

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

CCT CASE NO: 337/2022

SCA CASE NO:516/2021

Tax Court Case No: IT 24918

In the matter between:

**THE THISTLE TRUST**

Applicant

and

**THE COMMISSIONER FOR THE SOUTH AFRICAN**

**REVENUE SERVICE**

Respondent

---

**RESPONDENT'S HEADS OF ARGUMENT IN THE APPLICATION FOR LEAVE  
TO APPEAL ("SARS")**

---

**TABLE OF CONTENTS**

<b><u>INTRODUCTION</u></b>	3
<b><u>LEAVE TO APPEAL SHOULD BE REFUSED</u></b>	6
<i>The Constitutional Issue</i>	6
<b><u>IT IS NOT IN THE INTERESTS OF JUSTICE FOR LEAVE TO</u></b>	9
<b><u>APPEAL TO BE GRANTED</u></b>	
<b><u>PROSPECTS OF SUCCESS</u></b>	10
<b><u>CONTEXT OF THIS MATTER</u></b>	11
<b><u>LEGISLATIVE SCHEME AND BACKGROUND OF THE</u></b>	13
<b><u>RELEVANT PROVISIONS</u></b>	
<i>Amendment to Section 25B and the rationale thereof</i>	19
<b><u>SECTION 25B DOES NOT APPLY TO CAPITAL GAINS</u></b>	23
<b><u>PROPER INTERPRETATION OF PARAGRAPH 80(2)</u></b>	30
<b><u>COMMON LAW CONDUIT PIPE PRINCIPLE DOES NOT</u></b>	35
<b><u>APPLY IN THIS MATTER</u></b>	
<b><u>CONCLUSION</u></b>	38

## **INTRODUCTION**

- 1 The applicant (“Thistle”) seeks leave to appeal against a judgment of the Supreme Court of Appeal (“SCA”).
- 2 It arises from an assessment that was issued by the respondent (“SARS”) against Thistle, pursuant to an audit which established that during the 2014- 2016 tax years:
  - 2.1 Thistle was a beneficiary of a number of property holding trusts (“the Tier 1 trusts”);
  - 2.2 The Tier 1 trusts sold a number of their properties which resulted in capital gains;
  - 2.3 The Tier 1 trusts vested the capital gains in Thistle;
  - 2.4 Thistle in turn awarded the amounts of those capital gains to its beneficiaries;
  - 2.5 Thistle did not declare the capital gains in its income returns.
- 3 As justification for its failure to declare the capital gains, Thistle contended that because it had awarded the amounts of the capital gains that had vested in it to its own beneficiaries, it was left with no capital gain or loss of its own thereafter. The amount of any capital gain had, as a consequence to be taxed on its beneficiaries as it simply acted as a conduit.
- 4 But the capital gain vested in Thistle. What it then decided to do with such gain

thereafter did not alter such vesting and its liability for capital gains tax. It was on this basis that SARS raised an assessment against Thistle.

5 The SCA found, correctly, we submit, that the assessment by SARS was properly made and accorded with section 26A of the Income Tax Act 58 of 1962 (“ITA”), read with paragraph 80(2) of the Eighth Schedule.

6 Thistle seeks leave to appeal to this court against the judgment of the SCA in circumstances where:

6.1 It has at no stage sought to characterise the issue as being a constitutional issue;

6.2 It is not in the interests of justice for leave to appeal to be granted.

6.2.1 The present case essentially involves the question of whether the capital gains that vested in Thistle were taxable in its hands or whether they were taxable in the hands of its beneficiaries to whom it had subsequently distributed such amounts.

6.2.2 Capital gains tax is dealt with in the Eighth Schedule to the ITA. The Schedule provides a self-contained method for determining whether a capital gain or loss has arisen.<sup>1</sup> Section 25B of the ITA,

---

<sup>1</sup> Milnerton Estates Limited v Commissioner for the South African Revenue Service (1159/2017) [2018] ZASCA 155; 2019 (2) SA 386 (SCA) (20 November 2018) para 22

which deals with income of trusts in general and to the exclusion of capital gains, does not find application in this matter.

