

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 07/20

In the matter between:

CLICKS RETAILERS (PTY) LIMITED

Applicant

and

COMMISSIONER, SARS

Respondent

APPLICANT'S SUBMISSIONS

I. INTRODUCTION

1. On 12 August 2020, this Court invited written submissions on the effect of *Big G Restaurants (Pty) Ltd v Commissioner, SARS* [2020] ZACC 16 (*'Big G CC'*) on this matter. These are the applicant's submissions. In short, *Big G CC* significantly improves this application's prospects of success and improves the case for leave to appeal.

II. THE SCA JUDGMENT AND CLICKS' CASE

2. This matter concerns the tax treatment of loyalty programmes that are common in South Africa¹ – whereby a participating consumer earns points for qualifying purchases, which can be redeemed for free merchandise.² The crisp issue is whether the allowance under section 24C of the Income Tax Act 58 of 1962 is available to retailers that run such loyalty programmes.

¹ Application pp 17 – 18: founding affidavit in support of the application for leave to appeal (*'FA'*) paras 43 and 44.

² Application pp 17 – 18 FA paras 41 to 43.

3. Section 24C in effect permits a taxpayer to defer tax on income if (a) the income accrues in terms of a contract, and (b) the income will be used to finance future expenditure which the contract obliges the taxpayer to incur.³
4. If these two requirements are met, then the taxpayer may defer paying income tax on the relevant income until the tax year in which the future expenditure is actually incurred.
5. The applicant (**‘Clicks’**) claimed a section-24C allowance for its loyalty programme (**‘the ClubCard programme’**) on the following basis. When a shopper makes a qualifying purchase,⁴ income accrues to Clicks in terms of the contract of sale. At the same time, the shopper earns ClubCard points which can later be redeemed for Clicks merchandise. This imposes an obligation on Clicks to incur future expenditure, in that it must later give away (for no further consideration) stock to the value of the ClubCard points, when the points are redeemed. On the basis that both requirements of section 24C were met, Clicks deferred income tax on such portion of the income generated by qualifying purchases as equated to the value of the ClubCard points awarded to customers.⁵
6. In concrete terms: if a shopper makes a qualifying purchase of R100 and earns ClubCard points worth R2, then Clicks would, under section 24C, defer payment of income tax on the R2 to the tax year in which the ClubCard points

³ Section 24C as it was at the relevant time is quoted at application p 12 FA para 23.

⁴ As to what is meant by a ‘qualifying purchase’, see application p17 FA para 41.

⁵ Application pp 18 – 19 FA para 45.

are redeemed.⁶

7. There are no factual disputes, and quantum has been agreed between the parties. The matter accordingly proceeded on an agreed stated case.⁷ The sole issue is whether or not the ClubCard programme meets the ‘**same-contract requirement**’ of section 24C.⁸ This is “*a quintessential point of law*”.⁹
8. The Tax Court, per Nuku J, upheld Clicks’ entitlement to claim a section-24C allowance – finding, in relation to the sole issue, that Clicks satisfied the same-contract requirement.¹⁰
9. The Supreme Court of Appeal (‘**the SCA**’)¹¹ overturned Nuku J’s judgment. Two judgments were delivered: one by Dlodlo JA (in which the other members concurred); another by Wallis JA (in which the other members also concurred).
 - 9.1. In the judgment of Dlodlo JA, the SCA dealt with the same-contract requirement. As we explain, the SCA adopted and applied its own rigid interpretation of the ‘*sameness*’¹² requirement of section 24C - an interpretation that has since been rejected by this Court in *Big G CC*.
 - 9.2. In the judgment of Wallis JA, the SCA expressed certain *obiter* remarks

⁶ This is something of a simplification. For a more detailed description of the ClubCard programme and how section 24C applies to it, see application pp 16 – 20 FA paras 38 – 47.

⁷ Application p16 FA para 38; annexure ‘FA3’ pp76 – 85.

⁸ Application pp 82 – 83, paras 27 and 30, read with fn 36 of the stated case. Para 27 of the stated case summarised the sole basis on which SARS had raised the disputed assessment and disallowed the section 24C allowance claimed by Clicks, viz that the same-contract requirement was not met. Para 30 of the stated case made it clear that the sole issue was that referred to para 27 thereof. Footnote 36 expressly recorded that it was not in dispute that the ClubCard programme gave rise to ‘*future expenditure*’ within the meaning of section 24C.

⁹ *Big G CC* para 11.

