



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Reportable

Case no: 1299/2021

In the matter between:

**THE COMMISSIONER FOR THE
SOUTH AFRICAN REVENUE SERVICE
THE CHAIRPERSON, EXCISE APPEAL
COMMITTEE**

FIRST APPELLANT

SECOND APPELLANT

and

**RICHARDS BAY COAL TERMINAL
(PTY) LTD**

RESPONDENT

Neutral citation: *Commissioner for the South African Revenue Service and Another v Richards Bay Coal Terminal (Pty) Ltd* (Case no 1299/2021) [2023] ZASCA 39 (31 March 2023)

Coram: PONNAN ADP and MOCUMIE, GORVEN and GOOSEN JJA and UNTERHALTER AJA

Heard: 28 February 2023

Delivered: 31 March 2023

Summary: Customs and Excise Act 91 of 1964 – taxpayer not confined to the remedy of a wide appeal under s 47(9)(e) – can also review a tariff determination under the Promotion of Administrative Justice Act 3 of 2000, alternatively the principle of legality.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Durban (Topping AJ, sitting as court of first instance):

The appeal is dismissed with costs, including those of two counsel where so employed.

JUDGMENT

Ponnan ADP (Mocumie, Gorven and Goosen JJA and Unterhalter AJA concurring)

[1] This appeal turns on whether an aggrieved taxpayer, seeking to challenge a tariff determination in terms of the Customs and Excise Act 91 of 1964 (the CEA), is confined to the remedy of a wide appeal under s 47(9)(e) of the CEA. It arises from a challenge by the respondent, Richards Bay Coal Terminal (Pty) Ltd (RBCT), to a tariff determination by the first appellant, the Commissioner, South African Revenue Service (SARS). RBCT's challenge was two-pronged: It sought both to appeal the determination in terms of the statutory appeal provision in s 47(9)(e) of the CEA, as also, at the same time, to review it under the Promotion of Administrative Justice Act 3 of 2000 (PAJA), alternatively the principle of legality.

[2] As an incident of the review application, RBCT sought the record of the tariff determination in terms of Uniform rule 53. In the alternative, RBCT also sought the documents constituting the record under Uniform rule 35(11). SARS resisted production of the record on the basis that as the review was not competent, RBCT is consequently not entitled to the record.

[3] The factual backdrop, against which the issue arises for consideration (and which by and large is either common cause or undisputed), may be summarised as follows: In his 2001 budget speech, the then Minister of Finance, made the following announcement:

‘In the 2000 budget, a diesel fuel concession was reintroduced for fishing and coastal shipping. Government committed itself to explore the possibility of extending this to other primary producers, contingent on developing an administrative regime to minimise the risk of fraud; and ensuring the concession is affordable within the broader fiscal framework. The bulk of diesel fuel used in farming, forestry and mining is used off road. Given this, and to encourage the international competitiveness of especially our farmers, foresters and miners, the following diesel fuel concessions are proposed:

- 25.6 cents a litre of the general fuel levy on qualifying consumption,
- The full 16.5 cents a litre Road Accident Fund levy on qualifying consumption.

Qualifying consumption will be 80 per cent of total consumption. Diesel concessions will be implemented on 4 July 2001 and will cost R417 million a year.’

[4] RBCT is one of the leading coal export terminals in the world. Its shareholders are South Africa’s major coal exporters, with mines situated primarily in Mpumalanga and northern KwaZulu-Natal. Coal is sourced from these mines and transported to RBCT in Richards Bay, where it is stockpiled and loaded onto vessels for export. The administrative regime that was set up to implement the diesel rebate scheme was introduced by the Department of Finance in 2001, in the exercise of the powers provided for in s 75 of the CEA. In 2009, RBCT registered for the diesel fuel levy refund scheme. It thereafter claimed rebates for the period 2009 to 2017. On 22 April 2015, SARS launched an investigation into those claims. On 15 August 2017, SARS sent RBCT an audit engagement letter and, on 5 October 2017, it sent RBCT a Notice of Intention to Assess. SARS’ *prima facie* view, as communicated to RBCT, was that the latter had claimed refunds for ‘non-qualifying activity’ in excess of R7 million for the period March 2013 to August 2017. RBCT was given 14 days within which to respond to the Notice, which it did on 15 November 2017.

