THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 462/2020

In the matter between:

COMMISSIONER FOR THE SOUTH

AFRICAN REVENUE SERVICE **APPELLANT**

and

GLENCORE OPERATIONS SA (PTY) LTD **RESPONDENT**

Neutral citation: *Commissioner, South African Revenue Service v Glencore Operations SA (Pty) Ltd* (Case no 462/2020) [2021] ZASCA 111 (10 August 2021)

Coram: PETSE DP and MBHA JA and GORVEN, ROGERS and MABINDLA-BOQWANA AJJA

Heard: 27 May 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h45 on 10 August 2021.

Summary: Revenue –Customs and Excise Act 91 of 1964 (the Act) – diesel fuel concession – entitlement to a refund of diesel fuel levy used for primary production in mining – interpretation and ambit of Note 6(f)(iii) of Item 670.04 in Part 3 of Schedule 6 to the Act – claim by entity engaged in mining activities for diesel rebates in respect of period between August 2011 and 13 December 2013 – claim disallowed by Commissioner on grounds that the activities in respect of which claim submitted not constituting primary production activity in mining within ambit of Note 6(f)(iii) but related to secondary activities in mining – decision by the high court overturning the Commissioner's determination and instead holding that taxpayer entitled to a refund of diesel fuel levy for the relevant period reversed on appeal.

ORDER

On appeal from: Gauteng Division of the High Court of South Africa, Pretoria (Van der Westhuizen J, sitting as a court of first instance):

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

2 The order of the high court is set aside and in its place is substituted the following:

'The application is dismissed with costs, including the costs of two counsel where so employed.'

JUDGMENT

Petse DP (Mbha JA concurring):

Introduction

[1] This is an appeal by the Commissioner of the South African Revenue Service (the Commissioner) against a decision of the Gauteng Division of the High Court, Pretoria (the high court) (per Van der Westhuizen J), delivered on 24 October 2019. The high court upheld an appeal by the respondent, Glencore Operations SA (Pty) Ltd (Glencore), brought in terms of s 47(9)*(e)*[1] of

[1] Section 47(9)*(e)* provides:
'An appeal against any such determination shall lie to the division of the Supreme 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.'

the Customs and Excise Act 91 of 1964 (the Act) against a determination made by the Commissioner in terms of s 47(9)*(a)*(i)*(bb)*[2] of the Act.

[2] In terms of s 47(1) of the Act, among the duties levied on goods in accordance with Schedule 1 of the Act are the 'fuel levy' and the 'Road Accident Fund levy'. Distillate fuel (in common parlance, diesel) constitutes goods on which these two levies are imposed by Parts 5A and 5B of Schedule 1. The fuel used by Glencore is subject to these two levies. (Simply for convenience, I shall refer to the two levies collectively as the 'fuel levy' and the goods on which they are imposed as 'fuel levy goods'.) The question is whether Glencore is entitled to a rebate of the fuel levy pursuant to the provisions of s 75(1A) read with Item 670.04 in Part 3 of Schedule 6. Item 670.04 provides for such a rebate in respect of '[d]istillate fuel purchased for and used for the purposes specified in, and subject to compliance with Note 6'. Note 6 forms part of the notes which introduced Part 3 of Schedule 6.

[3] Invoking the provisions of Note 6(f)(iii), the Commissioner disallowed Glencore's application for a refund of the fuel levy leviable on diesel under the Act on the grounds that the distillate fuel in respect of which a refund was claimed by Glencore was not used in 'own primary production activities in mining' as contemplated in Note 6(f)(iii). And that, instead, it was actually used in secondary production activities which do not qualify for a refund.

---

[2] Section 47(9)*(a)*(i)*(bb)* provides in material part as follows:
'whether goods so classified under such tariff headings, tariff sub-headings, tariff items or other items of Schedule No. 3, 4, 5 or 6 may be used, manufactured, exported or otherwise disposed of or have been used, manufactured, exported or otherwise disposed of as provided in such tariff items or other items specified in any such Schedule.'

The parties

[4] The Commissioner is, in terms of s 2(1) of the Act and subject to the control of the Minister of Finance, charged with the administration of the Act and the interpretation of the schedules thereto. The Commissioner is the appellant in this appeal.

[5] Glencore is a holder of mining rights issued in terms of s 23[3] of the Mineral and Petroleum Resources Development Act 28 of 2002 (the MPRDA) and conducts the business of mining of coal at its various mines located in Middelburg, Mpumalanga. It is the respondent in this appeal and resists the relief sought by the Commissioner on appeal.

---

[3] Section 23 provides that:

'**Granting and duration of mining right**

(1) Subject to subsection (4), the Minister must grant a mining right if–

(a) the mineral can be mined optimally in accordance with the mining work programme;

(b) the applicant has access to financial resources and has the technical ability to conduct the proposed mining operation optimally;

(c) the financing plan is compatible with the intended mining operation and the duration thereof;

(d) the mining will not result in unacceptable pollution, ecological degradation or damage to the environment;

(e) the applicant has provided financially and otherwise for the prescribed social and labour plan;

(f) the applicant has the ability to comply with the relevant provisions of the Mine Health and Safety Act, 1996 (Act No. 29 of 1996);

(g) the applicant is not in contravention of any provision of this Act; and

(h) the granting of such right will further the objects referred to in section 2*(d)* and *(f)* and the accordance with the charter contemplated in section 100 and the prescribed social and labour plan.

(2) The Minister may, having regard to the nature of the mineral in question, take into consideration the provisions of section 26.

(3) The Minister must refuse to grant a mining right if the application does not meet all the requirements referred to in subsection (1).

(4) If the Minister refuses to grant a mining right, the Minister must, within 30 days of the decision, in writing notify the applicant of the decision and the reasons.

(5) A mining right granted in terms of subsection (1) comes into effect on the date on which the environmental management programme is approved in terms of section 39(4).

(6) A mining right is subject to this Act, any relevant law, the terms and conditions stated in the right and the prescribed terms and conditions and is valid for the period specified in the right, which period may not exceed 30 years.'

