



## THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

### MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

**From:** The Registrar, Supreme Court of Appeal

**Date:** 12 January 2024

**Status:** Immediate

***The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal***

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

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Today the Supreme Court of Appeal (SCA) dismissed an application for special leave with costs.

The applicant, BP Southern Africa (Pty) Ltd (BP), launched two separate urgent applications for interim interdicts (Part A in both applications), seeking substantially similar relief, in the high court (per Mothle J), against the respondent, the Commissioner for the South African Revenue Service (SARS), pending review applications (Part B in both applications). Mothle J dismissed both applications. In separate proceedings, BP unsuccessfully applied to file a supplementary founding affidavit in the high court (per Munzhelele AJ). Munzhelele AJ granted BP leave to appeal to the full court against her ruling. The full court dismissed all three appeals.

In Part A, BP sought the following orders: (a) an order truncating the time period in s 96 of the Customs and Excise Act 91 of 1964 (the Act); and (b) an order interdicting and restraining SARS from attaching and disposing of its property, and from proceeding with any execution proceedings against it, pursuant to the issuing of a certified statement filed in terms of s 114(1)(a)(ii) of the Act by SARS on 16 March 2020, pending the outcome of review applications brought under Part B. In Part B, it sought to review and set aside SARS' decisions: (a) to issue final demands and notices of the institution of legal proceedings; (b) to issue the debt management certificate on 16 March 2020; (c) proceed with the execution in respect of BP's property; and (d) SARS's failure to allow BP to submit an appeal in accordance with the Act. In Part B of the second application, it sought an order reviewing and setting aside SARS' decision to dismiss its application for suspension of payment.

After Mothle J dismissed Part A of BP's applications and its application for leave to appeal, it filed a supplementary founding affidavit in support of its review applications. SARS brought an application in terms of Uniform Rule 30(1) to declare the filing of the supplementary founding affidavit as an irregular step and to set it aside. BP opposed the application and brought a counter application to be allowed to file the supplementary founding affidavit. Munzhelele AJ granted SARS' application and dismissed BP's application. The appeals against Mothle J's and Munzhelele AJ's orders were consolidated. The full court dismissed the appeals with costs, including costs of two counsel on an attorney and own client scale.

BP is a licensee of a warehouse and an exporter of fuel. BP represented to SARS that it had exported fuel to Zimbabwe. It claimed refunds of the DAS (Duty at Source) it had paid when the fuel left a

Transnet storage facility at Tarlton, which is not a licensed warehouse. SARS investigated various consignments of fuel that BP alleged it had exported. SARS was of the view that the fuel had never been exported but consumed locally. BP's version was that it sold diesel to different intermediaries who, in turn, sold it to importers in Zimbabwe. It acted as an 'exporter of record' of the diesel because the intermediaries were not licensees of warehouses or licensed distributors of fuel, and would therefore not be entitled to refunds of excise duty, fuel levy and road accident fund levy paid by BP in terms of the DAS policy. BP sold the fuel to the intermediaries, excluding DAS, and claimed refunds of the DAS that it had paid, after the fuel was exported by the intermediaries. It denied that it committed fraud, or that it was a party to any fraudulent scheme.

On 13 February 2020, SARS issued BP with four letters of demand. BP did not pay the amounts demanded by SARS. On 24 February 2020, SARS issued a final demand and notice of the institution of legal proceedings against BP. On 16 March 2020, SARS filed a certified statement with the registrar of the Gauteng Division of the High Court, Pretoria, in terms of s 114(1)(a)(ii) of the Act for an amount of R49 978 544.06. On 17 March 2020, BP requested SARS to give it an undertaking that it would stay execution of the judgment pending the outcome of a review application to be launched by BP. On 18 March 2020, BP served a notice in terms of s 96(1) on SARS.

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

Mothle J found that neither application was urgent, but he nevertheless considered it expedient to deal with the merits of the applications. He further found that BP failed to prove that it would suffer any prejudice because it could afford to pay the amount claimed and that it would be able to recover the money after submitting the necessary documents to SARS. The full court found that BP failed to prove any of the requirements for an interim interdict and that Mothle exercised his discretion properly. Regarding the supplementary founding affidavit, the full court found that there is no procedural basis, in rule 53 proceedings, for the filing of such affidavit before the record had been filed.

The issues for determination before the SCA were as follows: in the first instance, whether the high court refused the s 96 application. Secondly, whether the applicant made out a proper case for an interim interdict. Lastly, whether the refusal to admit the supplementary founding affidavit was appealable and, if it was, whether the refusal to admit it was proper.

In addressing the issue of the s 96 application, the SCA held that the fact that Mothle J neither referred to, nor discussed s 96 is of no moment because he dealt with the merits of the matter. It reasoned that if he had refused the s 96 application, that would have spelt the end of the matter. In conclusion on this point, the SCA held that the ineluctable inference was that Mothle J granted the truncated times in terms of s 96 as a pathway to considering the merits.

The SCA found that Mothle J and the full court were correct in holding that BP failed to prove any of the requirements for an interim interdict as an interim interdict pending an action or a review is an extraordinary remedy within the discretion of the court and only granted against the exercise of statutory power only in the clearest of cases.

Lastly, in relation to whether the refusal to admit the supplementary founding affidavit was appealable, the SCA held that Munzhelele AJ's decision was a ruling that had no final effect, was not definitive of the rights of the parties and did not dispose of any part of the main proceedings. It concluded that it was not in the interest of justice that an interlocutory ruling of the kind made by Munzhelele AJ be appealable.

In the result, the SCA issued an order dismissing the application for special leave to appeal with costs.