



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 68281/2016

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE: 30 NOVEMBER 2023
SIGNATURE

In the matter between:

CANYON RESOURCES (PTY) LTD

Applicant

and

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

Respondent

Summary: *Customs and Excise Act 91 of 1994 – rebate item 670.04 – “Diesel refund” – application for setting aside determination made by SARS which had been referred in part for the hearing of oral evidence – evidence presented by the user insufficient to justify a*

finding that the determination whereby refund claims were disallowed should be set aside

ORDER

1. The applicant's application for the setting aside and substitution of the determination by the Commissioner for the South African Revenue Service regarding the diesel refunds claimed by the applicant under rebate item 670.04 provided for in the Customs and Excise Act no. 91 of 1964 in respect of the third assessment period of the applicant's contractor Close-up as well as the claims in respect of the applicant's contractors Alcedopro and Trollope, is dismissed and the determination is upheld.
2. The applicant is ordered to pay the costs of the application including the referral to oral evidence and the hearing thereof, including the costs of two counsel one of whom is a senior.

J U D G M E N T

This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

Introduction

[1] The applicant conducts open cast coal mining operations for which purpose it engages contractors. The applicant had submitted claims for diesel refunds under rebate item 670.04 provided for the Customs and Excise Act no. 91 of 1964 (“*the Act*”). The Commissioner for the South African Revenue Services (“*SARS*”) had disallowed refunds in excess of some R15 million. After a hearing of the applicant’s application for a review and setting aside of that disallowance, a part of the claim had been referred for the hearing of oral evidence. A determination now needs to be made in respect of the evidence presented.

Nature and extent of the referral

[2] The relevant part of the order of this Court made on 27 March 2019 reads as follows:

“14.1 The applicant’s application for the setting aside and substitution of the determination by the Commissioner for the South African Revenue Services (“the Commissioner”) regarding the diesel refunds claimed by the Applicant under rebate item 670.04 provided in the Customs and Excise Act no. 91 of 1964 in respect of the first two assessment periods of the applicant’s contractor Close-up as well as the claims in respect of the applicant’s contractors Ni-Da and Minopex, is dismissed and the determination is upheld.

14.2 The issue of whether the records of the applicant and its contractors Close-up (in respect of the third period) Alcedopro and Trollope demonstrate with sufficient particularity the entitlement to a diesel refund and the extent

thereof in respect of diesel utilised by the said contractors and whether the Commissioner's determination of a refusal thereof should be upheld or not is referred for the hearing of oral evidence on a date to be allocated by the Deputy Judge President".

[3] Shortly before the commencement of the hearing of oral evidence, the applicant abandoned its claims in respect of its contractors Alcedopro and Trollope. Accordingly the matter proceeded on the issue of the adequacy of the records submitted for the satisfaction of the Commissioner in respect of the applicant's contractor Close-up and only respect of the third period of assessment.

The diesel refund

[4] In order to contextualise the issue and to indicate what needs to be submitted to SARS in order to qualify for a diesel refund, it is necessary to briefly restate the statutory provision, although that had already been set out in the main judgment.

[5] In terms of Section 75(1)(e), subject to whatever conditions the Commissioner may impose, a refund of the fuel levy and the Road Accident Fund levy levied on fuel may be granted in certain circumstances.

[6] To qualify for such a refund the "user" of the diesel has to satisfy the requirements set out in rebate item 670.04 included in Part 3 of Schedule 6 of the Act (the rebate item). This item determines under which circumstances users who purchased diesel may become "eligible" for consideration of refunds.

[7] The relevant parts of Note 6 of the rebate item read as follows:

“f(i)(aa) 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 mining as provided in sub-paragraphs (ii) and (iii) to this note ...”.