[5] On 4 December 2017, SARS issued a letter of demand to RBCT under s 75 (read

with Part 3 of Schedule 6) of the CEA. SARS demanded repayment of R7 126 934.63, plus interest. On 9 February 2018, RBCT lodged an internal appeal in terms of s 77 of the CEA. On 7 February 2019, the internal administrative appeal committee of SARS, the Excise Appeal Committee (the EAC), rejected RBCT's appeal. Following engagement between the parties concerning the reasons for the dismissal of the appeal, as well as the appropriateness of alternative dispute resolution, RBCT applied to the KwaZulu-Natal Division of the High Court, Durban (the high court) on 26 November 2019. It sought to appeal the decision of the EAC (which was cited as the second respondent in the application) and, if successful on that score, for the decision of the EAC to be substituted with one: (a) upholding RBCT's appeal to it, and, (b) setting aside SARS' letter of demand. In the alternative, RBCT sought to review and set aside both the EAC's decision to reject its appeal and SARS' decision to issue the letter of demand.

[6] RBCT also sought the record of decision from SARS. On 24 January 2020, SARS informed RBCT that it did not consider the matter a review, but instead a 'wide' appeal under s 47(9)(e) and indicated that it would therefore not be delivering the record. In response, on 30 January 2020, RBCT served a Rule 30A notice on SARS calling on it to comply with Rule 53, alternatively with Rule 35(11). When SARS persisted in its refusal, RBCT launched the application, the subject of this appeal (the compelling application), on 11 March 2020. SARS took the view that if the high court lacks review jurisdiction, then Rule 53 does not apply and there would accordingly be no basis upon which to compel it to produce the record. In a judgment delivered on 12 August 2021, the high court (per Topping AJ) directed SARS to comply with Uniform rule 53(1)(b) within ten days, by dispatching to RBCT a complete record relating to the decisions that are subject to the appeal and review. The appeal by SARS against that order is before this Court with the leave of Topping AJ.

[7] Parenthetically, it is perhaps necessary to pass certain preliminary observations. First, in *Competition Commission of South Africa v Standard Bank*¹ (*Standard Bank*) the Constitutional Court held that an order compelling a respondent in a review to deliver the record of its decision in terms of Rule 53, is indeed appealable. Second, both the majority

¹ *Competition Commission of South Africa v Standard Bank of South Africa* [2020] ZACC 2; 2020 (4) BCLR 429 CC (*Standard Bank*).

and minority² in *Standard Bank* held that the court may only order the production of the record of a decision under Rule 53 after it has determined that it has jurisdiction in the review. The majority put it as follows:

‘Therefore, [rule 53] enables an applicant to raise relevant grounds of review, and the court adjudicating the matter to properly perform its review function. However, for a court to perform this function, it must have the necessary authority. It is not prudent for a court whose authority to adjudicate a review application is challenged to proceed to enforce rule 53 and order that disclosure should be made, before the issue of jurisdiction is settled. The object of rule 53 may not be achieved in a court that lacks jurisdiction.

For these additional reasons, we agree with the first judgment [of Theron J] that Boqwana JA erred in ordering that the Commission should disclose its record of investigation before the question of jurisdiction was determined. Once carried out, and in the event that the Competition Appeal Court concluded that it has no jurisdiction, what is to be done in terms of the order cannot be undone.’³

[8] Third, the notice of motion in this matter did not necessarily conduce to clarity. The review was advanced in the alternative to the appeal. Thus, if the appeal (being the main relief that was sought) were to succeed, the high court may notionally simply not get to the review; much less, the compelling application that was incidental to the review. The approach favoured by RBCT thus opened the door to a fractional disposal of issues and the piecemeal hearing of appeals. However, as there are dissonant high court judgments and because the present – as well as future – litigants will likely benefit, there may well be a practical need, as also some public interest, in this Court expressing its view on the point raised.