Briefly the facts

[6] A detailed account of the facts and circumstances that precipitated this litigation between the antagonists will be set out in detail later. For now a broad outline of the facts will suffice. As already mentioned, Glencore conducts business in mining of coal. In the case of its mining production operations it makes use, amongst others, of a variety of vehicles, plant and equipment that use diesel.[4]

[7] In order to promote international competitiveness of, amongst others, businesses engaged in mining, the government introduced a diesel fuel concession for own primary production in various sectors, including mining (this is Part 3 of Schedule 6) subject to strict compliance with an administrative regime aimed at minimising the risk of fraud whilst, at the same time, ensuring that the scheme was affordable from the perspective of the fiscus within its broader fiscal objectives and framework. To be eligible for this concession, the enterprise concerned is required to be registered as a vendor for value-added tax under the Value-Added Tax Act 89 of 1991 (the VAT Act). In addition, the claimant of a diesel levy refund must comply with the requirements as determined by the Commissioner.

[8] As previously indicated, Glencore submitted claims as required both by the Act and the VAT Act to the Commissioner for refund of the fuel levy in respect of the period from August 2011 to 13 December 2013. The

[4] In terms of sub-item (uu) of Note 6(f)(iii) of the Schedule to the Act the following equipment and vehicles are regarded as forming an integral part of the mining process:
(a) agitators; (b) drilling rigs; (c) hammer mills; (d) smelters; (e) tunnelling machines; (f) specially manufactured underground equipment; (g) front-end loaders; (h) excavators; and (i) locomotives for carriage by rail of minerals or equipment.

Commissioner disallowed some of the claims. In doing so, the Commissioner contended that the diesel in respect of which refunds for levy were claimed by Glencore was not used in 'primary production activities in mining' and therefore the fuel levy paid therefor was not refundable. In counter, Glencore contended first that the activities concerned were squarely covered by the list set out in sub-notes (cc), (gg), (mm), (oo), (pp) and (qq) of Note 6(f)(iii) of Schedule 6 to the Act. In the alternative, Glencore contended that in any event on a proper interpretation of the word 'include' located in Note 6(f)(iii) the list therein set out is not exhaustive. The discordant positions adopted by the antagonists in this litigation and their contentions in essence define the crux of the issues that arise in this appeal.

Issues

[9] The primary issue for decision in this appeal is whether the mining operations in relation to which diesel refunds were claimed by Glencore had been carried on for own primary production in mining as contemplated in Note 6(f)(ii) and (iii) of Part 3 of Schedule 6 to the Act and therefore qualify for a refund of levies as asserted by Glencore.

[10] A related, but subsidiary issue, is whether the list of activities set out in Note 6(f)(iii) of Part 3 of Schedule 6 to the Act which qualify as own primary production activities in mining is exhaustive. The answer to this question turns solely on the interpretation of the word 'include' located in Note 6(f)(iii) in light of the underlying purpose to which the fuel rebates are directed. Note 6(f)(iii) provides that 'own primary production in mining' include the following:

'(aa) The exploration or prospecting for minerals.

(bb) The removal of over burden 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 mining for those minerals 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 a mining operation 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 the mining operation is carried on, from such 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.

(jj) The construction or maintenance of dams, at the place where the mining operation is carried on, for the storage of uncontaminated water for use in a mining operation.

(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 for use in a mining operation.

(mm) Coal stockpiling for the prevention of the spontaneous combustion of coal as part of primary mining operations.

(nn) The reactivation of carbon for use in the processing of ores containing gold if the reactivation occurs at the place where mining for gold is carried on.

(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 vehicle, locomotive or other equipment on the mining site of ores or other substances containing minerals for processing in operations for recovery of minerals.

(qq) The service, maintenance or repair of vehicles, plant or equipment by the person who carries on the mining operation 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 networks for use in a mining operation, to the extent that the service, maintenance or repair is performed at the place where a mining operation is carried on.

(ss) Quarrying.

(tt) The transport of ores or other substances containing minerals from the mining site to the nearest railway siding.'

The determination of the subsidiary issue is conditional upon Glencore being unsuccessful in relation to the primary question.

Litigation history

[11] The appeal by Glencore against the Commissioner's determination was initiated in the high court by motion proceedings instituted on 20 February 2018. The substantive orders sought in the notice of motion were the following:

'1 That, in the event of the Respondent refusing to extend the period of one year referred to in section 96(1)(b) of the Customs and Excise Act 91 of 1964 ("**the Act**") in respect of the relief sought in prayers 2 to 5 below, that the above Honourable Court extends the said period in the interests of justice until 21 February 2018.

2 That the Applicant's appeal against the determination by the Respondent contained in Annexure "FA3" to the founding affidavit that the Applicant does not qualify for diesel refunds claimed by it under rebate item 670.04 in schedule 6 to the Act, be upheld and the determination be set aside.

3 That the said determination be substituted with a determination that the diesel refunds claimed by the Applicant qualify under rebate Hem 670,04.

. . .

7 That the Respondent be ordered to pay the costs of this application.'

Glencore's appeal was upheld by the high court and the Commissioner's determination was set aside. The Commissioner's subsequent application for leave to appeal against the decision of the high court was unsuccessful before the high court. Consequently, leave to appeal was sought from and granted by this Court on 6 June 2020.

[12] Before us counsel were agreed that the declaratory orders sought in prayers 4, 5 and 6 of the notice of motion were not pursued in the high court and therefore not considered. In prayer 4, Glencore had sought an order that the Commissioner's appeal determination should be set aside and substituted with a determination that Glencore's claims for diesel levy refunds for the relevant period fell within the ambit of Item 670.04 of Part 3 of Schedule 6. Prayer 5 on the other hand had sought a declarator that on a proper construction of Note 6(f)(iii) the expression 'own primary production in mining' does not mean that Glencore's primary mining activities cease once the ore is extracted from the ground. And that the list of activities set out in Note 6(f)(iii) is not exhaustive. Prayer 6 had sought a mandamus directing the Commissioner to take a decision in relation to Glencore's claims within two weeks of the court's order as well as additional relief consequential upon the granting of such mandamus.

Résumé of the facts

[13] Before setting out the contentions of the parties, it is necessary to complete the résumé of the salient facts that ultimately culminated in the current litigation. As already mentioned, Glencore's core business entails the mining of coal by virtue of its mining rights held in terms of the MPRDA. Once coal has been extracted from the bowels of the earth, Glencore utilises equipment, trucks

and light delivery vehicles which use diesel as an integral part of its mining activities. In terms of s 75(1A) and (4A) of the Act, read with Part 3 of Schedule 6 to the Act, businesses engaged in mining activities may, subject to them meeting the requirements stipulated by the Act, apply for rebates and refunds of the fuel levy upon compliance with the provisions of the relevant Item of Schedule 6.

