

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

Case No: 14430/2020

In the matter between:

**THARISA MINERALS PROPRIETARY LIMITED**

and

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



**NOTICE TO THE REGISTRAR OF THE HIGH COURT,  
PRETORIA**

**AS CONTEMPLATED BY RULE 16A OF THE UNIFORM RULE OF COURT**

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In the matter of **THARISA MINERALS (PTY) LTD**, the Applicant, and **THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE**, the Respondent, Case No. 14430/2020, the following constitutional issues are raised by the Applicant:

[1] The notice of motion contains the following prayers:

*"4[a] Sections 47(9)(c) and 75(1A)(f) of the Customs and Excise Act, 91 of 1964, are declared invalid for being inconsistent with the Constitution of the Republic of South Africa, Act 108 of 1966.*

*[b] The declaration of invalidity is not retrospective.*

*[c] The order is suspended for a period of six months to afford the legislature an opportunity to cure the invalidity.*

[d] During the period of suspension, sections 47(9)(c) and 75(1A)(f) of the Customs and Excise Act, 91 of 1964, will be deemed to read as follows; **what is in bold being the reading-in:**

[i] Section 47(9)(c) be struck out and deleted.

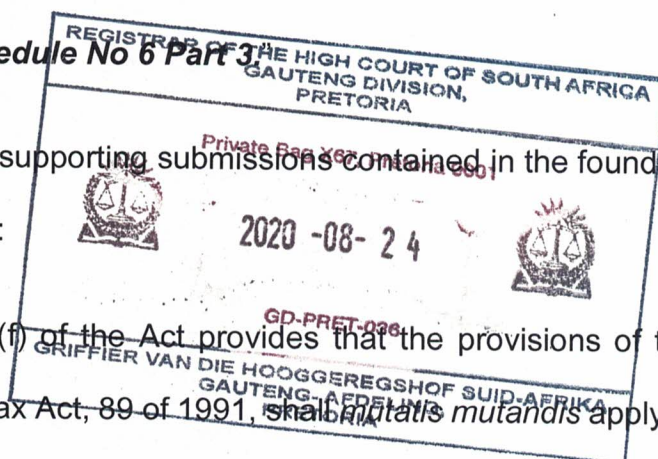
[ii] Section 75(1A)(f):

75(1A) Notwithstanding anything to the contrary contained in this Act or any other law – (f) The provisions of the Value- Added Tax Act, 1991 (Act No 89 of 1991), shall mutatis mutandis apply in respect of any amount of fuel levy or Road Accident Fund levy which is being recovered as it is in excess of the amount due or is not refundable, **or is being refunded for being due to a user under rebate item 670.04 of**

**Schedule No 6 Part 3**

[2] The substance of the supporting submissions contained in the founding papers amount to this:

[i] Section 47(1A)(f) of the Act provides that the provisions of the Value-Added Tax Act, 89 of 1991, shall mutatis mutandis apply in respect of the payment of interest on any amount of fuel levy or Road Accident Fund levy which is being recovered as it is in excess of the amount due or is not duly refundable. Section 47(1A)(f) of the Act (read with section 105 of the Act) entitled

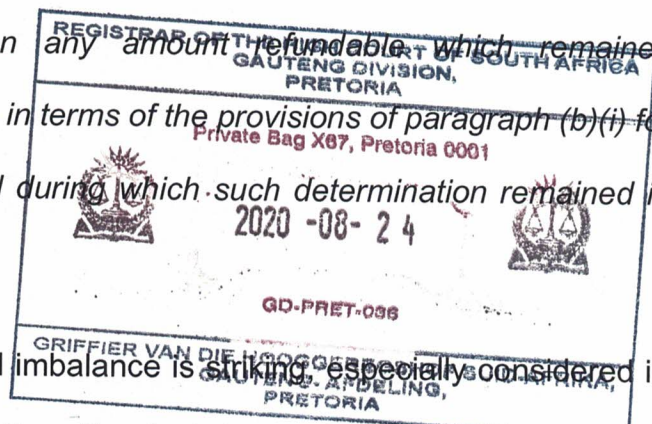


SARS to levy interest on a user. (Reference to “the Act” is to the Customs and Excise Act, No 91 of 1964.)

[ii] By contrast, SARS is not liable for interest on any outstanding diesel refunds.

[iii] Section 47(9)(c) of the Act provides:

*“Whenever a court amends or orders the Commissioner to amend any determination made under subsection (9)(a) or (d) or any determination is amended or a new determination is made under paragraph (d) or as a result of the finalization of any procedure contemplated in Chapter XA, the Commissioner shall not be liable to pay interest on any amount refundable which remained unpayable in terms of the provisions of paragraph (b)(i) for any period during which such determination remained in force.”*



[iv] The constitutional imbalance is striking, especially considered in comparison to other fiscal statutes. Compare, for example, section 89quat of the Income Tax Act, 1962, sections 39 and 45 of the Value-Added Tax Act, 1991 and section 187 of the Tax Administration Act, 2011. These Acts provide for payment of interest by taxpayers as well as the Commissioner.