[8] The mining activities which qualify for a refund have been qualified in the aforementioned sub-paragraphs as being that carried on “... *for own primary production activities in mining*” which includes the following:

- “(aa) The exploration or prospecting for minerals;*
- (bb) the removal of overburden 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 mined 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 mining operations or the 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 the 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 mining operation is carried on, from such a place or a place adjacent to that 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;*
- (ii) *the construction or maintenance of dams, at the place where the mining operations carried on or the storage of uncontaminated water for use in the mining operation;*
- (jj) *...*
- (kk) *the construction or maintenance of buildings, plant or equipment for use in a mining operation;*
- (ll) *the construction or maintenance of power stations or power lines solely used in a mining operation;*
- (mm) *coal stockpiling for the prevention of the spontaneous combustion of coal as part of primary mining operations*
- (nn) *...*

- (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 vehicles, locomotive or other equipment on the mining site or other substances containing minerals for processing and operations for recovery of minerals;*
- (qq) *the service, maintenance or repair of vehicles, plant or equipment by the person who carries on the mining operations solely for use in a mining operation at the place where the mining operation is carried on;*
- (rr) *the service, maintenance or repair of transport works for use in a mining operation, to the extent that that service, maintenance or repair is performed at a 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 such process of 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 mining minerals from the mining sites to the nearest railway siding;*
- (uu) *the following equipment and vehicles are regarded as forming an integral part of a mining process:*

- (A) *agitators;*
- (B) *drilling rigs;*
- (C) *hammer mills;*
- (D) *smelters;*
- (E) *tunelling machines;*
- (F) *specially manufactured underground equipment;*
- (G) *front-end loaders;*
- (H) *excavators;*
- (I) *locomotives for carrying by a rail of minerals or equipment;*
- (V) *rehabilitation required by an environmental management programme or plan approved in terms of the MPRDA but excluding such activities performed beyond the place where mining operations were carried on or after a closure certificate has been issued in the MPRDA.”*

[9] It appears from the above that extensive provision has been made for activities and vehicles and equipment used in primary mining activities. The use of the word “*solely*” denotes a measure of exclusivity. Any operations which relate to ancillary or secondary activities would therefore not qualify as primary mining activities. Such use of diesel would consequently not be

“eligible” for any refund. It has been held that the list referred to above is exhaustive¹.

[10] How does one then indicate to SARS which use of diesel or which operations performed by vehicles and equipment would qualify to be “eligible” for a refund? It is quite apparent that meticulous records must be kept, such as logbooks. The details to be reflected in such logbooks which would satisfy SARS that the refund claimed was for eligible use, is to be found in the following definition thereof, also contained in note 6:

“(xi) ‘Logbooks’ means systematic written tabulated statements with columns in which are regularly entered periodic (hourly, daily, weekly or monthly) records of all activities and occurrences that impact on the validity of refund claims. Logbooks should indicate a full audit trail of distillate fuel for which refunds are claimed, from purchase to use thereof. Storage logbooks should reflect details of distillate fuel purchases, source thereof, how dispersed/disposed and purpose of disposal. Logbooks on distillate fuel used should contain details on source of fuel, date, place and purpose of utilisation, equipment fuelled, eligible or non-eligible operations performed, and records of fuel consumed by any such machine, vehicle, device or system. Logbook entries must be substantiated by the required source documents and appropriate additional information that include manufacture specification of equipment, of operator, intensity of use (e.g. distance, duration, route, speed, rate) and other incidents,

¹ *Graspan Colliery SA (Pty) Ltd v The Commissioner for the South African Revenue Service* (8420/18) [2020] ZAZPPHC 560 (11 September 2020)

facts and observations relevant to the measurement of eligible diesel use”.

[11] Having regard, yet again, the exclusions alluded to in Note 6, it must follow that whatever logbooks are produced, must contain sufficient detail that it can be determined therefrom which of the diesel used was for primary and which for secondary or other operations. This detail requirement has already been determined by our courts as follows: *“There are many instances where a dispensing record would indicate the use of the vehicle at the time of dispensing but that use would change over time and conceivably cover eligible as well as non-eligible activities and the dispensing record in such instances would not be a correct reflection of a diesel usage which occurred”* and *“... the question is not whether it is fair or logical to include only one leg of a trip as being eligible but rather what the scope of the eligible activity is when regard is had to the schedule and in this regard there is no reason to depart from the clear language used by the legislator”*.²

[12] The fact that a claim for diesel refunds should be limited to eligible uses has more recently been confirmed by the Supreme Court of Appeal³ as follows:

