IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 30959/2019

Date:

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

11/3/22 [redacted]
DATE SIGNATURE

In the matter between:

CELL C (PTY) LTD **APPLICANT**

AND

THE COMMISSIONER OF THE SOUTH AFRICAN REVENUE SERVICE **RESPONDENT**

JUDGMENT

TOLMAY, J:

[1] This is an application in terms of Rule 30A to compel the respondent SARS/the Commissioner to dispatch a record in relation to a decision regarding a tariff determination ("the impugned decision"), which the applicant ("Cell C") seeks to review and set aside in the main application.

[2] In the main application Cell C seeks to appeal a tariff determination and asks that such determination be withdrawn and re-determined. It also seeks that the impugned decision be reviewed, set aside and varied retrospectively.

[3] The central dispute before this Court is whether, in the light of the wide appeal afforded to a party in section 47(9)(e) of the Customs and Excise Act 91 of 1964 ("the CEA"), the High Court has jurisdiction to review SARS's tariff determination in terms of Rule 53 of the Uniform Rules of Court. If the institution of review proceedings is competent then it is common cause that SARS is obliged to produce a record and reasons under Rule 53. However, if it does not have review jurisdiction then Rule 53 does not apply and there is no basis upon which to compel SARS to produce a record. It has been confirmed by the Constitutional Court in *Competition Commission v Standard Bank*[1] that a court must first decide the question of review jurisdiction and the production of the record can only be ordered if such jurisdiction is established.

[4] This application turns therefore primarily on a question of statutory

[1] Competition Commission v Standard Bank; Competition Commission v Waco Africa (Pty) Ltd & others [2020] ZACC 2 para 114-121 and 201-202.

interpretation, which is an objective inquiry.[2] This Court is required to interpret section 47(9)(e) of the CEA in light of its context and purpose and to determine whether, properly interpreted, a taxpayer challenging a tariff determination is confined to the wide appeal remedy provided for in section 47(9)(e).

[5] Section 47 of the CEA is concerned with the determination of the customs and excise duty payable on goods. In terms of section 47(1) customs and excise duty is payable on all imported and excisable goods, at the time of entry for home consumption, in terms of Schedule 1.

[6] Section 47(9)(e) provides that an appeal against any such determination lies to the division of the High Court in the area wherein the determination was made, or the goods were entered for home consumption.

[7] Rule 53(1) of the Uniform Rules of Court provides for review proceedings of decisions and proceedings of any tribunal, inferior court, board or officer performing judicial, quasi-judicial or administrative functions. It also requires that a record and reasons be provided.

[8] There is a marked difference between a wide appeal, as provided for by section 47(9)(e) and review proceedings. Reasons play an important part in review proceedings, but in a wide appeal the court hears the matter *de novo* and is not bound by the reasons given.[3]

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[2] Natal Joint Municipal Pension Fund v Edumeni Municipality 2012(4) SA 593 (SCA) para 18.
[3] Acti-Chem SA (Pty) Ltd v Commissioner for SARS [2019] ZAKZPHC 58 (15 August 2019) para 2; Distell v Commissioner of SARS 2012(5) SA 450 (SCA).

[9] The distinction between an appeal and review was set out in *Tikly and others v Johannes N.O. & others,*[4] it was said that an appeal in the wide sense is a complete re-hearing and fresh determination on the merits, with or without additional evidence, or information. An ordinary appeal or one in the strict sense, is a re-hearing on the merits, but limited to the evidence or information on which the decision under appeal was given and the only determination is whether that decision was right or wrong. A review on the other hand with or without additional evidence, or information is not to determine whether the decision was correct or not, but whether the arbiters exercised their powers and discretion honestly and properly.[5] This leads to the conclusion that the essential nature of a review, is not directed at correcting a decision on the merits, but is aimed at the maintenance of legality.[6] A review is therefore only concerned with whether a decision is lawful, whereas an appeal, is concerned with whether it is correct.[7] A review is ultimately concerned with process and regularity. This will be determined on the basis of the record and reasons.[8] In a review an administrator is bound by the reasons given at the time of the decision.[9] In *Levi Strauss SA (Pty) Ltd v Commissioner for the South African Revenue Service*[10] the preliminary nature of tariff determinations was recognised as well as the fact that the subsequent appeal allows for a complete reconsideration.