6.2.3 To the contrary, paragraph 80(2) of the Eighth Schedule expressly provides for the capital gains so vested in a trust (such as Thistle) to be taken into account in the hands of such trust in whom the gain had vested.

6.2.4 Paragraph 80(1) does not find application in this matter. The Tax Court's finding on this score has not been challenged by Thistle.<sup>2</sup>

6.2.5 This matter accordingly does not raise an arguable point of law.

7 We therefore submit that the application for leave to appeal falls to be dismissed.

8 Quite apart from this, we submit that the appeal is also untenable on its merits.

8.1 Thistle cannot succeed in persuading this honourable court that section 25B of the ITA, which deals generally with "*Income of trusts*" must be applied instead of section 26A of the ITA and paragraph 80, which is a

---

<sup>2</sup> Tax Court Judgment, Vol 4 page 311 para 20 – 21. The reason for the inapplicability of Paragraph 80(1) is that Thistle had a vested interest in the capital gains that arose from the disposal of the assets and not a vested interest in the assets that were disposed of by the trust that distributed the capital gains to the applicant i.e. Tier 1 Trusts. Paragraph 80(1) and paragraph 80(2), are distinguishable, in that paragraph 80(1) regulates the vesting by a trust of an asset in a trust beneficiary, whereas paragraph 80(2) regulates the vesting of the capital gain but not the asset arising out of the disposal of the asset in question.

specific provision that was enacted for purposes of dealing with capital gains tax.

8.2 Section 25B was introduced in 1991, whereas capital gains tax was only introduced in 2001, through the insertion of section 26A to the ITA. The legislature could thus not have intended for section 25B to apply to capital gains when there was no capital gains tax at that time.

8.3 When capital gains tax was introduced in 2001, the legislature with knowledge of the “*conduit pipe principle*” elected to codify its application to trusts by introducing paragraph 80 of the Eighth Schedule, in order to limit its application to capital gains generated from the sale or disposal of assets as set out in paragraph 80 and nowhere else.

### **LEAVE TO APPEAL SHOULD BE REFUSED**

9 It is now trite that leave to appeal to this Court will only be granted:

9.1 where the intended appeal raises a constitutional issue; and

9.2 where it is in the interests of justice for such leave to be granted.

### ***The Constitutional Issue***

10 Thistle seeks to characterise the constitutional issue purportedly arising in this case by contending that the SCA “(inadvertently) applied the amendment to section 25B retrospectively”, when it stated in paragraph 20 that:

*“the insertion of ‘other than an amount of a capital nature which is not included in gross income’ in the section after any amount, which came*

*about after capital gains was introduced, is yet another indicator that this section does not apply to an amount of the nature of a capital gains”.*<sup>3</sup>

11 It then contends that the SCA judgment offends the rule against retroactivity and thus raises a constitutional issue.<sup>4</sup>

12 There is however no merit to this contention as the SCA dismissed Thistle’s argument simply based on the proper interpretation of section 25B as it read before the amendment and without having regard to the amendment. It was only after having found that “*section 25B, read in its entirety, demonstrates that the amount is of a taxable income nature and not of a capital gains nature – ‘any amount’ will thus not include capital gains*”, that the court then added that:

*“the insertion of ‘other than an amount of a capital nature which is not included in gross income’ in the section after any amount, which came about after capital gains was introduced, is yet another indicator that this section does not apply to an amount of the nature of a capital gains”*<sup>5</sup>

13 Self evidently, there was no retrospective application of the amendment to section 25B of the ITA. To the contrary, the SCA merely reflected on the amendment as a “further indicator” which served merely to buttress a finding that it had already made.