“... the diesel rebates were never intended to be a complete reversal of the fuel levies in the mining sector. This explains why note 6(f)(iii) provides for a long and comprehensive list of what is encompassed by own primary production activities in mining. Put differently, the long list of inclusions served to carefully circumscribe the ambit of the activities in respect of which rebate

² *Umbhaba Estates (Pty) Ltd v The Commissioner for the South African Revenue Services (66454/2017) [2021] ZAGPPHC (10 June 2021) para. [76] to [85] as referred to in Mbali Coal (Pty) Ltd v The Commissioner for the South African Revenue Services (81950/2019) [2023] ZAGPPHC1792 (5 October 2023)*

³ *Commissioner for the South African Revenue Services v Glencore Operations (Pty) Ltd (Case no. 462/2020) [2021] ZASCA111 (10 August 2021)*

refunds may be claimed under the relevant item, thereby dispelling any notion that the list of inclusion is open-ended.”

Summary of the evidence presented

[13] The applicant presented the evidence of Mr Soohail Kholvadia who has been employed as a Financial and Accounting Manager and had been involved in the applicant’s Group Logistics since 2018. Before dealing with the evidence presented I need to upfront indicate that this witness was accepted, not only by the Court, but also by SARS as being a candid and honest witness who simply came to Court to present and explain, without hint of deception, the documentation on which the applicant sought to rely.

[14] Mr Kholvadia confirmed that Close-up was a contractor of the applicant who is but one company in a group of companies. Close-up had been contracted to perform primary mining activities relating to the removal of the overburden including topsoil, and was further contracted to perform blasting of the “hard” soil, the excavation and removal of the coal and the stockpiling thereof. “Softs” and “hards” were separately stockpiled. The applicant was not involved in the beneficiation of the coal and a separate company, Canyon Coal (Pty) Ltd saw to the washing, crushing and beneficiation of the coal.

[15] The applicant had been aware of the requirements of the relevant provisions of the Act and the need to properly record the purchase and usage of diesel in order to comply with the various amendments effected from time to time to Note 6. This was also apparent from a memorandum which the witness had produced for the applicant (and which he read out in Court) dated as long ago as 29 March 2017 wherein the statutory requirements focusing on the diesel purchases, delivery and usage and control thereof as well as the “... usage of

such diesel and Canyon Resources' compliance to these regulations ..." were set out.

[16] Mr Kholvadia also explained the working of a flow metre analysis utilised in the compilation of the logbook used by the applicant which metre has a primary reading which denotes the particular volume of diesel used at any given time as well as a second reading which is in fact a cumulative odometer. He explained that the diesel was purchased from a company named Chevron, which diesel was kept in a storage or holding tank and thereafter dispensed, inter alia to a bowser. From the bowser diesel would be dispensed to machines and various vehicles and equipment. A department in the applicant's offices would serve as an oversight unit in order to check the records for purposes of VAT claims. The witness also stated that he had on a number of occasions interacted with SARS and a number of processes were implemented where additional information was required by SARS. The applicant was also advised by a consultant (KPMG) as to the process and information to be contained in its logbooks. The applicant and the witness responded thereto and acted on the advice and assumed that the applicant was compliant.

[17] The first of the documents relied on contained a typed summary of the diesel usage by the applicant for the period October 2012 to May 2013. It consists of a table indicating the total volume of diesel per month used by Close-up in the Hakhano Mine extracted from VAT 201 returns and, as a comparison, "*eligible litres as per contractor logbook*" also per month. On this typed summary there were no variances between the VAT returns and the logbook.

[18] A separate document then listed the summary of diesel purchased for each month in a tabular form indicating the date of purchase, the seller

(Chevron), the invoice number and the number of litres. In the column headed “*Suppliers*”, the names of Alcedopro, Close-up and Nida feature. The purchaser was the applicant (also indicated initially by its previous name Umthombo Resources (Pty) Ltd).

[19] Another one of the documents supplied contained a “*Vehicle list to enter Hakhamo Colliery*”. From what one could gather from the evidence of Mr Kholvadia, this was most probably a list handed to the security at the mine regarding vehicles which leave or enter the mine from time to time. The list indicated a fleet number, a registration number and a description for each vehicle. Last-mentioned included a Toyota Hi-AV, a Toyota Hilux S/C, a Toyota Fortuner, Toyota Landcruisers and Landcruiser station wagons, a Toyota Prado, Mahindra Scorpios, a Mercedes Sprinter and a Toyota Quantum.