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[4] 1963(2) 588 (T) (Tikly).
[5] *Ibid* 590-591.
[6] Pretoria Portland Cement Co Ltd and Another v Competition Commission and Others 2003(2) SA 385 (SCA) para 35.
[7] Liberty Life Association of Africa v Kachelhoffer 2001(3) SA 1994 (C) p 1110-1111.
[8] Democratic Alliance v President of the Republic of South Africa 2017(4) SA 253 GP.
[9] National Lottery Board v South African Education and Environment Project 2012(4) SA 504; Van Zyl & others v Government of the Republic of South Africa & others 2008(3) SA 294 (SCA) at 311 D-F.
[10] Case no 20923/2015 (Delivered 2 May 2017) (Levi Strauss).

[10] It is therefore apparent that a wide appeal is fundamentally different from an appeal in the strict sense or a review, because the matter is heard *de novo*. The court is not confined to the record and is in the same position as the first instance decision maker.[11] As a result the record and reasons have very little value in a wide appeal. It follows that a wide appeal could, if evidence is led, be compared to a trial in all material respects.

[11] The question then arises whether section 47(9)(e) precludes the appellant, who brings a wide appeal from instituting review proceedings. This must be answered by considering the statutory framework as a whole. Section 47(9)(e) gives jurisdiction to the High Court to hear a wide appeal in relation to a tariff determination, as a result it is clear that the Legislature intended the High Court to have jurisdiction to not only enforce, but also grant the appropriate remedy. The statute is silent on the question of whether a review would still be available. This question will be answered by considering the provisions of the relevant statute as a whole,[12] as well as the ambit and scope of the wide appeal provided for in section 47(9)(e).

[12] Relying on *Madrassa Anjuman Islamia v Johannesburg Municipality,*[13] it was argued on behalf of SARS that where legislation restricts an aggrieved party to a particular remedy that party has no further legal remedy, otherwise the remedy provided by the statute will be cumulative.

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[11] Khan & others v Electoral Commission & Another 2016(2) SA 338 (CC) para 41; Refugee Appeal Board & others v Mukungubila 2019(3) SA 141 (SCA); Road Accident fund v Duma and Three Similar Cases 2013(6) SA 9 (SCA).
[12] Kubheka and Another v Imextra (Pty) Ltd 1975(4) SA 484 (W) at 489 A – B; Steenkamp and others v Edcon Limited 2016(3) SA 251 (CC) para 146.
[13] 1917 AD 718 (Anjuman).

However, it was also argued in *Anjuman* that it does not follow that in any particular case the rule should necessarily prevail, as the question is one of construction and if a court is satisfied from the language of the Legislature that the intention was that the special remedy provided by the Act should not be in substitution of, but in addition to the common law remedies, then effect must be given to that intention. The Court however emphasised such a case would be the exception to the general rule and the *onus* is on the person relying on such a contention.[14] It was also argued, relying on what was stated by Lord Macnaghten in *Passmore v Oswaldtwistle Urban Council*[15] after adopting the law as laid down by Lord Tenterden, "*whether the general rule is to prevail, or an exception to the general rule is to be admitted, must depend on the scope and language of the Act which creates the obligations and an (sic) considerations (sic) or policy and convenience.*"[16] The general rule must be considered in the context of the CEA, the ambit of a section 47(9)(e) appeal and with due consideration of the case law.

[13] In *Pahad Shipphing v SARS,*[17] the application was based on section 65(6)(a) of the CEA, this section provides similarly to section 47(9)(e) for a wide appeal to the High Court. It should be noted these sections are identically worded. The SCA held that the Commissioner is not obliged to keep a record or provide reasons. The following was said in relation to a wide appeal:

> "*The parties dealt with the case as if it was an appeal in the wide sense, ie as if it was a complete re-hearing of the case and a fresh*

[14] *Ibid* 723.
[15] 1898.A.C. 387.
[16] Anjuman p 723.
[17] [2017] ZAGPPHC 990 (2 May 2017) (Pahad).

determination of the merits of the case. Correctly so, in my view, for the following reasons:

(a) The Act does not require of the respondent to hear evidence, to give any reasons for his determination or to keep any record of proceedings. As was held in Tikly (supra) at 592 B-C, these considerations militate completely against the "appeal" being an appeal in the strict sense.

(b) It is implicit in the provisions of section 65(4)(c)(ii)(bb) to the effect that the determination by the respondent cease to be in force from the date of a final judgment by the High Court or this Court that the court must itself make a determination upon appeal to it. That eliminates the appeal being a review in the sense set out in (iii) above. (see Tikly at 591H-592A).