¹⁰ Tax Court judgment paras 32 to 37, annexure FA2 to the application pp 70 – 72.

¹¹ Commissioner, SARS v Clicks Retailers (Pty) Ltd 2020 (2) SA 72 (SCA) (‘**SCA judgment**’).

¹² *Big G CC* para 18.

concerning whether – quite aside from the same-contract requirement (which was the sole issue) – it could be said that the ClubCard programme gave rise to “*future expenditure*” within the meaning of section 24C¹³ (an aspect that was not in dispute). The judgment of Wallis JA also set out to explain – incorrectly, with respect – why this Court’s then-awaited judgment in *Big G CC* could have no bearing on the outcome of the present matter.¹⁴

The judgment of Dlodlo JA: the same-contract requirement

10. The SCA found that the ClubCard programme did not satisfy the same-contract requirement – this on the basis of the SCA’s interpretation of that requirement as adopted and applied in its judgment in *Big G*¹⁵ (*‘Big G SCA’*). On the SCA’s interpretation, the same-contract requirement cannot be satisfied by different contracts that are inextricably linked.¹⁶ This Court, however, held in *Big G CC* that the same-contract requirement can be satisfied by different contracts that are inextricably linked¹⁷ – thereby overturning or departing from the SCA’s approach.
11. The SCA held that the obligation to incur future expenditure is generated by the contract in terms of which a person becomes a member of the ClubCard programme (**‘the ClubCard contract’**); whereas the income in question

¹³ Paras 29 to 31 of the judgment of Wallis JA.

¹⁴ See paras 22 and 27 of the judgment of Wallis JA.

¹⁵ Commissioner, SARS v Big G Restaurants (Pty) Ltd 2019 (3) SA 90 (SCA).

¹⁶ SCA judgment, per Dlodlo JA, paras 7 and 17.

¹⁷ *Big G CC* para 18.

accrues in terms of the qualifying purchase.¹⁸ Because the income, on the one hand, and the obligation to incur future expenditure, on the other, were (so the SCA found) generated by different contracts, Clicks could not claim a section-24C allowance.¹⁹ The SCA found it to be irrelevant that these two contracts ‘*may be... inextricably linked*’²⁰ (a finding directly at odds with this Court’s approach in *Big G CC*). We refer to this as the ‘**same-contract finding**’.

12. The same-contract finding was, we submit, incorrect. In the first place, and as the Tax Court found,²¹ it is the qualifying purchase that generates *both* the income and the corresponding obligation to incur future expenditure (i.e. by triggering the award of ClubCard points).²²
13. More pertinently for present purposes, however, the same-contract finding is incorrect because this Court, in *Big G CC*, overturned or departed from the SCA’s interpretation of the same-contract requirement:

‘[I]t is a requirement of [section 24C] that the contract in terms of which the income that is to finance future expenditure is received or accrues must be the same contract under which the expenditure is incurred. So, there is a requirement of “sameness”. But I do not read the sameness requirement to connote that there must, for example, in the case of a written contract, be one piece of paper stipulating for the earning of income and the imposition of future expenditure. Two or more contracts may be so inextricably linked that they may satisfy this requirement.’²³

¹⁸ Occasionally referred to by the SCA as ‘the first contract of sale’.

¹⁹ Para 18 of the judgment of Dlodlo JA.

²⁰ See the second sentence of para 17 of the judgment of Dlodlo JA.

²¹ Tax Court judgment paras 32 to 37, application pp 70 – 72.

²² The SCA itself recognised that the qualifying purchase triggers and gives content to Clicks’ obligation to award points: in para 19 of the judgment of Dlodlo JA, the SCA held that ‘*when a qualifying contract of sale is concluded, the obligation on Clicks either to issue vouchers or to honour them, as the case may be, in terms of the Clubcard contract, becomes exigible*’; in para 22 of the judgment of Wallis JA, the SCA held that ‘*If the customer has concluded a ClubCard contract and presents the card at the point of sale, Clicks incurs an obligation under the ClubCard contract to award them points.*’ See further application pp 30 – 32 FA paras 76 – 80.

²³ *Big G CC* para 18 (our underlining).