[9] The dictum of Trollip J in *Tikly*,⁴ is perhaps a useful starting point. He there pointed out that the word ‘appeal’ can have different connotations and explained that it could mean:

‘(i) an appeal in the wide sense, that is, a complete re-hearing of, and fresh determination on the merits of the matter with or without additional evidence or information . . .;

² Ibid paras 118-119.

³ Ibid paras 202-203.

⁴ *Tikly & Others v Johannes NO & Others* 1963 (2) SA 588 (T).

(ii) an appeal in the ordinary strict sense, that is, a re-hearing on the merits but limited to the evidence or information on which the decision under appeal was given, and in which the only determination is whether that decision was right or wrong . . . ;

(iii) a review, that is, a limited re-hearing with or without additional evidence or information to determine, not whether the decision under appeal was correct or not, but whether the arbiters had exercised their powers and discretion honestly and properly . . .'.⁵ (Footnotes omitted.)

[10] The thrust of SARS' case is that because a s 47(9)(e) appeal is an appeal in the wide sense as articulated by Trollip J in (i) above, a complete rehearing of the matter is envisaged. This means a *de novo* reconsideration of the tariff determination, with or without new evidence and information. Accordingly, so the argument proceeds, a party seeking to challenge a tariff determination is confined to the wide statutory appeal envisaged by s 47(9)(e), to the exclusion of review proceedings. That provision reads:

'An appeal against any such determination shall lie to the division of the High Court of South Africa having jurisdiction to hear appeals in the area wherein the determination was made, or the goods in question were entered for home consumption.'

[11] SARS' contention raises a question of statutory construction: Does the fact that the CEA creates a tailor-made remedy, necessarily exclude a taxpayer's right of review? The question has been considered by the high court on four separate occasions. In *Distell Limited*, a Full Court held:

'With regard to the applicability, or not, of PAJA:

(a) The wording of the Act is trenchant and that the prescribed remedy of an aggrieved party against a tariff determination, irrespective of whether it is founded on the Commissioner's alleged wrong interpretation of the relevant statutory provisions (i.e. the first step in the classification process), or his incorrect application of the said provisions to the facts (i.e. the second and third steps of the classification process)), is an appeal in terms of section 47(9)(e) of the Act.

(b) Because the Act governs both the procedural and substantive prescripts and requirements of an aggrieved party's rights and remedies and because an appeal in terms of section 47(9)(e) is an appeal "in the wide sense" i.e. a complete rehearing of the whole issue, there is simply no need to

⁵ Ibid at 590F–591A.

resort to the corresponding provisions of PAJA.⁶

[12] In that matter, before Seriti J in the court of first instance, Distell had relied on both the statutory appeal in terms of s 47(9)(e) and on a review in terms of PAJA in attacking the tariff determinations made by the Commissioner.⁷ In dismissing Distell's application, Seriti J found that: (i) the proceedings attacking some of the tariff determinations were instituted too late, whether under PAJA or under the CEA; and (ii) the tariff determinations which could still be attacked, were correct on the merits. The matter then went on appeal to the Full Court where Ebersohn AJ, on behalf of that Court, observed: 'The only issue which falls to be decided in this appeal is the merits of the classification issue. . .'. Somewhat confusingly, the learned Judge then referred to certain other issues that had to be decided, including whether two of the tariff determinations, which had been made as long ago as 1995 and 1996, may be impugned, whether under s 47(9) of the CEA, the common law or alternatively s 7(1) (read with s 9) of PAJA. Ebersohn AJ then considered and applied the principles relating to tariff classification and held that the Commissioner's determinations had been correct on the merits and dismissed the appeal. It is in this context that the quoted excerpts in the preceding paragraph from the Full Court judgment concluding with the words: 'there is simply no need to resort to the corresponding provisions of PAJA', must be read.

[13] On further appeal, this Court took the view that the relief sought by Distell in the courts below 'took the form of appeals in terms of s 47(9)(e), or, as an alternative, applications to compel the Commissioner to correct determinations "made in error", as contemplated in s 47(9)(d)(i), and . . . declaratory relief.'⁸ This Court recorded that the appellants had refined the relief claimed without objection from the respondent before the Full Court and persisted with such refined relief in the appeal.⁹ As the separate concurring judgment of Harms DP in this Court makes perfectly plain, Distell had neither sought any relief on review nor relied on PAJA before the Full Court. Harms DP had this to say:

⁶ *Distell Ltd & Others v Commissioner for SARS & Another* [2009] 23384 (GNP) para 35.

