administration of this section."

This s 19A was inserted by s 40 of Act 19 of 2001 and amended by s 64 of Act 30 of 2002. It came into operation on 2 April 2003.

[9] From 29 September 2005 all kerosene, whether marked or not, that was removed for marking, was subject to duty, in other words, all kerosene that Petrosa had removed from its licensed manufacturing warehouse to the oil companies, was subject to duty. If the oil companies subsequently marked the unmarked kerosene in their special storage warehouses which would have been licensed by the Commissioner in terms of the provisions of Rule 19(A)(4), Petrosa was supposed to be able to get a refund of the duties paid. Sections 75 and 76 of the Act deal with refunds and set-off of duty paid. I will deal with the said sections later in this judgment.

[10] In introducing the new system, the Commissioner's intention was to improve the administration and control over excise duty and fuel levy collections so that excise duty became payable at the point of production instead of at the bonded warehouses.

Accordingly, the purpose of the new amendment was not so much to generate revenue for the fiscus as it was to reduce misuse of kerosene as a fuel additive or extent.

[11] In accordance with the new system or 'das', from October 2005 to September 2008, in other words, for a period of three years, Petrosa paid the Commissioner, in respect of duties, a sum of R229,905,821.15.

[12] On 5 September 2008 following an exchange of numerous correspondence and numerous discussions, Petrosa formally requested the Commissioner to:

12.1 licence the warehouses; and,

12.2 refund it the said sum of R229,905,821.15.

The said letter dated 5 September 2008 stated as follows:

"Petrosa is requesting:

(a) retrospective licensing of oil companies SOS warehouses to the inception of DAS, namely 2 April 2003 to allow for use of the acquittal mechanism retrospectively, alternatively

(b) rule that kerosene marked by oil companies historically should be treated as marked in a licensed SOS warehouse and refund the amount of R229,905,828.15 in respect of DAS on unmarked kerosene."

[13] At that stage the oil companies had complied with the provisions of section 19A(3)(a) of the Act in that they had licensed their warehouses in 2007.

[14] The Respondent refuses to refund the said amount of R229,905,821.15 to Petrosa on the following grounds that:

14.1 the Act does not provide for retrospective registration of special storage warehouses;

14.2 there is no proof that the kerosene supplied by Petrosa to the oil companies during the period 1 April 2003 to the beginning of 2008 was marked by such oil companies, or, if it was marked, that it was marked properly as prescribed by the Act;

14.3 that if the kerosene was properly marked by the oil companies, the marking was, contrary to the Act, undertaken in unlicensed premises and therefore done illegally;

14.4 that there was no application for retrospective licensing of the special storage warehouses;

14.5 that there is no application before this Court, or any other Court for that matter, for the retrospective licensing of the special storage warehouses;

14.6 no proof that the removed kerosene was properly received and dealt with by the petroleum companies has ever been furnished to the Commissioner;

14.7 that Petrosa has never applied for a refund of the amount of R229,905,821.15, or for that matter, for the refund of any duties paid. In conclusion the Commissioner steadfastly contends that as the warehouses were not licensed in terms of the Act, Petrosa was not entitled to any refund.

THE COMPLAINTS BY PETROSA

[15] Petrosa now complains that:

15.1 the Commissioner was, at all material times, aware that the oil companies were marking kerosene in unlicensed warehouses and that, for that reason, it was unable to recover duties paid;

15.2 the oil companies did not license their warehouses until in 2007 when the Commissioner threatened to impose penalties on them; and

15.3 it was only in 2008 that the oil companies had complied with the requirements of section 19 of the Act that the Commissioner, only then, introduced an appropriate administrative process in terms of which Petrosa could recover the duties it paid from thereon;

15.4 Petrosa contends furthermore that to ensure that the oil companies licensed their premises, the Commissioner could and should have introduced the appropriate rules and guidelines before implementing the new system. Secondly, the Commissioner should and could have imposed penalties on the oil companies for non-compliance or applied the penal sanctions at its disposal.

[16] Petrosa complains furthermore that although it made a formal request for the refund of the said amount on 5 September 2008, the Commissioner took more than five years just to respond. On 11 December 2014, the Commissioner responded to Petrosa's 5 September 2008 formal request for refund by informing Petrosa that he did not have the statutory power to license the oil companies' warehouses retrospectively and for that reason would not refund the said duties. In particular this decision, although attributed to the Commissioner, was taken by a certain Anand Kelowan, the Executive Compliance employed by the Commissioner in his Compliance Division. He is, accordingly, an officer who has been delegated by the Commissioner in terms of the Act.