[14] Except where the Commissioner otherwise authorises, on good cause shown, payment of a refund of levy granted in terms of the relevant item of Part 3 to any person is made subject to compliance with such conditions as the Commissioner may reasonably impose in each case. To be eligible to claim a refund of levies on distillate fuel the applicant therefor must be registered as a vendor in terms of s 23 of the VAT Act[5] and complete the diesel refund part of the VAT return form when seeking a refund of the fuel levy. There are also elaborate conditions and procedures relating to purchases and refunds that must be complied with for an enterprise to qualify for a refund. It is, however, not necessary for present purposes to spell all of them out in this judgment. It suffices to mention that insofar as mining is concerned it is required that the distillate fuel must have been purchased for use and actually used as fuel for own primary production activities in mining as envisaged in Note 6(f)(ii) and (iii) of Schedule 6.

[15] It is useful at this stage to set out the provisions of Note 6(f)(ii). It provides that:

[5] Section 23 provides, amongst other things, that every person who, on or after the commencement of the VAT Act, carries on any enterprise, became liable to be registered as a vendor for purposes of the VAT Act and subject to its provisions.

'The mining activities which qualify for a refund of levies must be carried on -

(aa) for own primary production by the user or by a contractor of the user who is contracted on a dry basis;

(bb) unless otherwise specified, at the place where the mining operation is carried on; and

(cc) by the holder or cessionary of the necessary authorisation granted or ceded in terms of the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002).'

[16] Reverting to the factual narrative, Glencore asserts that its mining activities typically entail the following: (a) a truck transports coal from the pit where it is mined to a coal stockpile; (b) there the coal is tipped from the truck onto a feeder that conveys it by means of a conveyor belt to where it will be crushed to size, ie less than 250 mm (the so-called primary crusher); (c) any discard from this process is loaded by front-end loaders into trucks to be carted back to the pit; (d) by-products such as rocks are loaded either into a feed mobile crusher to be used for making road-building material or taken back to the pit; (e) the secondary sizer crushes coal to less than 90 mm; (f) light-delivery vehicles are used to maintain the conveyor belts between the primary and secondary crushers and rotary breaker; (g) front-end loaders and bull-dozers are used to move coal from the secondary stockpile onto conveyor belts via feeders to feed coal to the plant; (h) forklifts, telehandlers and cranes are used to perform maintenance of the plant, where this is required; (i) discard is then conveyed via conveyer belts to a collection point from where dump trucks collect the discard to return it to the pit; (j) washed coal (ie coal after it has gone through the processing plant) is loaded on conveyor belts for conveyance to a stockpile or siding; (k) conveyor belts, maintained by light delivery vehicles, convey coal to the railway siding; (l) from the railway siding, coal is loaded onto the train

wagons where light delivery vehicles are again used to perform maintenance work on the load-out facility.

Discussion

[17] In this case counsel were at the outset agreed that the fate of this appeal hinged on the proper interpretation of the expression located in Note 6(f)(ii)(aa) of Part 3 to Schedule 6, namely 'own primary production activities in mining'. Counsel were further agreed that insofar as the proper interpretation of the relevant note is concerned, the ordinary rules of statutory interpretation apply.[6] The effect of this is that the fact that we are here dealing with a fiscal provision matters not except to the limited extent that there may be ambiguity in which event the *contra fiscum* rule would be triggered. In this regard, what this Court said in *NST Ferrochrome (Pty) Ltd v Commissioner for Inland Revenue* 2000 (3) SA 1040 (SCA) (*NST Ferrochrome*) bears repeating. It was there said (para 17):

'. . . Where there is doubt as to the meaning of a statutory provision which imposes a burden, it is well established that the doubt is to be resolved by construing the provision in a way which is more favourable to the subject, provided of course the provision is reasonably capable of that construction. (See for eg *Fundstrust (Pty) Ltd (In Liquidation) v Van Deventer* 1997 (1) SA 710 (A) at 735 G – H; *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue and Another* [1991] ZASCA 163; 1992 (4) SA 202 (A) at 216 C.) But where any uncertainty in a statutory provision can be resolved by an examination of the language used in its context, there is no rule of interpretation which requires that effect be given to a construction which is found not to be the correct one merely because that construction would be less onerous on the subject. . . .'

---

[6] See in this regard: *Secretary for Inland Revenue v Kirsch* [1978] 3 All SA 308 (T); 1978 (3) SA 93 (T) at 94D where it was stated that:
'There is no particular mystique about "tax law". Ordinary legal concepts and terms are involved and the ordinary principles of interpretation of statutes fall to be applied.'

[18] Most recently, in *Telkom SA SOC Ltd v Commissioner for the South African Revenue Service* [2020] ZASCA 19; 2020 (4) SA 480 (SCA) this Court affirmed its earlier decision in *NST Ferrochrome* and reiterated that resort can be had to the *contra fiscum* rule to resolve an 'irresoluble ambiguity' only if all other conventional methods of contextual and purposive construction still yield two equally plausible interpretations.[7] Differently put, one only invokes the rule when, despite all other ordinary approach to interpretation, one is still left with 'irresoluble ambiguity'.

Statutory interpretation

[19] The principles of statutory interpretation are well established. In *Natal Joint Municipal Pension Fund v Endumeni Municipality* (*Endumeni*) this Court restated the proper approach to statutory interpretation.[8] It went on to explain that statutory interpretation is the objective process of attributing meaning to words used in a written instrument under consideration.[9] This process, the court emphasised, entails a simultaneous consideration of –

(a) the language used in the light of the ordinary rules of grammar and syntax;

(b) the context in which the provision appears; and

(c) the apparent purpose to which it is directed.[10]

[20] What the Constitutional Court said in *Cool Ideas 1186 CC v Hubbard and Another (Cool Ideas)* in the context of statutory interpretation bears repeating. The court said:

---

[7] See paragraphs 18 – 20.

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

[9] Id para 18.

[10] Id.

'A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

(a) that statutory provisions should always be interpreted purposively;

(b) the relevant statutory provision must be properly contextualised; and

(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).'[11]

[21] Where a provision is ambiguous its possible meanings must be weighed against one another, having regard to the considerations outlined in the immediately preceding two paragraphs. By way of example, a meaning that undermines the manifest purpose of the statute or leads to insensible or unbusinesslike results is not to be preferred.[12] Neither is a construction that strains the ordinary and clear meaning of the words used.[13] That the text, context and purpose of the legislation must always be considered at the same time when interpreting legislation has been affirmed in several decisions of the Constitutional Court.[14]

---

[11] *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (8) BCLR 869 (CC); 2014 (4) SA 474 (CC) para 28.

[12] See *Endumeni* para 18.