[20] The most substantial of the documents relied on, was a series of pages which Mr Kholvadia said was a summary produced from logbooks obtained from the contractor. These were intended to reflect the diesel usage by each machine, vehicle or piece of equipment in order to determine the purpose of the usage and the eligible volumes. An audit process was also performed on this document during which Mr Kholvadia took photographs of the “sources of the diesel”. These included an articulated dump truck (ADT), a diesel bowser and a holding tank. These photographs were also provided to SARS and its officials were invited to visit the mine for observation.

[21] As this was the primary document relied on by the applicant (referred to by it as its “logbook”) and as it was subjected to scrutiny during cross-examination, it is necessary to describe it in full. I shall do so from the first page which starts in October 2012. The first column indicated a date, the second column an allocated registration number and the third column indicated the

source of the diesel under the heading “D/bowser”. Under that column the source was either indicated as H-tank (holding tank) or CCU706, being in fact a diesel bowser. The fourth column indicated a fleet ID to which the diesel had been dispensed, with the vehicle’s description featuring in the fifth column. The sixth column contained brief descriptions under the heading “Purpose” such as “pushing, digging and loading – used in pit” or “transport loose materials”. For items such as the drill rig, the purpose was merely described as being “create holes in the ground”. The seventh column had an “odo/hour metre” as its heading, the seventh column indicated the time of dispensing and the eighth and ninth columns indicated opening and closing odometer readings. The second last column then indicated the litres dispensed and the last column was simply headed “column 1”. Its contents had a more abbreviated description of the vehicle in question such as “bowser”, “excavator”, “dump truck”, “drill rig”, “water bowser”.

[22] This logbook was in the form of a printed excel spreadsheet and was compiled for each individual contractor. In the case of Close-up, it consisted of 8 or 10 pages per month. Each month was also accompanied by a summary with fewer columns consisting only of “machine type”, “vehicle description”, “purpose”, “sum of litres used”, “number of diesel fills per month” and average diesel fills per day” as the column headings. The column “sum of litres used” would at the end thereof reflect a grand total from which “non-eligible” litres were deducted leaving a total of “eligible litres”. In respect of October 2012 for example, the grand total was 313 110 litres and the non-eligible 998 litres, resulting in an eligible litre total of 312 112 litres. The same exercise was repeated for every month.

[23] Mr Kholvadia further explained that this reconciliation was done at the time of the purchase of the diesel and the invoices in respect thereof were

obtained from Shevron. Since 1 April 2023 note 6(a)(xii) had been amended with the insertion of the requirement that logbook entries must be substantiated by the source documentation and appropriate additional information that included manufacture specification of the equipment, particulars of operator, intensity of use and other incidental observations relevant to the measurement of eligible diesel usage.

[24] Mr Kholvadia submitted that when one has regard to the various pages of the logbook covering the entire third period, these complied with the amendments which included the requirement that a “full audit trail from purchase to use” be reflected in the logbooks. Hence, he explained, the volume of diesel purchases from Chevron were indicated which purchased diesel ended up in either the diesel bowser or the holding tanks reflected in the logbook.

[25] Mr Kholvadia stated that apart from a fully automated diesel system, the logbooks represented the best possible form of record-keeping one could do by way of a manual system. In cross-examination he further indicated that whilst the applicant did the prospecting and performed the actual mining operations, Canyon Coal (Pty) Ltd did the beneficiation but had its own tanks and agreements with Chevron. Canyon Coal (Pty) Ltd also had its own front-end loaders and trucks to load and take material to the wash plant. All the similar equipment utilised by the applicant in its mining operations were owned by Close-up.

[26] For purposes of determining which activities form part of primary mining operations and which formed part of secondary mining operations one has to bear in mind that the mine in question was an open cast coal mine with a “pit”, a stock-pile of “run of mine” (extracted) coal and adjacent to it a washing plant. All the movements of coal were done by mechanical devices (as opposed to belt

or rail feeders). In this regard Mr Kholvadia was also cross-examined and asked to comment on the contents of the affidavit by Mr Charles Arthur Stride who had been instructed by the applicant's attorneys to "*analyse and consider the disallowance by the respondent of the diesel rebate claims*". Mr Stride was a Chartered Accountant, a founding member of the Audit Standards Committee and a former advisor to the South African Reserve Bank on exchange controls and a former special advisor to the Minister of Finance. He stated he had extensive experience in financial investigations and was previously a Director of Tollgate.