(c) As there is no provision for a hearing before the determination of the transaction value by the respondent the Legislature must, in my view, have intended "appeal" to be an appeal in the wide sense."[18]

[14] The consequence of the aforesaid is that if no record keeping or reasons are required, there is no legal basis on which an applicant can require the delivery of such a record. Although a review is not specifically excluded in terms of the CEA as a whole, the scope of a wide appeal seems to negate the need for a review, as will be explained later on in the judgment.

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[18] *Ibid* para 14.

[15] In *Distell & Another v Commissioner for the South African Revenue Services and Another* the Court was called upon to determine whether either under section 47(9)(e), or the common law, alternatively PAJA certain tariff determinations made by the Commissioner could be impugned.[19] The matter proceeded to the Full Court[20] which argued that because an appeal in terms of section 47(9)(e) is an appeal in the wide sense there is no need to resort to PAJA. It was argued that the wording of the CEA is "*trenchant*" and the prescribed remedy for an aggrieved party is *"irrespective of whether it is founded on the Commissioner's alleged wrong interpretation of the relevant statutory provisions ..... or his incorrect application of the said provisions to the facts ...."* an appeal in terms of section 47(9)(e).[21]

[16] In order to determine whether the *Distell* Full Court decision made a finding that an applicant is confined to a section 47(9)(e) appeal, one needs to consider all the judgments in *Distell* as well as the wording of the Distell Full Court's finding. In dismissing the application the relevant issues decided by the Court *a quo* were that the proceedings attacking some of the tariff proceedings were instituted too late. It then proceeded to dismiss the application on the merits.[22] The Court a *quo* made no definitive finding regarding the question of whether a review application was still appropriate in the light of the provisions of section 47(9)(e).

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[19] Distell Ltd & Others v Commissioner for SARS & Another [2006] 18682 (GNP) para 30 – 31 (the Court *a quo*).
[20] Distell Ltd & another v Commissioner of SARS & another [2009] 23384 (GNP) (Distell Full Court).
[21] Distell Full Court para 35.
[22] The Court *a quo*'s judgment p 60.

[17] The Full Court proceeded to hold that the only issue to be decided in the appeal was the merits of the classification.[23] Despite defining the issue as such, it then proceeded to refer to other issues which it said had to be decided, including whether the tariff determinations which were made during 1995 and 1996 may be impugned, having regard to section 47(9)(e) of the CEA, the common law, alternatively section 7(1) read with section 9 of PAJA.[24]

[18] The matter proceeded to the SCA.[25] The SCA viewed the relief sought by Distell in the Courts below as taking the form of an appeal in terms of section 47(9)(e), or as an alternative, applications to compel the Commissioner to correct determinations "*made in error*" as contemplated in section 47(9)(d)(i), and in respect of one of the products, of declaratory relief.[26] It was recorded by the SCA that the appellants had refined the relief claimed by them without objection from the respondent before the Full Court and persisted with the refined relief in the SCA.[27] This relief did not include any reference to the question of whether review proceedings was still available in the light of section 47(9)(e). In a concurring judgment Harms DP stated that the Full Court added a discussion of matter which was not raised by either party, namely the application of PAJA to the case and said "*In the course of this the issue, which ought to be a straight forward interpretation issue became blurred.*"[28] He then continued to state "*The case is about excise duty.*"[29] The

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[23] Distell Full Court para 30 -31.
[24] Distell Full Court para 35.
[25] 2010 JDR 1024 (SCA) (Distell SCA).
[26] Distell SCA para 4.
[27] Distell SCA para 20.
[28] Distell SCA para 74.
[29] Distell SCA para 75.

blurred."[28] He then continued to state "*The case is about excise duty.*"[29] The majority did not deal with the Full Court's venture into an issue which it was clearly not called upon to determine and the remark by Harms DP is obviously correct. In *Blaauwbosch Diamonds Ltd v Union Government (Minister of Finance)*[30] it was held that the overlooking of an important point led to a judgment being granted per *incuriam*. It is trite that a case cannot be regarded as precedent on a point where the court acted per *incuriam*.[31]

[19] In my view the musings of the Full Court with reference to the applicability of PAJA cannot be construed as anything but a remark made per *incuriam* and as a result that issue did not require the SCA's attention and no inference can legitimately be drawn that the SCA supported or upheld that conclusion. It is in this context that the observation by Harms DP must be considered. This view is supported by the reference to the refined relief claimed which made no reference to the question of review jurisdiction.