[13] Id para 25. See also: *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit N O and Others* 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC).

[14] See, for example, in this regard: *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) para 90 (the judgment of Ngcobo J) quoted with approval in *Du Toit v Minister for Safety and Security* [2009] ZACC 22; 2010 (1) SACR 1 (CC); 2009 (12) BCLR 1171 (CC) para 38; *Bertie Van Zyl (Pty) Ltd v Minister for Safety and Security* [2009] ZACC 11; 2010 (2) SA 181 (CC); 2009 (10) BCLR 978 (CC) (*Bertie Van Zyl*) para 21; *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal* [2013] ZACC 10; 2013 (4) SA 262 (CC); 2013 (6) BCLR 615 (CC) para 129; *Kubyana v Standard Bank of South Africa Ltd* [2014] ZACC 1; 2014 (3) SA 56 (CC); 2014 (4) BCLR 400 (CC) paras 77-8.

[22] Allied to these considerations, courts must also heed the injunction that enjoins our courts to interpret legislation to promote the spirit, purport and objects of the Bill of Rights.[15] But in so doing, the court must again be careful not to strain the reasonable meaning of words. As to the context, it is as well to remember that:

'. . . [C]ontextual interpretation requires that regard be had to the setting of the word or provision to be interpreted with particular reference to all the words, phrases or expressions around the word or words sought to be interpreted. This exercise might even require that consideration be given to other subsections, sections or the chapter in which the key word, provision or expression to be interpreted is located. . . .'[16]

High Court

[23] The high court considered that the crucial question that required to be answered in relation to the core of Glencore's complaint was whether 'the distillate diesel fuel, in respect of the refunds that are sought, was used by [Glencore] in its mining operations for "primary production activities in mining"'.[17] It went on to state that this aspect necessarily raised the question whether Glencore used the diesel fuel in the manner intended in Note 6(f)(iii) of Part 3 of Schedule 6 to the Act.

[24] The high court, having taken the view that the meaning of the word 'mining' presented no controversy, held that the ambit of the dispute between the antagonists had thus narrowed to the proper interpretation to be ascribed to the word 'include' in Note 6(f)(iii). After alluding to the canons of statutory interpretation, it then said the following:

---

[15] Section 39(2) of the Constitution.
[16] *AfriForum and Another v University of the Free State* [2017] ZACC 48; 2018 (2) SA 185 (CC); 2018 (4) BCLR 387 (CC) para 43.
[17] See para 9 of the high court judgment.

'The ordinary grammatical, and for that matter dictionary, meaning of the word *"include"* has a broad meaning, i.e. one of non-exhaustiveness. That is the interpretation that the applicant contends should be applied. The respondent contends for a narrower meaning, i.e. one of exhaustiveness, should be given thereto.'

[25] Thereafter it proceeded to consider the meaning of the term 'mining' and stated that its primary meaning was well-known and therefore required no definition. Thus, it concluded that the word 'mining' must bear its ordinary meaning.[18]

[26] The high court thereafter referred to *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division and Others* 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC) and then continued:

'A cursory reading of the list in note 6(f)(iii) of the Schedule reveals that most of the instances, if not all, go beyond the primary meaning of *"mining"*. A simple example will suffice, namely (vv) in note 6(f)(iii) refers to *"rehabilitation required by an environmental management programme or plan approved in terms of the Mineral and Petroleum Resources Development Act, 2002, but excluding such activities performed beyond the place where the mining operations are carried on or after a closure certificate has been issued in terms of the Mineral and Petroleum Resources Development Act, 2002*."'[19]

[27] It then concluded:

'It follows that the activities in note 6(f)(iii) are non-exhaustive activities forming part of, i.e. included in, *"own primary production activities in mining"*. It further follows that where activities conducted by the applicant do not fit exactly within any of the activities referred to in note 6(f)(iii) of the Schedule, but are in reality part and parcel of the kind of operations which the legislature intended to include in the concept of primary activities in mining, the

[18] See paras 33 and 36 of the high court judgment.
[19] In this Court counsel were agreed that sub-paragraph (vv) was only added to Note 6(f)(iii) in 2016. Thus, it has no bearing on the interpretation of the note for purposes of the present case.

non-exhaustiveness of [the] list in note 6(f)(iii) of the Schedule permits that such activities are also subject to the concession relating to rebates of distillate diesel fuel. Thus, those activities qualify as primary production activities in mining as defined in note 6(f)(iii) of Schedule 6 part 3 of the Act.'

[28] It is apposite at this juncture to make a brief reference to the budget speech delivered by the Minister of Finance (the Minister) in the National Assembly during February 2001 which was a precursor to the introduction of rebate Item 670.04 and Note 6(f)(iii) of Part 3 of Schedule 6 to the Act.

[29] Dealing with 'diesel fuel concession for primary production' activities in mining, the Minister proclaimed as follows:

'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,

. . .

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.'

The parties' contentions

[30] Glencore's principal submission is that all of the mining activities in relation to which diesel refunds were claimed fall squarely within the items listed in Note 6(f)(iii). Accordingly, so the argument went, if it is found that this is the case, that outcome would render it unnecessary to determine its alternative

argument that the listed items do not constitute a closed list. In support of its argument in this regard, it was contended on behalf of Glencore that although the activities spelt out in sub-paragraphs (mm); (nn); (oo); (pp) and (tt) self-evidently take place after the mineral has already been extracted from the ground, they are nevertheless regarded as primary production activities in mining for purposes of rebate Item 670.04. Moreover, even activities that take place on a continuous basis as encapsulated in sub-paragraphs (gg); (hh); (ii); (kk); (ll); (qq) and (rr) and therefore not an integral part of the extraction of the mineral itself from the ground are likewise regarded as primary production activities in mining. For this reason, argued Glencore, its claims should not have been disallowed by the Commissioner.

[31] It was submitted on behalf of the Commissioner that the phrase 'primary production activities in mining' excludes activities undertaken subsequent to the extraction of the mineral being mined from the ground. Thus, all activities that, for example (in this instance), entail the transportation of coal from the primary stockpile to a secondary stockpile or processing plant do not constitute primary production activities in mining as envisaged in Note 6(f)(ii) and (iii).

[32] Whilst it may be so that the activities mentioned in paragraph 30 above are indeed encompassed in the list contained in Note 6(f)(iii), I do not think the evidence presented by Glencore provides any foundation to make it possible for that finding to be made in this case. The evidence that emerges from the record, even when viewed against the backdrop of the schematic presentation as explained in Glencore's founding affidavit, is at best for Glencore equivocal. It leaves a gaping factual void as to the precise nature of the primary activities in which Glencore was engaged in order for this Court to determine their eligibility

for a refund of the diesel levies paid. Consequently, Glencore's contentions based on this leg of its case cannot be sustained.