14. The import of *Big G CC* is thus that a taxpayer can claim a section-24C allowance even if the income and the corresponding obligation to incur future expenditure are generated by different contracts, provided that the contracts are *'inextricably linked'* to one another. (Contrast this with paragraphs 7 and 17 of Dlodlo JA's judgment, where the SCA expressly adopted and applied the opposite approach.)²⁴
15. Thus, even if it is assumed for the sake of argument that the qualifying purchase generates income only, and that it is the ClubCard contract that generates the obligation to incur future expenditure (as the SCA found), the *'sameness'* requirement of section 24C is, we submit, nonetheless satisfied on the basis that the two contracts are inextricably linked – in short, because, the conclusion of the ClubCard contract does not in itself generate any real obligations. The obligation to award points, while governed by the terms of the ClubCard contract, is only triggered and given content when a qualifying purchase is made.²⁵ The requisite *"correlation between the income-earning contract and obligation-imposing contract"*²⁶ is therefore present.
16. The SCA's finding that the same-contract requirement cannot be satisfied by

²⁴ In para 17, the SCA found that *'The difficulty with [Clicks' argument] is that... [the SCA] in Big G expressly rejected the notion that [section 24C] applies where there are different contracts but they are 'inextricably linked'.*' In similar vein, the SCA held in para 7 that *'[Section 24C] therefore envisages income, future expenditure and a single contract that links the two. [The SCA has] expressly rejected the notion that the section applies where the different contracts are 'inextricably linked''*

²⁵ Again, the SCA itself recognised this in para 19 of the judgment of Dlodlo JA: *'when a qualifying contract of sale is concluded, the obligation on Clicks either to issue vouchers or to honour them, as the case may be, in terms of the Clubcard contract, becomes exigible.'* See further Tax Court judgment paras 17 to 20 (application pp 63 – 66) and paras 32 to 36 (application pp 70 – 72); FA paras 76 to 79 (application pp 30 – 32); and FA paras 88.5 to 88.5.2 (application pp 35 – 36).

²⁶ *Big G CC* para 29.

different contracts that are inextricably linked (and hence that an inextricable link is irrelevant for purposes of section 24C) was – as is now clear from this Court’s judgment in *Big G CC* – an error of law. Clicks’ prospects of having the SCA’s same-contract finding overturned on appeal to this Court are, in the circumstances, substantially improved by *Big G CC*.

17. *Big G CC* also reveals as incorrect the SCA’s obiter finding, in the second part of paragraph 17 of Dlodlo JA’s judgment, that ‘[e]ven on a linked basis the contract is not the same contract’. This finding was based on the SCA’s view that there is a third contract (i.e. over and above the ClubCard contract and the qualifying purchase) that causes Clicks to incur expenditure, viz. the contract concluded when the customer redeems points for merchandise. We submit that it is clear, however, that this third contract (**‘the redemption transaction’**)²⁷ is inextricably linked to the preceding ClubCard contract and qualifying purchase.²⁸ The link between the three contracts is, in light of this Court’s approach in *Big G CC*, at the heart of the enquiry. But the SCA did not consider this.²⁹ The Tax Court, on the other hand, dealt with the link between the three contracts – finding that it was “*not only artificial ... but ... factually incorrect*” to regard the future expenditure that Clicks will incur at the time of the redemption transaction as arising under a “*different contract*” to the qualifying

²⁷ Occasionally referred to by the SCA as ‘the second sale agreement’.

²⁸ The reasons for this are summarised in para 18 of the supplementary affidavit filed by Clicks on 24 July 2020 (shortly after this Court’s judgment in *Big G CC* was delivered); see also application pp 36 – 37 FA para 91.

²⁹ On the contrary, it is clear from para 20 of the judgment of Dlodlo JA that the SCA took the view that the mere existence of three contracts necessarily placed Clicks outside section 24C - an approach shown to be wrong by *Big G CC*.

purchase (that generates the points that are subsequently redeemed).³⁰

The judgment of Wallis JA: the SCA's no-expenditure remarks

18. In the judgment of Wallis JA, the SCA expressed certain reservations concerning whether – quite aside from the same-contract requirement – it could be said that the ClubCard programme gave rise to any “*future expenditure*” within the meaning of section 24C.³¹
19. This component of the SCA judgment is referred to in the application for leave to appeal as ‘*the no-expenditure finding*’.³² On a proper reading of the judgment of Wallis JA, however, there was in truth no finding by the SCA in that regard. This is made explicit by Wallis JA’s concluding statement on the topic of future expenditure: “*However, in view of the concession in the stated case and the fact that as a result this was not fully argued it is undesirable that I go further than expressing these reservations.*”³³
20. It was, we stress, not in dispute between the parties that Clicks’ ClubClub programme gave rise to ‘*future expenditure*’ as contemplated by section 24C. Indeed paragraph 21 of the stated case expressly records the following as being common cause: “[Clicks] *is likely to incur future expenditure, in that when a member redeems a reward, [Clicks] supplies the member with goods equal to*

³⁰ Tax Court judgment paras 34 to 36, application pp 71 – 72.