[17] The issue that this Court is called upon to decide in this matter is, according to the Commissioner, limited to whether the decision not to licence the special storage warehouses retrospectively fell foul of the provisions of the Promotion of Administrative Justice Act 3 of 2002 ("PAJA"). It is not, as contended by Petrosa, a review of the Commission's alleged unlawful administration.

THE POINTS *IN LIMINE*

[18] The Commissioner raised the following three points *in limine*:

18.1 Petrosa's application is premature as Petrosa has failed to first exhaust the available internal remedies;

18.2 the Commissioner's decision, does not constitute administrative action as contemplated by PAJA and is therefore not reviewable;

18.3 by virtue of the provisions of sections 19A, 21, 60, 75, 76 and 76B of the Act and/or rules thereto, and an adjudication of the merits alone or the setting aside of the decision would not entitle Petrosa to payment of the refund or any other present relief.

THE FIRST POINT *IN LIMINE*

[19] Failure to exhaust internal remedies

Section 7(2)(a) of PAJA provides as follows:

"Subject to paragraph (c), no Court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has been exhausted."

It was argued by counsel for the Commissioner that the Act contains internal remedies in the form of internal administrative appeal and/or alternative dispute resolution processes. According to him these are provided for in Part 'A' and 'B' of Chapter XA of the Act. Chapter XA deals with Administrative Appeal: Alternative Dispute Resolutions and Dispute Settlement.

Section 77B(1) of Chapter XA provides as follows:

"Any person who may institute judicial proceedings in respect of any decision by an officer may, before or as an alternative to instituting such proceedings lodge an appeal –

(a) to the Commissioner against a decision of an officer; or

(b) to the appeal committee contemplated in this Part in respect of those matters and decisions of officers that the appeal committee is authorised by rule to consider and decide upon or make recommendations to the Commissioner.

(2) If dissatisfied with the final decision as contemplated in (a) or (b) and the Commissioner is of the opinion that the matter is appropriate, such a person may make use of the alternative dispute procedure contemplated in section 77I."

Relying on the case of **Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others 2014 (5) SA 138 CC**, in which the Constitutional Court found non-compliance with the provisions of section 7(2) of PAJA fatal to any review proceedings instituted, [see in this regard page 171, paras 115, 116, 117 and page 118 paragraph 119], counsel for the Commissioner argued furthermore that Petrosa instituted this application without first having exhausted the remedies available to it in terms of the Act and furthermore that no explanation for such failure has been provided. Finally, it was submitted that because of the failure to observe the provisions of section 7(2) of PAJA, this application was brought premature and it should not be entertained.

[20] On the other hand, counsel for Petrosa argued firstly that Petrosa's non-compliance with the internal remedies is a factual issue; and that it is trite that in motion proceedings an allegation of fact can only be made through admissible evidence contained in the affidavits filed. In this regard he relied on **Swissborough Diamond Mines Pty Ltd and Others v Government of the Republic of South Africa and Others 1999(2) SA 279 J at 323 F to 324 H.** Secondly, so he developed his argument, the Commissioner did not raise the alleged non-compliance with the provisions of s 7(2) of PAJA in his answering affidavit. To make matters

worse or to compound issues, the Commissioner did not even identify the relevant provisions of the Act.

[21] In terms of section 7(2)(4) of PAJA the Court may review applications in exceptional circumstances where internal remedies have not been followed. Petrosa complains that the Commissioner did not raise the issue of non-compliance with the provisions of PAJA in his answering affidavit. The result of such a failure is that Petrosa was unable to deal with it in its replying affidavit. Had the Commissioner raised the issue of non-compliance in the papers, especially in its answering affidavit, Petrosa would have had the opportunity of setting out exceptional circumstances in order to comply with the provisions of s 7(2)(4). I agree with him.

[22] It was argued by counsel for Petrosa that as the said issue of non-compliance was not raised in the papers the Commissioner should not have been permitted to raise it in the heads of argument.

[23] Thirdly, Part 'A' of 'B' of chapter XA of the Customs and Excise Act do not constitute the internal remedies envisaged in section 7(2)(A) of PAJA, so it was argued by counsel for Petrosa. For instance Part 'A' provides as follows:

"Any person who may institute judicial proceedings in respect of any decision by an officer may, before, or as an alternative to instituting such proceedings, launch an appeal ..."