[33] With Glencore having been unsuccessful with respect to the principal issue, it is now necessary to consider the alternative argument advanced by Glencore. That argument raised the question as to whether the list of activities stipulated in Note 6(f)(iii) as constituting primary production activities in mining is exhaustive. As already indicated in paragraph 8 of this judgment, Glencore's alternative submission was that the list is non-exhaustive. The upshot of Glencore's contention therefore is that the issue of whether an activity is a primary production activity in mining would be open-ended, meaning that this aspect would have to be determined on a case by case basis as dictated by the facts of each case. As already mentioned, Glencore's argument found favour with the high court. The high court, in essence, concluded that the list set out in Note 6(f)(iii) is non-exhaustive, meaning that any mining activity that does 'fit exactly within any of the activities referred to in Note 6(f)(iii). . . but are in reality part and parcel of the kind of operations which the legislature intended to include in the concept of primary activities in mining . . .are subject to the concession relating to rebates of distillate diesel fuel'.

[34] Unsurprisingly, Glencore aligned itself with the conclusion of the high court. Before us the pith of Glencore's contentions was that the activities listed in Note 6(f)(iii) not only encompass activities that are preparatory to the actual extraction of the minerals but also activities associated with and incidental to the actual mining of the mineral. Several examples of such incidental activities (borne out by the list itself) were provided.

[35] In order to bolster its contention that the list is non-exhaustive, Glencore submitted in its supplementary heads of argument that when rebate Item 670.04 was introduced in 2001 (at that stage as Item 670.03), Note 6 had contained a paragraph (d) which explicitly provided that the activities specified therein were not to be regarded as mining activities.[20] Thus, Glencore argued that it would be untenable to hold that the list in Note 6(f)(iii) is exhaustive, for to do so would undermine what paragraph (d) sought to achieve. Had the list been intended to be exhaustive, so the argument went, there would have been no need to provide for specific exclusions because it would follow axiomatically that any activity not included in the list was necessarily excluded. For the reasons that will become apparent in a moment, this argument cannot be sustained.

[36] It is necessary to emphasise that in ascertaining the meaning of the word 'include' in the context in which it is used, the point of departure must be Note 6(f)(ii). Note 6(f)(ii) provides in explicit terms that the mining activities which qualify for a refund of levies must be carried on: (i) for own primary production by the user or by a contractor of the user who is contracted on a dry basis; (ii) at the place where the mining operation is carried on; and (iii) by the mining right holder. That Glencore is 'the user' and the holder of the requisite authorisation is not in dispute. It is also not in dispute between the antagonists that only activities that relate to 'own primary production' in mining qualify for a refund of fuel levies. Whilst the phrase 'own primary production activities' has

---

[20] Paragraph (d) reads as follows:

'(d) The following are not regarded as mining activities:

(i) Dredging for materials for use in:

(aa) Building.

(bb) Road Making.

(cc) Landscaping.

(dd) Construction and similar activities.

(ii) Crushing operations such as the crushing of stone for road building and dam walls.'

not been defined, there can be no doubt that the list contained in Note 6(f)(iii) comprehensibly sets out activities that fall under the rubric of own primary production activities in mining. Put differently, the list covers activities that are inextricably linked to primary mining, ie extraction of the mineral from the ground.

[37] Accordingly, the crucial question in relation to this aspect of the case is whether the list of activities set out in Note 6(f)(iii) is exhaustive as the Commissioner contended. The answer depends on the language of the relevant note, the context and the purpose to which it was directed. As to the context, it is as well to remember the caveat sounded by Schreiner JA in *Jaga v Dönges N O and Another, Bhana v Dönges N O and Another* [1950] 4 All SA 414 (A); 1950 (4) SA 653 at 664H that the interpretative process ought not to be constrained by 'excessive peering at the language to be interpreted without sufficient attention to the contextual scene'. Moreover, it is by now established that the legislative history may provide helpful indicators to context. And another significant factor is that the factual background to the statute and the purpose to which it is directed also provide the legislative context.[21] As the Minister made plain in his budget speech, fuel levies are a 'significant source of general Government revenue'. Thus, by imposing fuel levies, the government sought to augment its revenue base. Nevertheless, with a view to encouraging international competitiveness in various sectors, including mining, it saw fit to make certain concessions in order to ameliorate the financial burden on miners, taking into account that the 'bulk of diesel fuel used in mining is used off-road'.

[21] See in this regard: *Commissioner for the South African Revenue Service v United Manganese of Kalahari (Pty) Ltd* [2020] ZASCA 16; 2020 (4) SA 428 (SCA) para 17 and the authorities therein cited.

It is therefore against this backdrop that the contentions of the antagonists must be considered.

[38] In their heads of argument counsel for the Commissioner submitted, with reference to certain decisions of this Court,[22] that the 'legislative history forms an integral part of the context in which legislation should be interpreted'. With that broad proposition there can be no quarrel. However, in elaboration counsel, relying on certain excerpts of the Minister's budget speech, contended that what the Minister said in relation to the refund of fuel levies forms part of the background material. Developing this point, counsel sought to argue that in construing Item 670.04 read with Note 6(f)(ii) and (iii) regard should also be had to the Minister's speech. It will be remembered that in delivering his speech the Minister, amongst other things, emphasised that fuel levies 'are a significant source of general Government revenue'. And that in order to 'minimise the risk of fraud' the refund system must ensure that it 'is affordable within the broader fiscal framework'. The questions whether and in what circumstances it is permissible to have regard to ministerial speeches as an aid to interpreting legislation are not free from difficulty. However, I do not consider it necessary to delve into this aspect. In the view I take of the matter it is not necessary, in the context of the facts of this case, to venture into uncharted waters[23] and determine whether regard could be had to the Minister's speech for the language of Item 670.04 read with Note 6(f)(iii) is clear and unambiguous.

---

[22] *Commissioner, South African Revenue Service v United Manganese of Kalahari (Pty) Ltd* [2020] ZASCA 16; 2020 (4) SA 428 (SCA) para17; *Telkom SA SOC Limited v Commissioner for the South African Revenue Service* [2020] ZASCA 19; [2020] 2 All SA 763 (SCA); 2020 (4) SA 480 (SCA) paras 8-17.