³¹ Paras 29 to 31 of the judgment of Wallis JA.

³² FA para 60 application p 24.

³³ Para 31 of the judgment of Wallis JA.

*the value of the reward at no cost to the member.*³⁴

21. The SCA remarked that this concession on the part of SARS was “*ambivalently worded*” (para 30). However, read in the context of the stated case as a whole, there was nothing ambivalent about the concession at all. For example, footnote 36 of the stated case recorded in terms that SARS had at one stage attempted to amend its pleading so as to place ‘*expenditure*’ in dispute (i.e. in addition to the same-contract requirement); that SARS had withdrawn its proposed amendment in the face of an objection by Clicks; and that SARS had thereafter ‘*expressly recorded that it did not intend pursuing the ... “expenditure contention”*’.³⁵
22. Again then, the sole issue as per the stated case is whether or not the same-contract requirement is met.³⁶
23. There was therefore no need for the SCA to explore whether or not the ClubCard programme gave rise to ‘*future expenditure*’ for purposes of section 24C, since this was not in dispute. (Indeed in dealing with this topic, the SCA seemingly overlooked its own jurisprudence – recently affirmed by this Court – against judicial over-reach: ‘*it is for the parties to identify the dispute [through pleadings, affidavits or a stated case] and for the court to determine that dispute and that dispute alone*’.³⁷)

³⁴ Application p 80.

³⁵ Application p 83.

³⁶ See footnote 8 above; also application p 23 FA paras 56 to 58.

³⁷ *Fischer v Ramahlele* 2014 (4) SA 614 (SCA) para 13 (our underlining), recently affirmed by this Court in *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) para 234.

24. The SCA’s no-expenditure remarks were, in the circumstances, no more than obiter comments relating to an aspect of the case that is not in dispute. We therefore do not intend to dwell on the further reasons why these were, in any event, incorrect.³⁸
25. It follows that should Clicks be granted leave to appeal to this Court, the appeal would turn exclusively on whether the ClubCard programme meets the same-contract requirement of section 24C. This is (i) a “*quintessential question of law*”, in relation to which (ii) the SCA applied the incorrect interpretation of section 24C. This is the case for leave to appeal in a nutshell.
26. We add that the concluding remark in paragraph 32 of the judgment of Wallis JA - “[w]hether in certain circumstances the requirement of the same contract may be satisfied by two or more connected contracts is not a question that needs to be resolved in this case” – cannot be squared with paragraphs 16 and 17 of the judgment of Dlodlo JA, where the SCA rejected Clicks’ contention that the relevant contracts were inextricably linked on the basis that this posited a test that had been rejected by the SCA.³⁹

III. THE EFFECT OF *BIG G CC*

27. The effect of this Court’s judgment in *Big G CC* is, then, that it significantly strengthens the case for leave to appeal. First, it improves Clicks’ prospects of

³⁸ As set out at application pp 24 – 29 FA paras 61 (read with 58) to 75.

³⁹ See also paras 17 to 20 of the judgment of the Tax Court (application pp 63 – 66), where Nuku J summarised Clicks’ contention that the contracts are ‘*inextricably linked*’.

success.⁴⁰ Clicks now no longer has to show that the ClubCard programme complies with the rigid same-contract requirement as interpreted and applied by the SCA. Even if, in the context of the ClubCard programme, the income-producing contract is different to the obligation-imposing contract, Clicks can nonetheless succeed on the basis that the contracts are inextricably linked. This is a more flexible test, with a lower threshold for Clicks to overcome (given that the implementation of the ClubCard programme involves more than one contract).

28. Second, this Court in *Big G CC* confirmed that the interpretation of a contract (or a set of contracts) to determine whether they comply with section 24C is ‘*a quintessential point of law*’ that engages this Court’s jurisdiction.⁴¹
29. Third, the ClubCard programme is not unique. Many loyalty programmes in South Africa work in much the same way. Whether the ClubCard programme qualifies for a section-24C allowance is thus an issue that ‘*transcend[s] the narrow interests of the litigants and implicate[s] the interest of a significant part of the general public*’.⁴²
30. In *Big G CC*, this Court held that determining the section-24C eligibility of the applicant Spur franchisee would clarify the tax position of other Spur franchisees, and that this meant that the application raised a legal point ‘*of*

⁴⁰ And prospects of success are relevant to whether it is in the interests of justice for this Court to grant leave to appeal. See recently *Road Traffic Management Corporation v Tasima (Pty) Limited* [2020] ZACC 21 paras 25 – 27.