While Part 'B' provides for alternative dispute resolution procedure in terms of which the Commissioner and such a person may resolve disputes, I agree with counsel for Petrosa that the provisions of Part A and B of Chapter XA of the Act do not constitute the kind of internal remedies envisaged by the provisions of s 7(2)(4) of PAJA. The material difference

complaint arising from a rule has a choice. Relying again on the decision of the SCA in DDP Valuers Pty Ltd v Madibeng Local Municipality 2015 JDR 2093 SCA counsel for Petrosa submitted that the fact that an internal remedy is not obligatory was sufficient for the SCA to find that a party do not have to exhaust it before bringing administrative action in terms of PAJA. In reaching the said conclusion the Court confirmed the correctness of the decision of Plasket JA in ESDA Properties Pty Ltd v Amathole District Municipality 2014 JDR 1878 (ECG) where he had the following to say:

"In my view, it was, for two reasons, not obligatory for ESDA to have first utilised this mechanism before applying for the review of the award of the tender.

... The second reason is that s 109(6) provides in express terms that a party has a choice of either using the dispute resolution mechanism or approaching a Court. In other words, it does not operate to prevent a party from approaching a Court "at any time"."

[24] I therefore find that the contention that Petrosa did not follow the provisions of s 7(2) of PAJA has no merit.

[25] The contention that the decision of the Commissioner is not administrative action and therefore not reviewable

In respect of this point *in limine* the Commissioner argued that his decision to refuse to refund the said amount was not administrative action. The Commissioner's argument is, according to him, predicated on the belief that the said decision did not, and could not, have affected Petrosa's rights inasmuch as no evidence exists that the oil companies would have applied for retrospective licensing for the special storage warehouses and furthermore, Petrosa would be prevented by time from applying for a refund.

[26] In contending that the Commissioner's decision to refuse to refund the duties paid constituted administrative action, Petrosa relied for support, on Capstone 556 Pty Ltd and Another v Commissioner, South African Revenue Service and Another 2011(6) SA 65 WCC and also Mapcash Trading Ltd v Commissioner, South African Revenue Services and Another 2001(1) SA 1109 CC. In Mapcash, the Court was concerned with section 36(1) of the Value Added Tax Act 89 of 1991, which provided that upon assessment by the Commissioner, and notwithstanding the noting of "appeal", a taxpayer was obliged to pay the assessed tax immediately, possible adjustment and refunds being left for later dispute and determination. It was held by the Court that although section 36(1) of the Value Added Tax Act did not allow automatic suspension of the obligation to pay, it expressly gave a discretion to the Commissioner to suspend such an obligation. It was held, furthermore, that when the Commissioner exercised such discretionary powers conferred upon him, such exercise of discretion given constituted administrative action which was reviewable in terms of the principles of administrative law. Accordingly, the Commissioner had to justify his decision, in the instant case, the decision to refuse to refund the duties paid to demonstrate that this decision was rational.

[27] The Commissioner, in deciding not to refund Petrosa the said sum of R229,905,821.15, is exercising public power in that he is implementing legislation. As such the exercise of such public power constitutes administrative action that falls within the administrative justice clause of the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution"). Such administrative action is therefore reviewable under the provisions of PAJA. PAJA defines administrative action as:

"Any decision taken or any failure to take a decision by –

(a) an organ of state when –

(a) an organ of state when –

(i) ...

(ii) exercising a public power or performing a public function in terms of any legislation."

[28] I agree with counsel for Petrosa that any decision by the Commissioner in the exercise of power founded on the provisions of the Act constitutes administrative action and is accordingly subject to judicial review in terms of the provisions of PAJA. Therefore, the Commissioner's decision to refuse to refund the duties constitutes administrative action. The Commissioner's decision is therefore susceptible to be reviewed in terms of PAJA. The point *in limine* that the decision is not administrative action is therefore unmeritorious.

HOW THE CUSTOMS AND EXCISE ACT OPERATES

[29] The decision by the Commissioner to refuse to refund the said sum of R229,905,821.15 must be seen against the following background.

[30] I agree with the Respondent's counsel that the system created by the Act is, from the outset, one of self-assessment and that it operates in the same fashion as the Income Tax Act 58 of 1962 ("the Tax Act") and the Value Added Tax Act 89 of 1991 ("the VAT Act"). The Act imposes no duty on the Commissioner to ensure that all those who operate or conduct their activities within the sphere of the Act apply for registration and licensing in terms of the Act.