[23] Cf *S v Makwanyane and Another* [1995] ZACC 3: 1995 (3) SA 391 paras 14-15; *Case and Another v Minister of Safety and Security and Others, Curtis v Minister of Safety and Security and Others* [1996] ZACC 7; 1996 (3) SA 617para 12 fn 18; *Thoroughbred Breeders' Association of South Africa v Price Waterhouse* [2001] ZASCA 82; [2001] 4 All SA 161 (A) para 117 of the concurring judgment of Marais JA, Farlam JA and Brand AJA.

[39] As was to be expected, in this Court, as in the high court, argument on this aspect centred mainly on the word 'include' located in the opening phrase in Note 6(f)(iii).

[40] As already mentioned, Glencore's submission was essentially that the list of production activities set out in Note 6(f)(iii) is non-exhaustive. This argument found favour with the high court which, in a nutshell, held that 'where activities conducted by [Glencore] do not fit exactly with the activities referred to in Note 6(f)(iii). . . but are in reality part and parcel of the kind of operations' encompassed by the phrase 'primary production activities in mining' as envisaged, they are covered by rebate Item 670.04 and therefore 'qualify as primary production activities in mining as defined in note 6(f)(iii) ...'.

[41] Consequently, on the high court's interpretation the issue of whether an activity is a primary production activity in mining is open-ended. This means that apart from the list contained in Note 6(f)(iii) the question whether an activity qualifies for rebate of the diesel levy is to be determined on a case by case basis.

[42] The counter-argument advanced on behalf of the Commissioner was essentially this. The concession brought about by rebate Item 670.04 provides for an exception to the general rule, ie the imposition of fuel levies in order to promote revenue collection for the fiscus. And bearing in mind the underlying purpose of the Act which is to provide for, amongst others, the levying of a fuel levy, Note 6(f)(iii) was intended to delineate the parameters of the concession and is therefore exhaustive.

[43] Central to the Commissioner's contention was a statement by Lord Watson in *Dilworth v Commissioner of Stamps* [1899] AC 99 at 105 in which the following was stated:

'The word "include" is very generally used in interpretation clauses in order to enlarge the meaning of the words and phrases occurring in the body of the statutes; and when it is so used, these words or phrases must be construed as comprehending not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. But the word "include" is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to "mean and include", and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions.'

[44] In *R v Ah Tong* 1919 AD 186, this Court said the following at 189-190:

'The word "include" is often used in the definition of Acts of Parliament for the purpose of enlarging the meaning of a word or phrase by bringing under it something which is not comprehended under the ordinary meaning of that word or phrase. But assuming that the words comprise and include are exactly synonymous, it is clear that this is not the sense in which the word is here used, for the shops enumerated are such as would ordinarily fall under the natural meaning of "refreshment shop". In this section the word is used not for the purpose of extending the meaning of the expression "refreshment shops" but for the purpose of enumerating the different kinds of shops which are intended to be comprehended under that denomination. That, I think, would be the result to be arrived at even if the Legislature had used the word "including" instead of "comprising".'

[45] In *De Reuck* the Constitutional Court had occasion to observe that the meaning of 'include' in a statute has to be ascertained from the context in which the word is used, having regard to the purpose which the list under consideration

was designed to serve. In para 18 of that judgment, Langa DCJ stated the following (footnotes omitted):

'The correct sense of "includes" in a statute must be ascertained from the context in which it is used. *Debele* provides useful guidelines for this determination. If the primary meaning of the term is well known and not in need of definition and the items in the list introduced by "includes" go beyond that primary meaning, the purpose of that list is then usually taken to be to add to the primary meaning so that "includes" is non-exhaustive. If, as in this case, the primary meaning already encompasses all the items in the list, then the purpose of the list is to make the definition more precise. In such a case "includes" is used exhaustively. Between these two situations there is a third, where the drafters have for convenience grouped together several things in the definition of one term, whose primary meaning – if it is a word in ordinary, non-legal usage – fits some of them better than others. Such a list may also be intended as exhaustive, if only to avoid what was referred to in *Debele* as "n moeras van onsekerheid" (a quagmire of uncertainty) in the application of the term.'

[46] The upshot of what the Constitutional Court said in the passage quoted in the preceding paragraph was an endorsement of a well-established principle enunciated and explained in earlier cases.[24]

[47] In the heads of argument it was contended on behalf of the Commissioner that '[t]he use of the word "include" in the context of the whole of the provision, ie the very specific and limited definition which it proceeds to explain, shows that it could not possibly have been the purpose of the Schedule to create a non-exhaustive open-ended list of eligible activities'. Building on this thesis, it was submitted that the scope of each of the activities listed in Note 6(f)(iii) is

[24] See, for example, *Attorney General Transvaal v Additional Magistrate for Johannesburg* 1924 AD 421; *R v Hurwitz* 1944 EDL 23; *Nkabinde v Nkabinde and Nkabinde* 1944 WLD 112; *Estate Droste v Commissioner for Inland Revenue* 1946 TPD 435 at 437; *Union Government v Rosenberg (Pty) Ltd* 1946 AD 120 at 126-127; *Torf's Estate v Minister of Finance* [1948] 2 All SA 283 (N) at 288-289; 1948 (2) SA 283 (N) at 289; *R v Debele* 1956 (4) SA 570 (A) at 575B-576H; *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003(1) SA 113 (SCA) para 20.

qualified by the phrase 'own primary production in mining'. Thus, so the argument went, the purpose of the list was to clarify what the phrase 'own primary production in mining' entails rather than to extend its ambit.

[48] In the recent case (unreported) of *Graspan Colliery (Pty) Ltd v Commissioner for the South African Revenue Service* (*Graspan*)[25] heavily relied upon by the Commissioner, the court there had occasion to consider whether the word 'include' employed in Note 6(f)(iii) was intended to be exhaustive or not of the activities listed therein. In grappling with this question, Collis J stated the position as follows:

'In employing the reasoning of the cases listed above, I am persuaded that the use of the word "include" in the phrase own primary production activity in the note is to give the phrase a more precise meaning by **listing** what will encompass own primary production activities in mining. The word *"include"* is therefore, aimed at illustrating that the list is exhaustive of the meaning of primary production activities in mining. To hold otherwise, would render the usage of the word "include" nugatory and it will bring about a superfluous usage of the word in the phrase which could not have been what was intended by the legislator. Differently put, the legislator would not have embarked on the exercise to list twenty activities . . . if the legislator had no intention of having a list which is exhaustive. . . .'