[27] In Mr Stride's affidavit he described in paragraph 17 thereof the coal mining operations, starting from the removal of the topsoil and setting it aside for land restoration. Mr Kholvadia was especially referred to the following operations described by Mr Stride in his affidavit namely "*remove the first layer of coal, and transport coal to the coal washing and crushing facilities*", "*remove the next layer of coal and transport the coal to washing facility*", "*upon removal of the final layer of coal refill the mined out area by transporting the soft, hard and parting from the dumps back to the mined out area*" and "*finally as part of land repatriation move the topsoil back from its dump and place on top of the refilled area*". The purpose hereof was to enquire, with reference to the fact that the washing plant and/or the stock-piles were also in the pit area (as no additional dumps had been created), whether the answer that all the vehicles in the logbooks were used "in the pit" would necessarily be sufficient to indicate that they were exclusively involved in primary mining operations.

[28] Mr Kholvadia was of the view that the logbook sufficiently confirmed this but then a further issue was put to Mr Kholvadia namely that from the vehicle list contained in the logbooks it appeared that a number of the vehicles

were “non-dedicated equipment” which could travel outside a pit and on public roads. These, for example, included the list mentioned in paragraph 19 above. Also, the vast majority of entries in the logbook indicated diesel usage in rounded off figures or in tens of litres. It was questioned whether this would have been normal operations as there were no fractions of litres. Mr Kholvadia could not comment on this but stated that the flow metres would have indicated the correct amounts dispensed or used.

[29] Further scrutiny of the logbook indicated that the line items were often not in date sequence, even in respect of open and closure odometer readings from the holding tank or the bowser. Mr Kholvadia could not explain this and stated that the logbook was compiled from purchases as aforesaid and individual logbooks kept by Close-up.

[30] Further questions about discrepancies reflected in the logbook for February regarding machine types were explained by Mr Kholvadia as “formula errors”. He maintained that, after a proper audit, the totals of diesel usages reflected in the logbook were reconciled with the total diesel purchased from Chevron and that it tallied. The logbook was compiled for all the vehicles using diesel in the pit. His department had not been required to differentiate or separate diesel used to transport the run of mine coal. This was not done in practice. The logbook was a summary of what Close-up mining had compiled to specifically indicate all mining operations from “box cut” to “run of mine”. Mr Kholvadia understood all of this to form part of primary mining activities.

Evaluation of the evidence presented

[31] At the conclusion of cross-examination of Mr Kholvadia, Adv. Puckrin SC, who appeared for SARS, handed up a “list of anomalies” which had been compiled overnight with reference to the logbook referred to above. This list

indicated that for the 33 line entries from 4 January 2013 to 9 January 2013, column 5 of the logbook contained no description of the respective vehicles. At the top of column 4 the word “lighting plant” appeared and at the top of column 5 the words “lighting night-shift”. However if one has regard to the fleet identifications and compared that with previous entries on previous pages and the purposes indicated in the right hand column of each page, the diesel used could not have been in respect of the lighting plant. The purposes were for example “create holes in the ground”, “digging”, “pushing, digging and loading” and only in respect of two line items was the purpose indicated as “lighting night-shift”. In all other instances the vehicle identification was “#value”. This last-mentioned indication was apparently used in the logbook when no detail was available at the time.

[32] The further anomaly complained of was that the litres used in the above entries were all rounded off, e.g. 400 litres, 600 litres, 70 litres, 900 litres, 300 litres, 790 litres, 380 litres, 260 litres, 240 litres, 30 litres, 40 litres, 520 litres etc. The list of anomalies further indicated that the closing litres on the bowser/holding tank did not always correspond with the opening litres for the next day’s entries. This was however difficult to verify as the line items started on 9 January, proceeded for 5 items before it went on to 10 January for another 7 items whereafter it reverted back to 3 January continuing with numerous items, ending at the bottom of the page again at 5 January. The same complaint regarding opening and closing litres on the bowsers/holding tank occurred near the end of the month but it was again difficult to reconcile as the page referred to had 3 line items for 31 January 2013 and thereafter started again from 3 January up to 27 January whereafter it again started from 3 January onwards.