[31] There is imposed upon any person or entity involved in the commercial activity that triggers or attracts the application of any tax legislation in the Republic of South Africa a legal duty to comply with the provisions of any such tax legislation and, in the instant case, the Act. By

the said compliance is envisaged the registration and licensing in terms of the Act, followed at a later stage by rendering returns to the Commissioner and paying the relevant taxes, duties and levies based on the assessment and calculations made by the taxpayer or vendor or importer or manufacturer, whichever is applicable. There is imposed on such a taxpayer or manufacturer a duty to submit or render correct returns and to pay the correct duty and tax and to keep the prescribed and other records supporting the veracity of returns lodged by the claimant safe.

[32] Counsel for Petrosa argued that the Commissioner's analogy to a taxpayer's compliance with its obligations under the Income Tax Act or the VAT Act is improbable in the circumstances of this matter. He contended furthermore that Petrosa has complied with all its obligations under the Act and that it is the oil companies that have failed to comply with their obligations. The statement by Petrosa that it has complied with its obligations under the Act is not correct. For instance, the Act imposed a duty on Petrosa not to deliver kerosene, unmarked or marked, to the oil companies unless such oil companies were properly licensed in terms of the Act. Petrosa did not comply with this obligation. In addition, he contended furthermore that it was the Commissioner who failed to administer the Act so as to ensure that Petrosa was not levied with additional recoverable duties. I disagree with Petrosa's contention that the Respondent failed to administer the Act. I agree with counsel for the Respondent that there is no provision in the Act that places a legal duty on the Commissioner to ensure that participants are licensed. There is no provision in the Act in terms of which the Commissioner can lawfully compel the oil companies to comply with the requirements and prescripts of the Act. I agree with the observation made by counsel for the Respondent that if the Commissioner was legally compelled to ensure compliance with the provisions of the Act in the manner envisaged by Petrosa, the system would practically

cease to be one of self- governing and self-assessing. Accordingly the statement by Petrosa that the Commissioner failed to administer the Act so as to ensure that it was not levied with additional recoverable duties is, in my view, flawed.

[33] Independently of any intervention by the Commissioner, there is a concomitant duty on the taxpayer to comply, without exception, with all the provisions of the Act. Accordingly the taxpayer's rights and obligations in terms of the Act, are determined more by its compliance with the Act and very little by any conduct on the part of the Commisisoner.

[34] I now turn to examining the conduct of Petrosa and the oil companies to establish whether such conduct complied with the requirements of the provisions of the Act. This exercise must be seen against the point repeatedly made by Petrosa that the reason for the introduction of the "das" system was not so much to generate revenue as it was to exercise proper control. In my view, the interpretation placed on the "das" system by Petrosa is somewhat flawed and shows clearly a lack of insight into the subrogate system.

[35] Having manufactured kerosene and having entered the removal thereof to another warehouse as is expected and prescribed by the provisions of the Act, duty in respect thereof becomes payable. According to the Act duty remains payable until proof thereof is submitted to the Commissioner that the kerosene has been dealt with fully in accordance with the provisions of the Act. The whole purpose of the requirement that the duty be paid upfront pending compliance and proof of compliance with the relevant rebate item in respect of the kerosene is to incentivize the parties to ensure compliance with the relevant item because if they did not, they would not be refunded the duty. The removal of kerosene from Petrosa's manufacturing warehouse to the oil companies' unlicensed warehouses was in

breach of the provisions of section 19A(3) and 37A(1)(c) of the Act and therefore constituted a serious offence in terms of the provisions of section 80 of the Act.

[36] This self-regulating system is structured in such a way that it compels the taxpayer whether he likes it or not to comply with its requirements. It achieves that goal by having in place certain consequences that will flow automatically from any failure to comply.

[37] In the circumstances in the customs and excise field, the provisions that provide for payment of duty, are rebates and refunds which typify the operation of "das" are the quintessential examples. The mechanism that constitutes the keystone of the "das" system while at the same time it ensures compliance therewith operates as follows:

37.1 payment of duty or security for such payment is to be made upfront, in other words, on importation of the goods or in case of the manufactured goods when such goods are removed from for home consumption from the warehouse. This is of paramount importance in this application. It will be shown later why this is of paramount importance;

37.2 only once both the substantive and procedural prescripts and requirements of the relevant rebate item and the provisions governing the payment of refunds have been complied with does the participant become entitled to the refund of duty. This repayment may take the form of an actual refund or by crediting of the security held by the Commissioner, or, in the event of a manufacturer of excisable goods, by allowing the manufacturer to apply set-off in its monthly excise account.