[49] The decision in *Graspan* was trenchantly criticised by counsel for Glencore. First, it was submitted that the court in *Graspan* was bound by the judgment now on appeal before us in this case which had been delivered almost a year earlier unless it was found to be clearly wrong. Second, it was submitted that the basis upon which *Graspan* was distinguished from the earlier decision was unsound. Third, that in concluding that the list in Note 6(f)(iii) was exhaustive, the court in *Graspan* allowed itself to be influenced by the question

[25] Gauteng Division of the High Court, Pretoria case no 8420/2018 delivered on 20 September 2020.

'whether rehabilitation was a primary production activity in mining' – which is what *Graspan* dealt with – 'or whether the activities of Glencore in the present case qualified as primary production activities in mining'.

[50] The criticism levelled against *Graspan* misses the point. It deflects focus from what is at the heart of the dispute in this case, namely whether 'include' in the context of the instrument in which it is employed is indicative of an exhaustive rather than a non-exhaustive list of activities.

[51] A non-exhaustive list would lead to unbusinesslike or insensible result. This is so because an interpretation that favours a non-exhaustive list has a potential to frustrate the principal purpose sought to be advanced by the imposition of fuel levies on diesel in the first place. Thus, it would be out of sync with the Government's fiscal framework that was at the core of the introduction of rebate Item 670.04. Even more, that some of the activities included in the list unquestionably fall outside the meaning of primary mining not only reinforces the conclusion reached in this judgment but also militates against the interpretation for which Glencore contended. In addition, such an interpretation pays no regard to the underlying purpose and scheme of the Act which is to provide, amongst others, for the levying of a fuel levy. As Collis J rightly observed in *Graspan* there would have been no virtue in Note 6(f)(iii) listing multiple activities encompassed by 'own primary production activities in mining,' some of which go beyond the extraction of coal from the ground, if the list would nevertheless be non-exhaustive.

[52] To my mind, the purpose of having a comprehensive list of inclusions such as the one found in Note 6(f)(iii) was to avoid uncertainties. And, as already

mentioned, this is borne out by the fact that some of the activities contained in the list of inclusions, as the high court rightly noted, have the effect of broadening the natural meaning of the phrase 'primary production activities in mining' by bringing within its scope activities that are not comprehended under the ordinary meaning of that phrase. Consequently, to hold that the list was meant to be non-exhaustive would lead to uncertainties in the implementation of the rebate item with which this case is concerned.

[53] In sum, to interpret the word 'include' in the context in which it is used in Note 6(f)(iii) as indicative of a non-exhaustive list would not only be to ignore fiscal reality and the broader fiscal framework that informed the introduction of rebate Item 670.04 but also the object of the Act which, through the imposition of fuel levies, sought to broaden the government's revenue base. This is manifest in the purpose of the Act and Item 670.04 itself. These factors impel the conclusion that 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 serves to carefully circumscribe the ambit of the activities in respect of which rebate refunds may be claimed under the relevant item, thereby dispelling any notion that the list of inclusions is open-ended. That the phrase 'own primary production activities in mining' is nowhere defined in Note 6 also reinforces this conclusion.

[54] For the foregoing reasons I am persuaded that in granting its order the high court came to an erroneous conclusion. Therefore, the appeal must succeed and the Commissioner's determination reinstated.

[55] In the result the following order is made:

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

2 The order of the high court is set aside and in its place is substituted the following:

'The application is dismissed with costs, including the costs of two counsel where so employed.'

X M PETSE
DEPUTY PRESIDENT
SUPREME COURT OF APPEAL

Rogers AJA (Gorven and Mabindla-Boqwana AJJA concurring):

[56] I have read the judgment of Petse DP. I agree with its conclusion and much of the reasoning. However, there are some aspects where my approach differs to his, hence this separate judgment.

[57] Like my colleague, I prefer not to place reliance on the Minister's speech when the rebate scheme was introduced. In the present case, the purposes of the legislation are apparent from its content. The primary taxing provision – the fuel levy – has as its purpose to raise revenue for the State. The rebate scheme, which

was introduced later, has as its purpose to grant a financial indulgence to firms engaged in certain forms of primary production.

[58] The taxing provisions (s 47(1) read with the relevant items in Parts 5A and 5B of Schedule 1, which impose the fuel levy on diesel) are in wide and simple terms, and undoubtedly apply to the diesel at issue in this case. By contrast, the rebate scheme (Item 670.04 read with Note 6 in Part 3 of Schedule 6) is meticulously detailed. The lawmaker was at pains to circumscribe the activities which were entitled to benefit from the scheme. I agree with Petse DP that an open-ended interpretation which allows for the inclusion of items not plainly covered by the language of Note 6 is unlikely to give effect to the legislation's intention.

[59] The lawmaker did not intend all mining activities to benefit from the scheme, only 'own primary production activities'. Due weight must be given to the word 'primary', of which the natural antonym is 'secondary'. In my view, 'primary production activities' in mining mean activities associated with extracting minerals from the ground as distinct from activities which occur after minerals have been extracted from the ground, such latter activities being 'secondary'. Items (aa) to (uu) in Note 6(f)(iii) must as far as reasonably possible be interpreted in a way which is consistent with the ordinary meaning of the phrase 'primary production activities in mining' rather than in a way which negates the distinction between 'primary' and 'secondary' activities. This is so whether or not the list is exhaustive. And if the list is not exhaustive, its contents may cast light on what the lawmaker intended as the ordinary meaning of 'primary production activities'.

[60] In this case the ‘mineral’ for which Glencore mines is coal. Glencore’s papers provided no information about how the coal is extracted from the ground. The operation appears to be an open-cast mining operation. All the diesel-using activities in issue are activities in relation to ‘coal’ after it has been extracted from the ground. The material transported from the pit is said to be ‘coal’. The ‘coal’ is crushed to size in various operations and transported by conveyor belt to a plant where it is washed, stockpiled and taken to a railway siding. Since all these operations take place after the mineral (coal) has been extracted from the ground, they are not within the ordinary meaning of ‘own primary production activities’.

[61] My colleague has quoted Note 6(f)(iii) as it read at the time relevant to this case. He considers that some of the listed activities are clearly beyond the ordinary meaning of ‘own primary production activities in mining’ but finds that Glencore put up insufficient evidence to bring its activities within any of those in the list. In my view, however, it is possible to interpret the listed activities in a way which is consistent with ‘own primary production activities’. In this regard, there is a distinction between extracting ore and extracting minerals. Note 6(f)(i)(bb) defines ‘minerals’ as meaning ‘minerals in any form, whether solid, liquid or gaseous, occurring naturally in or on the earth, in or under water or in the tailings and whether organic or inorganic and having been formed by or subject to a geological process, excluding water, but including sand, stone, rock, soil (other than topsoil), clay, gravel and limestone’.