⁴¹ *Big G CC* supra para 11.

⁴² *Paulsen v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC) para 26.

general public importance'.⁴³ The same must be true for Clicks. A determination of the contested issue in this matter – besides resolving the ClubCard programme's eligibility for a section-24C allowance – is likely to affect other, similar reward programmes.⁴⁴

31. Fourth, Clicks lost in the SCA because the SCA held that the ClubCard programme did not comply with the SCA's rigid interpretation of the same-contract requirement. But in *Big G CC*, this Court overruled or departed from that interpretation. Thus, if this Court does not grant leave to appeal, the matter will have been finally resolved on an incorrect application of the law. This would not be in the interests of justice. As this Court held in *CUSA v Tao Ying*,⁴⁵ '*a decision premised on an incorrect application of the law*' infringes the principle of legality.⁴⁶

32. Finally, *Big G CC* has exposed the flaws in SARS' opposition to this application. SARS claims that the application does not have good prospects because the ClubCard programme does not comply with the same-contract requirement as interpreted by the SCA.⁴⁷ (SARS' opposition is indeed expressly premised on '*the assumption that the interpretation of Section 24C*

⁴³ As envisaged by section 167(3)(b)(ii) of the Constitution - see *Big G CC* para 14.

⁴⁴ Application pp 17 – 18 FA paras 43 to 44; also FA paras 3, 4, 12 and 13. SARS claims that the reference to other, similar loyalty programmes is '*new evidence*' that Clicks cannot raise in the application for leave to appeal (AA paras 37.1 and 37.4). SARS is, with respect, wrong. The evidence was raised for the first time in the application for leave to appeal because this is the first time that the evidence is relevant – because it is only in this Court that Clicks must show that the appeal raises a point of law of *general public importance*. This was irrelevant to the case before the Tax Court and the Supreme Court of Appeal. SARS is, in any event, not prejudiced by this evidence. It is free to respond to it in answer, which it has (AA para 37.2 (inclusive)).

⁴⁵ *CUSA v Tao Ying Metal Industries* 2009 (2) SA 204 (CC).

⁴⁶ *Id* para 68.

⁴⁷ AA paras 9.4 – 9.17.

in Big G (SCA) is correct’.)⁴⁸ But *Big G CC* rejected that interpretation.⁴⁹ SARS claims that Clicks’ application does not raise a point of general public importance,⁵⁰ but paragraph 14 of *Big G CC* (summarised in paragraph 30 above) shows this to be incorrect. SARS asserts that the interpretation of the relevant contracts is a factual issue,⁵¹ but *Big G CC* made it clear that the interpretation of a contract to determine whether it complies with section 24C is a question of law.⁵²

33. In the premises, we submit that leave to appeal should be granted and an order made in accordance with the notice of motion.

34. This Court’s directions invited written submissions of no more than ten pages. In order to place the effect of *Big G CC* in its proper context, we have sought to provide in these submissions a self-contained overview of the application. In doing so, we have exceeded the ten-page limit by three pages – for which we respectfully request condonation.

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Wednesday, 19 August 2020

⁴⁸ AA paras 9.15, 19, 44.1 and 54.

⁴⁹ *Big G CC* para 18.

⁵⁰ AA paras 10 – 14.

⁵¹ AA para 9 (inclusive).

⁵² *Big G CC* para 11.

TABLE OF AUTHORITIES

Statutes

1. Income Tax Act 58 of 1962

Case-law

2. *Big G Restaurants (Pty) Ltd v Commissioner, SARS* [2020] ZACC 16
3. *Commissioner, SARS v Big G Restaurants (Pty) Ltd* 2019 (3) SA 90 (SCA)
4. *Commissioner, SARS v Clicks Retailers (Pty) Ltd* 2020 (2) SA 72 (SCA)
5. *CUSA v Tao Ying Metal Industries* 2009 (2) SA 204 (CC)
6. *Fischer v Ramahlele* 2014 (4) SA 614 (SCA)
7. *Paulsen v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC)
8. *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC)
9. *Road Traffic Management Corporation v Tasima (Pty) Limited* [2020] ZACC