[38] I now turn to the Respondent's reasons for refusing to refund Petrosa the amount of duties paid by Petrosa:

38.1 No application for the retrospective licensing of the special storage warehouse has been made.

One of the major reasons proffered by the Commissioner for refusing to refund the said amount was that no petroleum company submitted to him any application for retrospective licensing of its SOS. According to the Commissioner a licence for an SOS can only be issued to an applicant for such a licence following a formal application.

38.2 At the pain of repetition section 19A(3)(a) of the Act provides as follows:

"(3)(a) When this section comes into operation the excisable or fuel levy goods concerned shall not be removed to any customs and excise warehouse unless such warehouse is another such manufacturing warehouse or a storage warehouse licensed for any special or limited purpose as contemplated in subsection (1)."

For purposes of this judgment, section 19(A)(3)(a) was designed to serve two purposes. The first objective was to prohibit, by the use of the phrase "shall not be removed", the removal of such excisable or fuel levy goods from any customs warehouse to another customs warehouse or manufacturing warehouse; and secondly, to determine that the storage warehouse to which the excisable or fuel levy goods concerned are removed must be licensed.

38.3 In terms of the provisions of section 19(1)(a) kerosene, which is the subject matter of the current application, was such excisable goods manufactured in the Republic.

38.4 The application for a special storage warehouse has to be applied for in terms of Rule 19(A).02(a) and (b) which provides as follows:

"(a) A person applying for a licence or renewal of a licence for a customs and excise manufacturing warehouse or a customs and excise special storage warehouse must –

(i) apply on form DA185 and the appropriate annexures thereto and compliance with all the requirements specified therein, in these rules, any relevant section or item or Schedule No. 8 governing such licences, any requirements specified in Schedule No. 6 and any additional requirements that may be determined by the Commissioner;

(ii) submit with the application the completed agreement in accordance with the pro-forma agreement specified in these rules;

(iii) before a licence is issued furnish the security the Commissioner may require."

[39] The document called "Excise Procedure For The Oil Industry", Annexure 'AK1' to the papers, prescribes the procedure for licensing of warehouses as follows in clause 7.2.3:

"1. To licence a Customs and Excise Warehouse, an application form DA185 obtainable from the Controller or from SARS' Website (www.sars.gov.za) must be completed and submitted with the applicable supporting documents. After the premises are approved, a surety bond has been furnished and the relevant licence (sic) fee has been paid, the warehouse licence (sic) will be issued. A unique warehouse number will be allocated."

The provisions of Rule 19(A).02 (a) and (b) and Clause 7.2.3 of the Excise Procedure Of The Oil Industry, Annexure 'AK1' speak for themselves and do not need any further explanation. It is not Petrosa's case that anyone of the oil companies complied with the aforegoing requirements.

[40] In the first place, since 2 April 2003 Petrosa and oil companies knew about the provisions of section 19A(3)(a) and (b) of the Act; Rule 19A.02 (a) and (b); Clause 7.2.3 of the "Excise Procedure For The Oil Industry and the provisions of sections 60 and 80 of the Act. Petrosa knew, and was aware, at all material times that the said section 19A(3)(a) of the Act prohibited the removal of unmarked kerosene from its manufacturing licensed warehouse to the oil companies' warehouses unless such warehouses were licensed for special or limited purpose, to mark the previously unmarked kerosene. Petrosa was therefore aware that by removing kerosene from its premises to the oil companies' unlicensed special storage warehouses it was acting in complete disregard of the provisions of the said section 19A(3)(a) and (b) and, secondly, that by doing so it was committing an offence as envisaged by the provisions of section 80 of the Act. Section 60 of the Act also contains a prohibition. It provides that:

"60(1)(a) no person shall perform any act or be in possession of or use anything in respect of which a licence is prescribed in Schedule No. 8 unless such person has obtained the appropriate licence which shall not be issued unless the prescribed licence fee has been paid.

(b) The activities for which a licence is required, the persons who are required to licence, the procedures, conditions, which may include the furnishing of security and any other requirement relating to such licence, if not prescribed as law in this Act, may be prescribed in the Notes to the item in which such licence is specified in Schedule No. 8 and any rules made by the Commissioner under the provisions of this Act."