[62] Certain minerals, typically metals such as gold, silver, copper and the like, are embedded in ore. Extracting mineral-bearing ore from the ground is only part of the process of extracting the mineral, since further processes have to be

performed to extract the mineral from the ore. In such cases, 'primary production activities in mining' can sensibly include those further processes, ie all processes until one has extracted the mineral for which one is mining.

[63] Some of the items on the list on which Glencore relied in argument can, in my view, be explained on this basis. Item (pp) refers to the transporting of 'ores or other substances containing minerals for processing in operations for recovery of minerals'. The very wording of this item shows that the minerals contained in the ore or other substance have not yet been extracted from the material in which they are embedded. Transporting such material to the place where the mineral will be extracted is still part of 'primary production'. Item (tt) refers to the transporting of 'ores or other substances containing minerals from the mining site to the nearest railway siding', presumably because in some cases extraction of the mineral from the ore takes place elsewhere than at the mining site. What I have said in relation to (pp) applies to (tt) as well. What is significant is that the list does not include the transporting of 'minerals', only the transporting of ore or other substances containing minerals. The diesel-using activities in Glencore's case are concerned with transporting and processing coal, being the extracted mineral.

[64] Item (nn) refers to the 'reactivation of carbon for use in the processing of ores containing gold if the reactivation occurs at the place where mining for gold is carried on'. Because this is an activity aimed at extracting the mineral (gold), it forms part of primary production, although the lawmaker only included this form of primary production if it occurs 'at the place where the mining for gold is carried on'. This is in keeping with the general requirement in Note 6(f)(ii)(bb) that, in order to qualify for the rebate, the activities must, unless

otherwise specified, be carried on ‘at the place where the mining operation is carried on’. In context, this refers to the place where material is extracted from the ground. Although the extraction of minerals from ore may be part of primary production in mining, there has to be extraction of material from the ground for there to be ‘mining’.

[65] All the other activities listed in Note 6(f)(iii) should, in my view, be understood as referring to activities of the kind in question when associated with primary production activities. Item (cc) is the core primary production activity – ‘operations for the recovery of minerals …’. In order to place its meaning beyond doubt, and no doubt out of an abundance of caution, the lawmaker in December 2013 amended item (cc), with retrospective effect to 1 January 2011, by inserting the words ‘but not including any post-recovery or post-mining processing of those minerals’. Unless compelled by plain language to do so, one should not negate this qualification by interpreting other items in the list as including activities forming part of ‘post-recovery or post-mining processing’ of minerals.

[66] Items (aa) and (bb) are preparatory steps to enable primary production to take place (prospecting, removing over burden etc). Other items in the list are activities directly associated in one way or another with the extracting of minerals from the ground. Thus when item (gg) refers to the ‘construction or maintenance of private access roads at the place where the mining operation is carried on’, it is referring to access roads which enable the primary production activities (the extraction of material from the ground, and the extraction of minerals from the ore if applicable) to be conducted, ie which enable workers and materials to get to the place of extraction.

[67] Item (mm) refers to '[c]oal stockpiling for the prevention of spontaneous combustion of coal as part of primary mining operations'. Since this item expressly refers to 'primary mining operations', it cannot encompass coal stockpiling as part of secondary mining operations. Glencore did not state that any of the stockpiling in issue in this case is conducted in order to prevent spontaneous combustion. In any event, it is clear that the stockpiles referred to in the evidence are stockpiles created after completion of primary production. In underground coal mining operations, item (mm) could refer to the stockpiling of coal in mining shafts before it is taken to the surface. It may also refer to stockpiling at the surface (whether brought there from underground or in open-cast operations), before the coal is collected for further processing.

[68] Item (vv), which the high court quoted and which was inserted with effect from 27 May 2016, covers rehabilitation, excluding such activities performed beyond the place where the mining operations are carried on. This does not, in my view, show that the list includes items plainly not encompassed within the ordinary meaning of 'own primary production activities in mining'. Item (vv) can sensibly be applied to rehabilitation of ground where the extraction of mineral-bearing ores and/or the extraction of minerals takes place. Since environmental management plans for rehabilitation are required prior to mining activity being authorised, this is also a necessary part of the primary production activity. Without it, no mining could take place.

[69] In my opinion, therefore, the activities in which Glencore used the diesel do not fall within the scope of any of the items listed in Note 6(f)(iii).

[70] The attention devoted by the high court and by counsel to the meaning of ‘include’ was, in my view, misdirected. Glencore’s argument was that if its activities do not fall within any of the listed activities, the introductory word ‘include’ is non-exhaustive, so that its activities could nevertheless be held to be covered. The argument is misconceived. The only effect of giving ‘include’ a non-exhaustive interpretation is to allow Glencore to fall back on ordinary meaning of ‘primary production activities in mining’. A non-exhaustive interpretation of ‘include’ does not permit one to travel beyond (a) the meaning of the defined term (here ‘own primary production activities in mining’) and (b) the meaning of the definition (here, items (aa) – (uu)). What the high court seems to have done is to insert non-primary activities into the definition by analogy with those activities contained in the list. That was not permissible.

[71] For the reasons stated, it is not necessary, in my view, to decide in what precise sense the word ‘include’ is used in Note 6(f)(iii), although I am inclined to share Petse DP’s view that it is exhaustive. The main purpose of the list, in my view, is to identify those activities sufficiently closely associated with the extraction of minerals from the ground to be included in the rebate scheme. Had such a list not been enacted, there may have been doubt as to whether ancillary activities which were necessary for primary production to take place, but which did not themselves constitute the act of extracting minerals from the ground, were covered. Since the primary activity of extraction seems to be covered by item (cc), there does not appear to be scope for any other activity to be brought within the ordinary meaning of ‘own primary production’. At any rate, I cannot at the present time think of any such other activities.

[72] For these reasons I agree with the order proposed by Petse DP.

_____

O L ROGERS

ACTING JUDGE OF APPEAL

APPEARANCES

For the appellant:	P Ellis SC (with him L Haskins)
Instructed by:	The State Attorney, Pretoria
	The State Atorney, Bloemfontein
For the respondent:	P J Vorster SC
Instructed by:	Macrobert Inc., Pretoria
	Lovius Block Attorneys, Bloemfontein