---

<sup>3</sup> FA, Vol 4 page 281 para 22

<sup>4</sup> FA, Vol 4 page 274 para 5, page 279 para 17, page 281 para 24 and page 287 36

<sup>5</sup> SCA Judgment, Vol 4, page 295 para 20

- 14 This court dealt with a similar issue in Steenkamp NO v Provincial Tender Board of the Eastern Cape,<sup>6</sup> and held that:

*“This contention must fail. First, the Supreme Court of Appeal disposed of the appeal to it on the substantive ground that the loss arising from the administrative breach of the tender board is not actionable in delict. It expressly makes the point that its finding on the validity of the tender is for the sake of completeness. The Supreme Court of Appeal is clearly correct. Once it had found that the loss incurred by the successful tenderer is not recoverable in damages it matters not whether the tender was valid or not on the closing day for submission of tenders. A decision on the validity of the tender would not alter the finding that Balraz is not owed a duty of care”*

- 15 On the facts of this matter, the SCA’s reference to the amendment to section 25B as being *“yet another indicator”* that section 25B did not apply to an amount of the nature of a capital gains did not alter its main finding that section 25B, read in its entirety and properly construed, demonstrated that it did not apply to capital gains.
- 16 As the SCA did not apply section 25B retrospectively, it then follows, we submit, that there is no constitutional issue in this matter and that this application stands to be dismissed on that basis alone.

---

<sup>6</sup> Steenkamp NO v Provincial Tender Board of the Eastern Cape 2007 (3) SA 121 (CC) para 19

17 In any event, the court's consideration of subsequent amendments and explanatory memoranda which explain the basis of such amendments does not constitute retrospective application of legislation.<sup>7</sup>

**IT IS NOT IN THE INTERESTS OF JUSTICE FOR LEAVE TO APPEAL TO BE GRANTED**

18 Even if it were to be held that this application raises a constitutional issue, which we submit it does not, that is merely the entry level inquiry. The true question is whether it is in the interests of justice for leave to appeal to be granted to this Court in relation to the present application.

19 This appeal does not raise an arguable point of law of general public importance. The principles of interpretation of statutes, capital gains tax and using a later amendment as an aide in interpreting its predecessor are all settled in our law. Judgments of this court and the Supreme Court of Appeal have repeatedly confirmed these principles.

20 It accordingly cannot be contended that this matter raises a novel point of law which ought to be considered by this honourable court. This is particularly so having regard to the fact that Thistle's contentions have already been rejected by a unanimous court of the Supreme Court of Appeal, in what we submit is a well reasoned judgment that is based on trite principles of interpretation.

---

<sup>7</sup> CSARS v United Manganese of Kalahari (Pty) Ltd, para 25. See also Nehawu v University of Cape Town & Others 2003 (2) BCLR 154 (CC) para 66

- 21 It also does not raise any issues of public interest or an “*important issue of principle*”, as this Court requires in respect of hearing appeals against findings of specialist courts such as the Tax Court.<sup>8</sup>
- 22 As such, we submit with respect that there are compelling reasons why this appeal should not be heard.

### **PROSPECTS OF SUCCESS**

- 23 More so and for reasons stated above, the proposed appeal has no prospects of success.
- 23.1 Section 25B, read in its entirety, demonstrates that the amount referred to therein is of a taxable income nature and not of a capital gains nature – ‘any amount’ thus does not include capital gains.
- 23.2 When the provisions are read as a whole and in context, it is apparent that the legislature intended that section 25B be applied to the taxation of income that accrues to a trust or its beneficiaries. In contrast, the Eighth Schedule is to be applied to the taxation of capital gains that accrue to trusts or their beneficiaries.
- 23.3 Thistle did not dispose of any capital asset nor determine a capital gain that was distributed to its beneficiaries. Instead, it distributed monies that

---

<sup>8</sup> National Education Health and Allied Workers Union v University of Cape Town and Others 2003 (3) SA 1 (CC) para 31

vested in it as of right. In these circumstances, the 'conduit principle' does not apply.

23.4 Paragraph 80(2) of the Eighth Schedule, properly interpreted and applied, requires that the capital gains which accrued upon the disposal of assets by the Tier 1 trusts are to be taxed in the hands of Thistle and not its beneficiaries to whom it distributed those gains.