[41] The oil companies knew that unless properly licensed by the Commissioner they were prohibited from receiving unmarked kerosene. Furthermore, they knew that unless properly

licensed they were by law prohibited from marking kerosene in their unlicensed warehouses. Notwithstanding that knowledge that it was a criminal offence to do so they did so. Unfortunately the oil companies are not before this Court nor are they part of this application.

[42] Secondly, and more importantly, the request contained in the letter from Petrosa to the Commissioner dated 5 September 2008 or Annexure 'FA4' did not in any manner whatsoever constitute an application by the oil companies or on their behalf as contemplated in s. 19A(3)(a), Rule 19A.02 (a) and (b) or Clause 7.2.3 of the Excise Procedure For The Oil Industry. Such letter failed, if it was intended to serve as an application, to comply with the requirements both of Rule 19A.02 (a) and (b) or the said Clause 7.2.3. Accordingly the Commissioner was entitled to treat such a request as no application.

[43] Thirdly, no proof existed that the said request was supported by the oil companies or that Petrosa was acting for any oil company. Quite clearly the purpose of such a request was not so much to assist the oil companies to be properly licensed as it was to facilitate the refund by the Commissioner to Petrosa of the said sum of R229,905,828.15. No duty lay on the Commissioner to consider the request favourably. Unsupported as it was by any of the oil companies, on whose behalf Petrosa purported to write to the Commissioner, the Commissioner was correct in not according it any earnest consideration. Petrosa repeated the same request, this time as an allegation in both the founding and replying affidavits. In my view, the said allegations bear no weight. The oil companies knew the law or should have known it. They should have made formal applications to the Commissioner to have their special storage warehouses properly licensed. Petrosa should have refused to supply the oil companies with kerosene and thereby forced them to apply for the necessary licence. Petrosa was the only manufacturer that supplied them with kerosene or at least most of

them with kerosene. The oil companies would have undoubtedly applied for their licensing with the minimum delay. In the alternative, Petrosa should have made arrangements with the Commissioner so that he could lawfully supply the oil companies on the strength of such arrangements, with kerosene. Still Petrosa could have entered into an agreement with the oil companies in terms of which they would refund it the duties in the event of SARS refusing to refund it the duties paid. In my view, it was unnecessary and for that matter illegal, for Petrosa to openly flaunt the law, to take a risk on behalf of the oil companies, in a hope that it would recoup from the Commissioner the amount of duties paid.

PETROSA REQUESTED THE COMMISSIONER TO RETROSPECTIVELY LICENSE THE OIL COMPANIES' SOS's

[44] It was contended by Petrosa that it requested the licensing of the warehouses at the SAPIA meetings during 2006 and 2007 in a letter dated 5 September 2005. The idea that the Commissioner could retrospectively license the oil companies was, for the following reasons, misplaced:

44.1 Petrosa took up cudgels on behalf of the oil companies. But Petrosa did not indicate that it had any mandate from the oil companies to request the Commissioner to retrospectively license their SOS's;

44.2 there was no application by the oil companies themselves to license their SOS's;

44.3 there was no application by the oil companies for the retrospective licensing of the SOS's; and

44.4 Petrosa's letter dated 5 September did not constitute an application to license the oil companies' SOS's nor did it constitute an application for the retrospective licensing of the SOS's;

44.5 the Act did not empower the Commissioner to retrospectively license the oil companies.

Petrosa requested the Commissioner to license the oil companies' special storage warehouses retrospectively. This request was contained in Annexure 'FA4'. In response the Commissioner requested Petrosa in a letter dated 29 June 2010, Annexure 'FA6', to the papers, to specify the sections and or rules of the Act which authorise the Commissioner to retrospectively issue special Customs and Excise storage warehouse licences.

[45] In their letter dated 8 September 2010, Annexure 'FA10' to the founding affidavit, Petrosa's attorneys set out a treatise why the Oil Companies should be licensed retrospectively.

[46] The attorney's disquisition about whether or not the Commissioner had the necessary power to retrospectively license the oil companies' SOS's was carried over from their letter dated 8 September 2010 to Petrosa's founding affidavit and argued by counsel for Petrosa.