[20] In addition to the above the Full Court did not give any indication that any consideration was given to whether a wide appeal will exclude a review. The learned judge in the Full Court merely stated that there was no need to revert to PAJA due to the availability of the wide appeal. As a result, 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

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[28] Distell SCA para 74.
[29] Distell SCA para 75.
[30] 1915 AD 599 p 603.
[31] National Union of Metal Workers of SA v Jumbo Products CC 1996(4) 735 A at 7427 J, see also Trade Fairs and Promotions (Pty) Ltd v Thomson 1984(4) SA 177 (W) at 184 D-I.

remark that no need to resort to PAJA exists due to the nature of a wide appeal, is correct.

[21] The same dispute between the parties also arose in other matters. In *BCE Food Services Equipment (Pty) Ltd v Commissioner of the South African Revenue Services*[32] the applicant sought to review a decision of the respondent and elected not to pursue any rights under section 47(9)(e) of the CEA. The court found that a review was competent. The court stated as follows:

> *"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 been surprising*

[32] [2017] ZAGPJHC 243 (12 September 2017) ("BCE").

if they did deprive an aggrieved person of the rights afforded him or her in terms of PAJA and the Constitution. Kriegler J said as follows:

'It is important to have clarity about the effect of the mechanism created by ss 33 and ss 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 s 33 of the Constitution, and as fleshed out in the Promotion of Administrative Justice Act.'

Indeed Kriegler J was at pains to make it clear that an aggrieved party is not limited to the remedies created in the legislation:

'But, and this is crucial to an understanding of this aspect 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.'

The applicant disavowed reliance on appeal procedure and all arguments advanced by the respondent as if this (sic) an appeal and based on the provisions of s 47(9)(e), fall by the wayside."[33]

[22] In *Richards Bay Coal Terminal (Pty) Ltd v Commissioner of the South African Revenue Service*[34] an appeal and review were sought in the alternative.

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[33] *Ibid* paras 7 & 8 (footnotes deleted).
[34] Case number D10030/2019 LZNLO (12 August 2021) ("RBCT").

As in this case, SARS argued that the impugned decisions were not reviewable either under the provisions of PAJA, or the principle of legality. As in this instance, SARS insisted that the applicant was limited to the wide appeal provided for in section 47(9)(e) of the CEA, the Court referred to *BCE* and found that there was no basis for a construction which would confine an aggrieved party to that remedy alone and to exclude any other rights, including the right to a review. The Court distinguished the matter before it from what was found in *Pahad Shipping* and *Levi Strauss* on the basis that those matters did not deal with instances where review proceedings had been instituted.

[23] This Court is bound by BCE unless it is found that the finding was clearly incorrect. Due consideration should also be given to what was found in *RBCT*. Whether this Court should deviate from what was found in these matters will now be explored.

[24] The CEA caters for the correction of a tariff determination by the Commissioner, or by the High Court by way of a wide appeal. The question arises whether the court's review jurisdiction is ousted as a result of the nature of a wide appeal. *BCE* and *RCBT* found that it was not. In *BCE* an election was made by the applicant not to avail itself of the wide appeal provided for in section 47(9)(e) on this aspect *BCE* is distinguishable from the present matter.

[25] It was argued by SARS that review proceedings would subvert the

process provided for and the statutory scheme of the CEA. In *Levi Strauss*[35] the court reiterated that the object of the *de novo* appeal is to permit a first instance hearing at which the applicant may seek reconsideration on additional facts and grounds. Review proceedings imply, by its very nature the existence of a decision by a forum of first instance, which can only be reviewed and set aside if the conditions for a review exist. Review proceedings will subvert the purpose of the wide appeal provided for in the CEA, because the tariff determination is preliminary and provisional and subject to later revision by the court. It is particularly problematic, to in the same proceedings, deal with two different remedies which will require the application of conflicting legal principles. In this regard the differences between a wide appeal and review as set out in *Tikly* are particularly relevant.