[v] Section 105 has been amended by section 21(1) of the Taxation Laws Second Amendment Act, 18 of 2009, substituting it with a new section altogether. In its amended form, section 105 makes provision for the payment of interest by the Commissioner on any drawback or refund. A copy of an extract from the relevant Government Gazette 32611 of 30 September 2009 is attached hereto, marked "A". After a lapse of nearly a decade, the date of the commencement of this amendment has not been proclaimed.

[vi] To remedy the unconstitutionality of the interest provisions of the Act:

[a] Section 47(9)(c) should be struck out.

[b] Section 75(1A)(f) should be amended by adding the following phrase at the end thereof: "*; or is being refunded for being due to a user under rebate item 670.04 in Schedule No 6 Part 3.*"

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION,  
PRETORIA

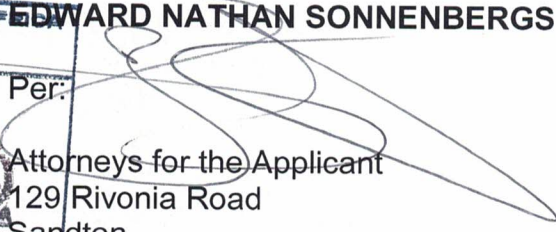
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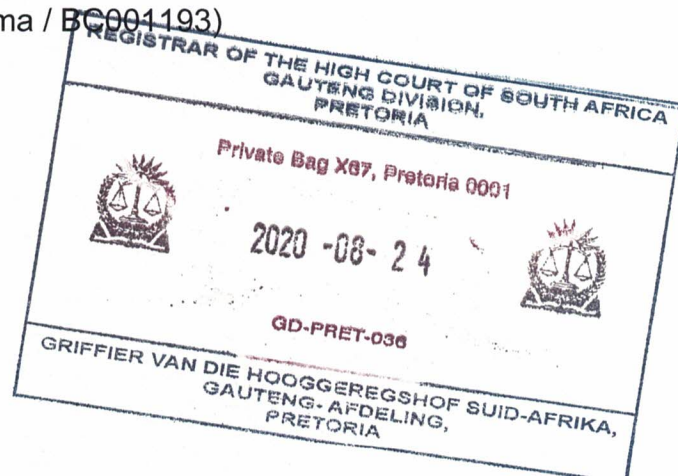
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"A"

Amendment of section 105 of Act 91 of 1964, as substituted by section 2 of Act 111 of 1991 and amended by section 65 of Act 45 of 1995, section 72 of Act 30 of 1998, section 6 of Act 32 of 1999, section 63 of Act 30 of 2000, section 111 of Act 74 of 2002, section 35 of Act 16 of 2004, section 93 of Act 31 of 2005 and section 72 of Act 20 of 2006

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31. (1) The Customs and Excise Act, 1964, is hereby amended by the substitution for section 105 of the following section:

**"[Interest on outstanding amounts] Payment of outstanding amounts and interest and mitigation or remission of interest"**

- 105. (1) Notwithstanding anything to the contrary in any law contained—**
- (a) interest shall be payable from such date and for such period as the Commissioner may prescribe by rule on any outstanding amount payable in terms of this Act;
  - (b) interest shall be payable by the Commissioner on any drawback or refund contemplated in section 75 or 76 from such date and for such period as the Commissioner may prescribe by rule;
  - (c) the interest so payable shall be paid at a rate the Minister determines in terms of section 80(1)(b) of the Public Finance Management Act, 1999 (Act No. 1 of 1999): Provided that where the Minister fixes a new rate in terms of that Act, that new rate applies for purposes of this Act from the first day of the second month following the date on which that new rate came into operation;
  - (d) the Commissioner—
    - (i) may subject to section 3(2), on such conditions as the Commissioner may consider necessary; or
    - (ii) must as a result of the finalisation of any procedure contemplated in Chapter XA,
 mitigate or remit any interest for which any person is liable by virtue of this section.
  - (e) the Commissioner may permit payment of any amount referred to in paragraph (a) by instalments of such amounts and at such times and subject to such conditions as the Commissioner may determine;
  - (f) any such interest—
    - (i) shall be calculated on the daily balance owing and compounded monthly; and
    - (ii) when recovered, shall be paid into the National Revenue Fund;
  - (g) the Commissioner may prescribe by rule—
    - (i) all matters which by this section are required or permitted to be prescribed by rule;
    - (ii) any other matter which the Commissioner may consider reasonably necessary and useful to achieve the efficient and effective administration of this section.
- (2) (a) Interest contemplated in paragraph (b), shall be payable in respect of any such drawback or refund for which a duly completed application is received by the Commissioner after the date this section comes into operation.
- (b) Interest shall not be compounded on outstanding amounts in respect of which the Commissioner on a date before this section comes into operation permitted payment by instalments in terms of subsection (1)(e)."

(2) Subsection (1) or any part thereof comes into operation on a date or dates determined by the Minister of Finance and published in the Gazette.

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