⁷ *Distell Ltd & Others v Commissioner for SARS & Another* [2006] 18682 (GNP).

⁸ *Distell v CSARS* [2010] ZASCA 103; [2011] 1 All SA 225 (SCA) para 4.

⁹ *Ibid* para 20.

'The Full Court added a discussion of matter not raised by either party, namely, the application of [PAJA] to the case. In the course of this the issue, which ought to be a straightforward interpretation issue, became blurred.'¹⁰

[14] This Court applied the principles of tariff classification and concluded that the Commissioner's tariff determinations were wrong on the merits. It thus upheld the appeal (except in relation to the determinations in respect of which the appellants had not timeously instituted litigation). But, it did not (nor was it required to) give any consideration to whether a review is ousted by the appeal provisions in the CEA. It follows that SARS' reliance on *Distell* is misplaced.

[15] In the next matter, *BCE Food Service Equipment v Commissioner, South African Revenue Service (BCE)*, the applicant elected not to pursue any rights that it may have had of appeal under s 47(9)(e) of the CEA, preferring instead to confine itself to review the decision of the respondent, SARS.¹¹ As here, SARS argued 'that the review proceedings were not available to the applicant and that the applicant's remedy was limited to one in terms of s 47(9)(e), ie, an appeal as is provided for in the section'.¹² The high court (per Wepener J) held:

'Section 47 bestows a right on a party, which right would not have existed but for the provisions of the section. There is no common law or other legislative provisions which an aggrieved party could employ in order to challenge a determination of the respondent, save of course for a common law review or the provisions of PAJA. There is no indication in the Customs and Excise Act that the provisions of PAJA have been ousted and that an aggrieved party is limited to the appeal procedure provided for in that Act. The test is whether the legislation obliges and restricts an aggrieved person to utilise the remedy provided for in that legislation. No such construction can be placed on s 47 of the Customs and Excise Act and there is no language contained in the Act that leads to a conclusion that the legislature has confined a complainant to the particular statutory remedy. The decisions on which the respondent relied during argument in support of the contention that a party may not utilise the provisions of PAJA, do not say that and it would have

¹⁰ Ibid para 74.

¹¹ *BCE Food Service Equipment (Pty) Ltd v Commissioner for the South African Revenue Service* [2017] ZAGPJHC 243.

¹² Ibid para 3.

been surprising if they did deprive an aggrieved person of the rights afforded him or her in terms of PAJA and the Constitution.¹³

[16] In finding against SARS on the point, Wepener J called in aid the dicta of Kriegler J in *Metcash v Commissioner, South African Revenue Service (Metcash)*.¹⁴ There, in an analogous context, Kriegler J stated:

'It is important to have clarity about the effect of the mechanism created by sections 33 and 33A of the Act. Were it not for this special "appeal" procedure, the avenues for substantive redress available to vendors aggrieved by the rejection of their objections to assessments and decisions by the Commissioner would probably have been common-law judicial review as now buttressed by the right to just administrative action under section 33 of the Constitution, and as fleshed out in the Promotion of Administrative Justice Act.

. . .

But, and this is crucial to an understanding of this part of the case, the Act nowhere excludes judicial review in the ordinary course. The Act creates a tailor-made mechanism for redressing complaints about the Commissioner's decisions, but leaves intact all other avenues of relief'.¹⁵

[17] In the present matter, Topping AJ held that a review of a tariff determination is competent. The learned judge accepted that the s 47(9)(e) appeal is 'an appeal in the wide sense and constitutes a rehearing of the matter', in which 'additional evidence or information may be adduced' and that the high court 'is not confined to the record and is placed in the same position as a court of first-instance, with the power to reconsider and, if necessary, replace the first-instance decision.' Relying on *BCE*, Topping AJ concluded 'that [the] Court's review jurisdiction had not been excluded . . . and that [he was] therefore entitled to grant an order directing compliance with the provisions of Rule 53(1)(b)'.