[26] In *Richards Bay Bulk Storage (Pty) Ltd v Minister of Public Enterprises*[36] it was held that the question of whether a court *a quo* had jurisdiction to hear a review application will depend on whether the relevant act excludes such jurisdiction and if the act does not do so in express terms, the question that should follow is whether it does so by implication.[37]

[27] The CEA seen as a whole does not expressly exclude review jurisdiction, nor does it do so by implication. It provides for appeals in *inter alia* section 47(9)(e), 49(7)(iii), 65(6) and 69(5), and for reviews in section 60(2), 75(4A)(f) and 101(A)(6)(b). These provisions bolsters the view that review

[35] Levi Strauss para 29, see also Pahad, Khan & Others v Electoral Commission and Another 2016(1) SA 338 (CC) para 41.
[36] 1996(4) SA 490 (A).
[37] *Ibid* 494 para F-L.

proceedings are not excluded altogether, but also confirms the notion that, depending on what one seeks to accomplish will ultimately determine the appropriate procedure. If one avails oneself of the wide appeal in terms of section 47(9)(e), the possibility of a review is excluded due to the scope of a wide appeal. In *Lloyd and Others v McMahan*[38] it was accepted that a wide appeal will also encompass grounds of review.[39] The appeal provided for in section 47(9)(e) is more generous than a review, for example in a review the court is enjoined to afford a decision maker *"appropriate deference"*,[40] this is not required in a wide appeal. A wide appeal by its very nature will accordingly provide an applicant with proper access to justice as the wide appeal will also encompass grounds of review and will call for a total re-hearing which is not confined in any sense.

[28] It was argued on behalf of Cell C that the appeal process, while appropriate to decide the correctness of a tariff determination, is inappropriate when a court is to decide whether it will interfere with the exercise of the Commissioner's discretion regarding the effective date. It was argued, relying on *International Business Machines (Pty) Ltd v Commissioner for Customs and Excise*[41] that the appeal process is dependant on (a) ascertaining the meaning of the words in competing tariff headings by applying the principles of interpretation and the Explanatory Notes to the Harmonised System, considering the nature and characteristics of the goods and (b) deciding which

[38] [1987] All ER 118 (HL).
[39] 1135 – 1136, 1152, 1157, 1165 - 1166.
[40] Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Tourism & others 2004(4) SA 490 (CC) para 46.
[41] 1985(4) SA 852 (A) 863G.

tariff heading most appropriately describes the goods.

[29] On a proper reading of section 47(9)(e) it is clear that a wide appeal includes all aspects relating to tariff determination including the effective date of the tariff determination. Section 47(9)(a) allows the Commissioner to determine the tariff heading in terms of which goods are classified and to determine whether goods have been used in terms of such tariff headings. Section 47(9)(b) provides that whenever a determination is made or withdrawn and another one is made, any amount remains payable as long as the relevant determination remains in force. Section 47(9)(c) provides that when the High Court amends or orders the amendment of a determination, the Commissioner is not liable for interest. Section 47(9)(d) empowers the Commissioner to amend or withdraw a determination that was made in error or irregularly. In terms of section 47(9)(d)(ii) a new determination may be made with effect retrospectively or prospectively.

[30] In *BCE* the Court held that the CEA did not oust the provisions of PAJA and an aggrieved party is not limited to the procedure provided for in section 47(9)(e).[42] The court in doing so relied on *Metcash Trading Limited v Commissioner, South African Revenue Service & Another.*[43] This case involved *inter alia*, the constitutionality of the VAT Act, which provides that upon assessment and notwithstanding the noting of a statutory administrative appeal a taxpayer is obliged to pay VAT, with possible adjustments and refunds being

[42] BCE para 7.
[43] 2001(1) SA 11099 (CC) (Metcash).

left for dispute later.[44] The Constitutional Court had to consider what other remedies were available to a taxpayer, apart from the statutory appeal. The Court emphasised that the internal appeal was an administrative and not a judicial process. The Court held that the creation of this special, non-judicial appeal procedure did not oust the High Court's common law review power in the ordinary course.[45] In *Metcash* there was no indication or consideration of a wide appeal to the High Court. The appeal in *Metcash* was an appeal in the ordinary sense.[46] The effect of interpreting section 36 of the VAT Act to mean that a party was deprived of a common law review would mean that the party was, in the first instance, deprived of the right to approach a court at all and even after the internal appeal was not entitled to a wide appeal. It follows that *Metcash* cannot be authority for the notion that review proceedings remain available when applying section 47(9)(e). Accordingly the principle in *Metcash* was incorrectly applied in *BCE*. Contrary to what happened in *Metcash* section 47(9)(e) does not deprive a party of judicial recourse, a party is entitled as of right to a judicial re-consideration of a tariff determination on the merits.