[47] The argument about retrospective licensing of the oil companies' warehouses was carried in the replying affidavit by Ms Futter as well. According to the said affidavit, the position of Petrosa was that the Act does not preclude retrospective licensing of the oil companies' warehouses. In her replying affidavit, Ms Futter advised that the phrases *"retrospectively"* and *"with retrospective effect"* used in the notice of motion and the founding affidavit are not to be afforded their ordinary meaning. According to Petrosa, *"the said phrases need to be contextualised ... in the circumstances of the application."* The question, according to Petrosa, is not so much whether the Commissioner should now license the oil companies' warehouses retrospectively but whether the Commissioner should have enforced the licensing of the warehouses in 2003 at the inception of its "das" system.

[48] It will be recalled that in her replying affidavit Ms Futter submitted as follows:

"It is respectively submitted that he was negligent in this respect and that his failure constitutes administrative action as contemplated by the Promotion of the Administrative Justice Act 3 of 2000 which, as set out in my founding affidavit, is reviewable by this Court."

The perceived Commissioner's alleged failure to act appropriately during the period commencing in 2003 and ending in 2005 constitutes the centrepiece of Petrosa's case. It was also argued vigorously by Petrosa's counsel. Petrosa's case is therefore that the Commissioner should have enforced the licensing of warehouses in 2003 at the inception of the "das" system. For the following reasons, Petrosa's interpretation cannot be sustained. Firstly, I agree with the argument put forward by counsel for the Commissioner that contextualisation of the evidence does not, and cannot, have any bearing on the Commissioner's impugned decision, its impact and the consequences of it to be set aside. Secondly, contextualisation of the evidence as espoused by Petrosa necessitates the review and setting aside of the Commissioner's alleged unlawful conduct in 2003 and not of the decision constituting the subject matter of the application. Thirdly, if Petrosa was unhappy with the Commissioner's alleged conduct in 2003, it should have taken appropriate steps to challenge the Commissioner's conduct within a reasonable time. In this respect the Respondent's counsel was fortified by 3M South Africa v CSAR (272/09) [2010] ZA SCA 20 (23 March 2010). The words of the relevant statute are clear and unambiguous. They do not need any interpretation, especially of the extent and the nature contended for by Petrosa. I have pointed out earlier that the Act did not oblige the Commissioner to enforce the provisions of the Act. Fourthly, as I already have pointed out somewhere *supra*, there is no provision in the Act that provides for the retrospective licensing of the oil companies' warehouses, even by any stretch of the meaning of *"retrospectivity."* The Act makes no

exceptions. It accommodates no other interpretation than that retrospective licensing is not authorised.

[49] In support of its proposition that the Commissioner has the power and authority to license the oil companies' warehouses, Petrosa relied on the provisions of section 2(1) of the Act. This section provides as follows:

"1. The Commissioner shall, subject to the control of the Minister, be charged with administration of this Act, including the interpretation of the Schedules thereto."

He relied furthermore on the provisions of section 2(1A) which provides as follows:

"The Commissioner may, for purposes of the administration of this Act, make such arrangements or enter into such arrangements with any railway, port, airline or postal authority, depot operator or container operator or any person or authority as he may deem necessary."

[50] Counsel for the Commissioner argued that the authorisation contained in section 2(1A) quite evidently refers to entering into agreements and arrangements with persons and authorities that would assist the Commissioner in his administration of the Act. He developed his argument and contended that the authorisation does not refer to entering into arrangements and agreements with persons or entities such as Petrosa and the oil companies who participate in one or more of the activities administered by the Commissioner. I disagree with him.

[51] The Commissioner concluded that he did not have any power to licence the oil companies' warehouses retrospectively because no provision in the Act authorised the Commissioner to do so. Nothing in law supports the idea of retrospective licensing. More importantly the Act

does not provide for the retrospective registration and licensing of special storage houses. In this regard I agree with the argument by Petrosa that the Act empowers the Commissioner to make some arrangements as he deems necessary for the purpose of administering the Act.

[52] But, however, I agree only to that extent with Petrosa. In this regard I think that the real issue, calling for a decision and the issue more appropriate is whether, except that the Commissioner has the power to make such arrangements as he deems necessary for the purpose of administering the Act, it was competent for him to transcend the limits of the authority conferred upon him. If the Commissioner had done so he would have acted ultravires because he would not have done what he was obliged to do. He would have travelled outside the limits of the statutes. See in this regard **Britten and Others v Pope 1916 AD at pp 158 and 159** or he would have disregarded the express provisions of the statutes. See in this regard **Shidiack v Union Government 1912 AD 642.**

[53] The Commissioner's powers to make such arrangements necessary for the purposes of administration of the Act do not transfer to him the powers to make arrangements which are not allowed by the Act. The power that the Commissioner has may be exercised subject to the provisions of the Act. The fact that the Commissioner has the power to make proper arrangements does not empower the Commissioner to make arrangements for the retrospective registration of special warehouses. This is so because the Act does not provide for retrospective registration of SOS.