24 It is not in the interests of justice to grant leave to appeal where there are no prospects of success in the appeal.<sup>9</sup>

25 In all the circumstances, the application for leave to appeal falls to be dismissed. In what follows, we nevertheless address the merits of the appeal, as per the directions of this Court.

### **CONTEXT OF THIS MATTER**

26 In what follows, we sketch out the factual background to this matter. A great many of the facts set out below are common cause between the parties.

27 Thistle is an *inter vivos* discretionary trust and a beneficiary of the Tier 1 trusts. It was part of what has broadly been described as the Zenprop Group, a group of property owners and developers.

28 The Tier 1 trusts in whom Thistle was a beneficiary were Truzen 63 Trust; 115 West Street Trust; Newcastle Mall Property Trust; Truzen 20 Trust; Truzen 56

---

<sup>9</sup> Marshall and Others v Commissioner, South African Revenue Service [2018] ZACC 11 para 14

Trust; Truzen 62 Trust (1A Protea Place); Truzen 59 Trust; Truzen 12 Trust; Truzen 102 Trust; and Truzen 62 Trust (1 Protea Place).

- 29 The Tier 1 trusts owned a number of properties and shopping malls.
- 30 During the 2014, 2015 and 2016 years of assessment, the Tier 1 trusts sold or disposed of some of their properties and vested Thistle with the capital gain that arose from the disposal of those assets.
- 31 Pursuant to receipt of the capital gain distributions, Thistle in turn awarded the amounts of the capital gains that had vested in it to its own beneficiaries in the same years as the years in which it received such capital gains from the Tier 1 trusts.
- 32 Thistle however declared no capital gains in its income tax returns for the 2014, 2015 and 2016 years of assessment, as it contended that it was left with no capital gain or loss of its own after awarding such amounts to its own beneficiaries in the same year of assessment.
- 33 SARS adopted the position that Thistle, and not its beneficiaries, was liable for capital gains tax because the capital gains had vested in Thistle after the distribution that was made by the Tier 1 trusts.
- 34 On this basis, SARS assessed Thistle on the capital gains that it had been vested with and imposed understatement penalties and interest.
- 35 Thistle objected to such assessment on the grounds that its beneficiaries ought to be taxed and not it.

- 36 For reasons set out below, we submit that the assessment that was raised by SARS was properly made and accorded with section 26A of the ITA, read with paragraph 80 of the Eighth Schedule.
- 37 Before the Tax Court, this matter was determined based on agreed common cause facts between the parties. Of importance, the parties agreed that the fact that Thistle's beneficiaries had paid capital gains tax on the capital gains they received would not play any appreciable part in this appeal.<sup>10</sup>
- 38 The question as to how Thistle's beneficiaries dealt with the amounts received accordingly does not form part of this appeal. This appeal is confined solely to the question as to whether the capital gains received by Thistle were taxable in Thistle's hands.

### **LEGISLATIVE SCHEME AND BACKGROUND OF THE RELEVANT PROVISIONS**

- 39 Section 5 of the ITA deals with the imposition of income tax and provides that income tax shall be payable in respect of the taxable income received by or accrued to or in favour of any person during the year of assessment ended last day of February of each year.
- 40 The definition of a person as contained in section 1 of the ITA includes a trust. The inclusion of a trust in the definition of a person was introduced in 1991 and in terms of section 2(1)(b) of the Income Tax Act, 129 of 1991, pursuant to the

---

<sup>10</sup> Tax Court Judgment, Vol 4 page 305 para 8

judgment of Trustees of the Phillip Frame Will Trust v CIR,<sup>11</sup> which held that a trust was not a person for tax purposes and that making a trustee a “*representative taxpayer*” did not make a trust a taxable entity.