[33] In respect of the monthly summaries, particularly with reference to February 2013, the complaint raised was that the “machine type” indicated in

column 1 did not match the purpose of the vehicle set out in column 3. Upon analysis, it appears that these “anomalies”, go even further. So for example, the “machine type” would be indicated in the first column as a “backhoe loader”, but under “vehicle description” one would find anything from a 1992 Cat grader to an Umthambo LDV, a 2012 Bell B400 ADT to a drill rig and a bowser. Similarly, where the “machine type” was indicated as “bakkie” one would similarly find only one light delivery vehicle indicated with the remainder of vehicle descriptions varying from “water pump” to “front-end loader” to a Toyota Fortuner.

[34] Even the machine types “diesel bowser”, “bowser” and “drill rig” and “dump truck” suffered from the same difficulties. It might be that one would have to ignore the “machine type” indicated in the first column to make any sense of the summary referred to, being that of February 2013 but the summaries of the other months suffered from the same defects.

[35] In the judgment in the main application when the issue of the logbooks was discussed and criticized the point was made that it was not possible for the Court to determine from those documents which were the exact litres of fuel usage which qualified as being “eligible”. Now that these logbooks have been introduced by way of oral evidence, the Court is still none the wiser. The discrepancies indicate that the logbooks are either incomplete or suffered from such descriptive anomalies that their contents are either incorrect or too inaccurate to be relied on.

[36] There are however two further deficiencies with these “logbooks”, which in my view are more fundamental. Firstly, one cannot from the detailed spreadsheet make any determination or verification of the correctness of the amount of non-eligible diesel (sometime as low as 1% of the total usage)

indicated therein. Conversely, one cannot with any measure of certainty determine whether the remaining diesel usage represented “eligible” usage. The summaries at the end of each month suffer from the same deficiencies. The second fundamental difficulty is that these “logbooks” are in fact not logbooks of each of the individual items of equipment or vehicle utilised in the supposed primary mining operations. At best, these spreadsheets represent the dispensing records for the diesel pumped from either the holding tank or the bowser.

[37] All that the records produced on behalf of the applicant therefore showed, was that accurate record had been kept of the diesel purchased by Chevron and which had been pumped into either the bowser or the holding tank and that the records further showed (albeit in rounded of figures) the dispensing of diesel from those two sources to individual items of equipment or vehicles. For VAT purposes, this might be sufficient but these dispensing records do not indicate the hours, times or distances relating to the operation of those vehicles and neither do they reflect therefore with any measure of certainty the volume of diesel utilised by each vehicle in primary mining operations. The “logbook” therefore does not qualify as a logbook as contemplated in Note 6 referred to in paragraph [8] above.

[38] I therefore find that on the question that has been referred for the hearing of oral evidence, the applicant has not produced sufficient evidence on which this Court could find that SARS’s determination was incorrect. The application to have it set aside can therefore not succeed.

Costs

[39] I find no reason to deviate from the customary rule that costs follow the event.

Order

1. The Applicant's application for the setting aside and substitution of the determination by the Commissioner for the South African Revenue Services regarding the diesel refunds claimed by the Applicant under rebate item 670.04 provided in the Customs and Excise Act no. 91 of 1964 in respect of the third assessment period of the Applicant's contractor Close-Up as well as the claims in respect of the Applicant's contractors Alcedopro and Trollope, is dismissed and the determination is upheld.
2. The Applicant is ordered to pay the costs of the application including the referral to oral evidence and the hearing thereof, including the costs of two counsel one of whom is a senior.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 31 July – 3 August 2023

Judgment delivered: 30 November 2023

APPEARANCES:

For the Applicant:	Adv. L D Isparta
Attorney for the Applicant:	Alant, Gell & Martin Inc, Pretoria
For the Respondent:	Adv C E Puckrin SC together with Adv K Kollapen
Attorney for the Respondent:	Mothle Jooma Sabdia Incorporated, Pretoria