[54] For instance, in Die Uitleg Van Wette 5de Uitgawe LC Steyn p. 206 states as follows:

"Dit spreek vanself dat 'n pesoon of liggaam wat sy bevoegdhede aan 'n Wet ontleen, niks geldigs kan verrig waartoe hy nie by daardie Wet, uitdruklik of by wyse van verswee bepaling, gemagtig is nie, en dat hy enige beperkings wat in daardie wet voorgeskryf word, uitdruklik of by wyse van verswee bepaling, in ag sal moet neem."

[55] Accordingly, the argument by Petrosa that the Act may be interpreted in such a way as to empower the Commissioner to make its provisions to apply retrospectively is, in my view, flawed, and so is the argument that the Commissioner may use his powers conferred upon him by the statutes for a limited purpose to make such agreements as he deems necessary for the purpose of administering the Act to make arrangements for retrospective registration of special storage houses.

NO PROOF THAT KEROSENE PROPERTLY RECEIVED AND DEALT WITH BY THE PETROLEUM COMPANIES

[56] It is the Commissioner's case that no proof exists that the kerosene supplied by Petrosa to the oil companies in the period commencing on 1 April 2003 and ending at the commencement of 2008 was marked by the relevant petroleum companies or, if it was so marked, that it was properly marked as prescribed by the Act. Petrosa's argument was, that this was not part of the Commissioner's decision on 11 December 2014. Petrosa concedes that it does not know whether the companies did mark the kerosene and furthermore, if it was marked, whether it was properly marked. In conclusion Petrosa submitted that the Commissioner should have presented evidence in support of its contention as this information would have proved the oil companies' monthly and quantity DA160 and DA159 forms and in the declaration of VAT and in their monthly VAT201 forms. This point, in my view, has no merit because the Commissioner has already testified that it has been

established from the oil companies involved that they did not keep the records which in terms of the Act a licencee undertaking the marking of kerosene is obliged to keep, which records would have been essential for Petrosa to proof compliance with the Act. That the oil companies kept no such records as explained supra is not in dispute.

NEITHER PETROSA NOR THE PETROLEUM COMPANIES HAVE EVER APPLIED FORMALLY FOR A REFUND

[57] This is one of the reasons the Commissioner has refused to refund the sum of R229,905,821.15. In view of the fact that the oil companies are not involved in this application and this application is not about them, it is otiose for this Court to deal with their failure to apply for a refund. I will therefore not refer anymore to that aspect. It is Petrosa's failure to formally apply for a refund that is in issue. In the light of the admission made by Petrosa in its replying affidavit that:

"The Applicant did not request the refund in September 2008 but could not formally do so in its excise account (EA160) until such time as the warehouses were licensed", it is not necessary to be delayed any further by this aspect. Refunds in terms of the Act are dealt with by sections 75 and 76. Section 76(4) provides that:

"No application for a refund or a payment in terms of this section shall be considered by the Commissioner unless it is received by the controller duly completed in the form as may be prescribed by the rule and supported by the necessary documents and other evidence to prove that such refund or payment is due under the section –

(a) within a period of two years from the date on which the charge to which the application relates was paid; or

(b) in any other case within the relevant period specified in section 76B."

It is accordingly clear that in the absence of any application; whether in terms of section 75 or section 76 the Commissioner may not lawfully pay any refund.

[58] On any single ground of the grounds raised by the Commissioner against the refund of the said sum of R229,905,821.15, this application for review was bound to fail.

Accordingly, the application for review is hereby dismissed, with costs, which costs shall include the costs consequent upon the employment of two counsel, wherever applicable.

P.M. MABUSE
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant:	*Adv. AP Joubert (SC)* *Adv. GD Wickins*
Instructed by:	*Norton Rose Fulbright South Africa Inc.* *c/o Macintosh, Cross & Farquharson*
Counsel for the Respondent:	*Adv. A Meyer (SC)* *Adv. W Mothibe*
Instructed by:	*The State Attorney*
Date Heard:	*18-19 September 2017 & 27 March 2018*
Date of Judgment:	*6 November 2018*