[18] Most recently, in *Cell C (Pty) Ltd v Commissioner for the South African Revenue*

¹³ Ibid para 7.

¹⁴ *Metcash Trading Limited v Commissioner, South African Revenue Service and Another* [2000] ZACC 21; 2001 (1) SA 1109 (CC).

¹⁵ Ibid para 33.

Service, the Pretoria High Court (per Tolmay J) concluded that it lacked jurisdiction to hear a review of a tariff determination, and accordingly dismissed Cell C's Rule 30A application to compel the Rule 53 record on that basis.¹⁶ Tolmay J stated: 'The *Distell* Full Court finding is not binding authority for the proposition that reliance on PAJA is excluded in terms of the CEA. It should nevertheless be said that, the remark that no need to resort to PAJA exists due to the nature of a wide appeal, is correct'.¹⁷ The learned judge also considered the decision in *BCE* — by which it was bound unless it was clearly wrong — as well as the decision of Topping AJ in the present matter, which had followed *BCE*. Tolmay J concluded:

'It is clear from the above that the court's general review jurisdiction is not ousted, but in the light of the ambit of a wide appeal the need for a review falls away when such an appeal is available. The court can, as was illustrated above, exercise its own discretion and substitute its decision on all grounds with that of the Commissioner. To allow a wide appeal and a review in these circumstances will also result in the remedies to be cumulative and will lead to confusion. The vastly different legal principles applicable to a wide appeal and a review will result in a legally untenable situation. In doing so the purpose of treating the tariff determination being provisional and preliminary will be subverted. The fact of the matter is that the CEA does not require the Commissioner to keep a record or give reasons as was said in *Pahad*. Accordingly it would not be appropriate for a court to compel the Commissioner to provide a record where he is not legally required to keep one. In any event, in a wide appeal the applicant will be able to obtain access to all relevant documents by way of discovery in terms of Rule 35 of the Uniform Rules of Court.'¹⁸

[19] In my view, for the reasons that follow, the conclusion reached by Tolmay J in *Cell C* cannot be supported. In *Zondi*,¹⁹ the Constitutional Court stated that PAJA is not ordinary legislation. It was enacted, pursuant to the provisions of s 33 of the Constitution, to give effect to the right to just administrative action. In applying PAJA, the Court held that all decision-makers, who enjoy authority to make administrative decisions by any statute must do so in a manner that is consistent with PAJA. Statutes that authorise administrative action must now be read together with PAJA. The Constitutional Court

¹⁶ *Cell C (Pty) Ltd v Commissioner for the South African Revenue Service* [2022] ZAGPPHC 152; 2022 (4) SA 183 (GP); 84 SATC 369.

¹⁷ *Ibid* para 20.

¹⁸ *Ibid* para 36.

¹⁹ *Zondi v MEC for Traditional and Local Government Affairs and others* 2005 (3) SA 589 (CC).

indicated that the only exception to this rule would be the instance where, on a proper construction of the statute, its provisions are inconsistent with PAJA. However, it held that before inconsistency can be found, consideration must first be given to whether the provisions can possibly be read in a manner that is consistent with the Constitution.²⁰

[20] SARS' argument appears not to take into account the clear wording of s 33 of the Constitution that everyone has the right to administrative action that is lawful, reasonable and procedurally fair or that all public power (which would include tariff determinations) is subject to constitutional control and must comply with the Constitution and the doctrine of legality.²¹ As it was put in *Pharmaceutical Manufacturers*:

'Courts no longer have to claim space and push boundaries to find means of controlling public power. That control is vested in them under the Constitution which defines the role of the courts, their powers in relation to other arms of government, and the constraints subject to which public power has to be exercised.'²²

[21] SARS argues that RBCT has no entitlement to the record of decision because all that matters is whether the ultimate decision is 'correct' and it does not really matter how it arrived at that decision. This argument misconstrues what is sought to be vindicated in a review, namely, the right to just administrative action.²³ A decision may be correct but taken unlawfully or unfairly. The correctness of a decision in no way negates the right of a person adversely affected by administrative action to a lawful and fair decision. SARS' argument also flies in the face of the principles that underpin the exercise of all public power²⁴ and undermines the very important principle in our law that decisions should not be taken in secret and that administrative bodies such as SARS can and should be held accountable for their actions. Thus, disclosure of the record is essential to give effect to

²⁰ Ibid paras 101–102. See also *Walele v City of Cape Town* 2008 (6) SA 129 (CC) para 51.