[31] It is not correct, as Cell C argued, that there are two discrete decision-making processes. There is no discrete decision as to retrospectively. The decision as to the effective date of the determination is part of the determination itself and is subject to an appeal under section 47(9)(e). The aforesaid is clear from the determination itself. SARS gave notice that the tariff determination

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[44] *Ibid* para 8.
[45] *Ibid* para 33.
[46] The section 34 appeal was in terms of the now-repealed section 86A of the Income Tax Act 58 of 1986, which was an ordinary appeal. See Commissioner for Inland Revenue v Da Costa 1985(3) SA 768 (A) at 775 B-F; Commissioner for the South African Revenue v Capstone 556 (Pty) Ltd [2016] All SA 21 (SCA) para 19.

provisions of section 47(9)(e). A perusal of the determination clearly points to a single determination. There is no indication that there are decisions that can be disaggregated.

[32] Some emphasis was also placed on the internal appeal provided for in Chapter XA of the CEA, which was amended in 2003 and which, makes provision for an internal appeal in section 77B. This administrative appeal is not obligatory and this remedy does not require exhaustion prior to the institution of legal proceedings, therefore a section 47(9)(e) appeal must be interpreted as though it operates as a direct appeal. In this instance the administrative appeal route was followed, but that will not have any significance or limit the High Court's discretion in any way due to the nature of a wide appeal.

[33] On a proper interpretation of the CEA the court retains review jurisdiction in certain circumstances, but when one has access to the wide appeal remedy provided for in section 47(9)(e), the possibility of a review is excluded. Relying on a wide appeal and a review application in the same application create a number of difficulties. As is by now clear a wide appeal entails a complete de *novo* hearing, a review on the other hand is restricted to procedural issues. SARS was clear that it did not contend that review procedure would generally be unavailable, if I understand the argument correctly it is that by virtue of the provisions of section 47(9)(e), review procedure which would otherwise be available, will not be available. The consequence of this is merely that if one has access to a wide appeal, one

procedure which would otherwise be available, will not be available. The consequence of this is merely that if one has access to a wide appeal, one cannot in the same breath resort to review proceedings. I am of the view that this is indeed the correct approach. This approach gives effect to the purpose of the CEA and does not limit access to justice.

[34] It must be emphasised that if Cell C succeeds in its statutory appeal against the re-determination, then the re-determination, including the retrospectivity, will be set aside. The merits of the determination must be dealt with together with the effective date.

[35] As already stated a section 47(9)(e) appeal embraces review grounds. The fact that there is an element of discretion is no obstacle, as a wide appeal is a complete re-hearing in which the court itself exercises a discretion on the facts before it in *Commissioner for the South African Revenue Service v Afri-Guard (Pty) Ltd* [47] the Full Court confirmed this.

CONCLUSION

[36] 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

[47] [2017] JOL 3922 G (GJ) para 59.

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.

[37] The ordinary concern with ouster clauses, namely that an aggrieved party's access to courts, administrative justice or an effective remedy is limited does not arise.[48] There can accordingly not be any prejudice or limitation to access to courts, or administrative justice if a party is obliged to pursue a wide appeal instead of a review. In my view the result is that where a statutory appeal is available under section 47(9)(e), that process should be followed instead of a review.

[38] I have already indicated that this Court is not bound by *Distell* as the remarks made were clearly per *incuriam*. As far as *BCE* is concerned, it would seem that the finding was clearly wrong, as the principles set out in *Metcash* was incorrectly applied and the ambit of a section 47(9)(e) appeal was not

[48] Liberty Life Association of Africa v Kachelhoffer NO & others 2001(3) SA 1094 © at 106 B; Lenz Township Co (Pty) Ltd v Lorentz NO & andere 1961(2) SA 450 (A); Minister of Law and Order & others v Hurley and Another 1986(3) SA 568 (A).

properly appreciated.

[39] As a result the Court finds that it does not have review jurisdiction, and as a result the Commissioner cannot be ordered to supply a record.

[40] I make the following order:

1. **It is declared that the Court does not have review jurisdiction to review the respondent's tariff determination in the light of the wide appeal afforded to the applicant in section 47(9)(e) of the CEA.**

2. **The application in terms of Rule 30 A to compel is dismissed.**

3. **The applicant is ordered to pay the costs of the application, including the costs of two counsel, one of which is senior counsel.**

[redacted]

R G TOLMAY
JUDGE OF THE HIGH COURT, PRETORIA

DATE OF HEARING: 12 OCTOBER 2021

DATE OF JUDGMENT: 11 MARCH 2022

ATTORNEY FOR APPLICANT:	CLIFF DEKKER HOFMEYR INC
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	J P VORSTER (SC)
ATTORNEY FOR RESPONDENT:	VDT ATTORNEYS
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