²¹ See for example *Fedsure Life Assurance Limited and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999 (1) SA 374.

²² *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) para 45.

²³ See for example *Commissioner South African Revenue Services v Pretoria East Motors (Pty) Ltd* [2014] ZASCA 91; [2014] 3 All SA 266 (SCA); 2014 (5) SA 231 (SCA) para 11.

²⁴ Section 195 of the Constitution establishes various principles applicable to all organs of state including that 'people's needs must be responded to' and that 'transparency must be fostered by providing the public with timely, accessible and accurate information'.

a litigant's rights under section 34 of the Constitution.²⁵

[22] The audit conducted by SARS and the subsequent ruling by the EAC are quintessentially administrative action as defined in s 1 of PAJA. SARS does not contend otherwise. It follows that SARS was obliged to engage the taxpayer in an administratively fair manner.²⁶ Even if the determinations sought to be impugned by RBCT in these proceedings are not administrative action, they would fall under the exercise of public power that is subject to the rule of law and are reviewable under the principle of legality.²⁷

[23] It follows that SARS' argument cannot be sustained. The fundamental flaw in SARS' argument is that it conflates the remedy to vindicate the constitutional right to just administrative action and the remedy to rectify a decision on its merits. The undeniable effect of SARS' argument is that it would deprive affected persons of the right to just administrative action and render its decisions immune from judicial review in terms of s 33 of the Constitution, PAJA and under the rule of law. Affording s 47(9)(e) of the CEA the construction advanced by SARS, would bring it into conflict with: (i) s 33 of the Constitution, which protects the right to just administrative action, and provides for a fundamental right to review administrative action by a court if it is not lawful, reasonable and procedurally fair; (ii) the rule of law and s 169 of the Constitution, which gives the high court the power to decide any violation of the principle of legality (save for certain specific exclusions that do not apply here); and, (iii) s 172 of the Constitution, which affords courts the power to make a declaratory order that the conduct complained of is inconsistent with the Constitution and invalid to the extent of such inconsistency and to make such an order that, in the circumstances, is just and equitable.

[24] Even in our pre-constitutional era, there was a strong presumption against the ouster or curtailment of a court's jurisdiction. It has been stated that the curtailment of the

²⁵ *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* [2012] ZASCA 15; 2012 (3) SA 486 (SCA) para 37 (*DA v ANDPP*).

²⁶ *Commissioner South African Revenue Services v Pretoria East Motors (Pty) Ltd* fn 22 above.

²⁷ *Fedsure Life Assurance Limited and Others v Greater Johannesburg Transitional Metropolitan Council and Others* fn 20 above para 40.

powers of a court of law is, in the absence of an express or clear implication to the contrary, not to be presumed.²⁸ These principles continue to apply, now buttressed by the Constitution.²⁹ Nothing in the CEA expressly ousts the jurisdiction of the high court to review a tariff determination decision. SARS does not suggest that it does. In fact, there may well be certain indicators in the language of the CEA that point in the opposite direction. First, s 77B of the CEA headed 'Persons who may appeal' provides in subsection 1 that '[a]ny person who may institute judicial proceedings in respect of any decision . . . may, before or as an alternative to instituting such proceedings, lodge an appeal'. Thus recognising, so it seems, that affected taxpayers also have other remedies in addition to an appeal under s 47(9)(e). Second, s 47(9)(d)(i)(bb) of the CEA affords to the Commissioner the power to 'amend any determination or to withdraw it and make a new determination if it was made in error or any condition or obligation on which it was issued is no longer fulfilled or on any other good cause shown including any relevant ground for review contemplated in section 6 of [PAJA]'. It would certainly be anomalous that the Commissioner can interfere with a decision on a PAJA ground, but a court cannot.

[25] In *Metcash*, the Constitutional Court made clear that the mere fact that a party has a statutory appeal against a decision of SARS does not preclude such party from instituting a review against that decision. There is nothing repugnant to our principles of justice in the notion that an affected person may enjoy both a right of appeal in the wide sense as well as a right of review. It is fallacious to treat the right of review as a hollow remedy, simply because a taxpayer is afforded a wide right of appeal. Had the CEA intended to remove the court's jurisdiction to review SARS' determinations, it could and, one suspects, would have said so expressly. Accordingly, no warrant appears to exist for the conclusion that a taxpayer, who is dissatisfied with a determination by SARS, does not enjoy the right to review the determination in terms of PAJA.

[26] In the context of the duty to discover documents, it is well to remember Lord Denning's observation in *Riddick v Thomas Board Mills Ltd* that it is a tool for the

²⁸ See *Nedbank Ltd v Mateman and Others; Nedbank Ltd v Stringer and Another* 2008 (4) SA 276 (T) at 280I–281I and the cases there cited.

²⁹ *De Lille v Speaker of the National Assembly* 1998 (3) SA 430 (C) para 40–41.

discovery of the truth.³⁰ In this matter, RBCT seeks disclosure of the record to ensure that it can fully access justice in a manner that is real, meaningful and not illusory. The reasoning and information on which the impugned decisions were made is a core issue in the case; of which, as things presently stand, only SARS is aware. There is a heightened need for the record where SARS has refused to provide any reasons. SARS cannot shield its own conduct from scrutiny by refusing to make disclosure of the details relevant to its conduct.³¹ There is moreover a duty on public officials to take the court into their confidence and disclose all relevant information so that it is properly placed in an informed position to make a decision in the public interest to ensure good governance.

[27] In the matter of *Helen Suzman Foundation v Judicial Service Commission*, the applicant had sought to review a decision of an organ of state, the Judicial Service Commission (the JSC) and had sought disclosure of the record of decision.³² The JSC refused to provide the applicant with the deliberations of the JSC that had preceded its decision. The Constitutional Court ordered the disclosure of those records. Madlanga J (for the majority) emphasised the importance of openness and accountability as well as the danger of illegalities being concealed from scrutiny, as well as the impact of non-disclosure on the fairness of the trial.³³

[28] It remains to add that even on its own approach, namely that because the appeal under s 47(9)(e) is a wide appeal, RBCT can raise 'any ground, including grounds that resemble grounds of review', SARS can hardly resist production of the record. How, it must be asked, can RBCT meaningfully raise 'grounds that resemble grounds of review', without the benefit of the record. It is unclear why SARS refuses to disclose the documents. It could have disclosed the record without prejudice to its rights to raise the jurisdiction point, but elected not to. What discernible benefit SARS hoped to derive by adopting this course, remains unexplained. On the other hand, the prejudice to RBCT is plainly self-evident. There is no gainsaying that if a review application is launched in a forum that enjoys jurisdiction, then a party is entitled to the record even if their grounds of

³⁰ *Riddick v Thames Board Mills Ltd* [1977] 3 All ER 677 (CA) at 687.

³¹ *DA v Acting NDPP* 2012 (3) SA 486 (SCA) para 37.

³² *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC) para 59.

³³ *Ibid* paras 64 - 68 and 77

review are meritless.³⁴ SARS accordingly accepts that if the institution of the review proceedings is competent (as we have found), then it does not dispute that it is obliged to produce the record of its decision under Uniform rule 53. This conclusion renders it unnecessary to consider RBCT's alternative case founded upon Rule 35.

[29] In the result, the appeal must fail and it is accordingly dismissed with costs, including those of two counsel where so employed.

V M PONNAN
JUDGE OF APPEAL

³⁴ *Standard Bank* fn 1 above para 120.

APPEARANCES

For appellant: C J Pammenter SC and G J Marcus SC
and M Mbikiwa

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For respondent: M Chaskalson SC

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