- 41 Simultaneously with the amendment to the definition of a person, the Legislature also inserted section 25B<sup>12</sup> in the ITA, which, during the relevant period provided as follows:

*“Income of trusts and beneficiaries of trusts*

*(1) Any amount received by or accrued to or in favour of any person during any year of assessment in his or her capacity as the trustee of a trust, shall ... to the extent to which that amount has been derived for the immediate or future benefit of any ascertained beneficiary who has a vested right to that amount during that year, be deemed to be an amount which has accrued to that beneficiary, and to the extent to which that amount is not so derived, be deemed to be an amount which has accrued to that trust.*

*(2) Where a beneficiary has acquired a vested right to any amount referred to in subsection (1) in consequence of the exercise by the trustee of a discretion vested in him or her in terms of the relevant deed of trust, agreement or will of a deceased person, that amount shall for the purposes of that subsection be deemed to have been derived for the benefit of that beneficiary.”*

- 42 The introduction of section 25B accordingly ensured that the conduit pipe

---

<sup>11</sup> 1991 (2) SA 34W, 53 SATC 166, the decision of the court *a quo* was upheld in CIR v Friedman and Others NNO 1993 (1) SA 353A, 55 SATC 39.

<sup>12</sup> Inserted by section 27(1) of the Income Tax Act 129 of 1991 and similarly, made retrospective to 1 March 1986.

principle would continue to be applied to income vested in the same year of assessment in which it was derived by a trust.

- 43 Prior to the inclusion of a trust in the definition of a person and the introduction of section 25B of the ITA, our courts had endorsed the common law conduit pipe principle into our system of taxation.<sup>13</sup> The effect thereof was that where an amount was received by a trust and immediately passed on by it to its beneficiary in the same year of assessment in which it was received, such amount would be regarded as having accrued to such beneficiary as opposed to the trust that received it. The trust, in other words, was no more than a conduit and accordingly not taxed on the amount that flowed through from it to its beneficiary. Rather, it is the beneficiary that is taxed.
- 44 The Legislature accordingly introduced section 25B in the ITA, in appreciation of the fact that its introduction of a trust as a person (and a taxpayer in its own right) would, in the absence of section 25B(1), result in a trust being taxed and the conduit pipe principle being redundant.
- 45 Ten years later and with effect from 1 October 2001, capital gains tax was introduced for the first time in South Africa through the insertion of section 26A in the ITA,<sup>14</sup> which provided that:

---

<sup>13</sup> Armstrong v Commissioner of Inland Revenue 1938 (AD) 343 at 348-9.

<sup>14</sup> Inserted by section 14 of the Taxation Laws Amendment Act, 5 of 2001

***Inclusion of taxable capital gain in taxable income***

*There shall be included in the taxable income of a person for a year of assessment the taxable capital gain of that person for that year of assessment, as determined in terms of the Eighth Schedule.*

- 46 This court in President of the Republic of South Africa and Another v Hugo stated the following:<sup>15</sup>

*“Textual support for the view that the powers exercised by the President under section 82(1) are executive powers is to be found in the heading to and contents of section 83(1) and (2). It is there provided as follows:*

***“83. Confirmation of executive acts of President.-***  
...

*For the purpose of elucidating a provision in a statute our courts have referred to the headings of sections in a statute. A similar position has been adopted in England and Canada. In the case of headings which are part of a constitution which was the product of negotiations conducted by the drafters thereof, and those headings are part of the constitution as drafted, there is at least as much to be said for their relevance as a tool of interpretation as there is in the case of ordinary legislation. It follows, in my opinion, that the heading of section 83 can be referred to as support for the conclusion that the powers of the President under section 82(1) are executive powers. The President, as an executive organ of state, by reason of the supremacy clause, is subject to the provisions of the interim Constitution.*

---

<sup>15</sup> President of the Republic of South Africa and Another v Hugo (CCT11/96) [1997] ZACC 4; 1997 (6) BCLR 708; 1997 (4) SA 1 (18 April 1997) para 12. See also Huang v Bester NO 2012(5) SA 551 (GSJ) at 557, where the court stated that headings may be referred to for the purposes of determining the sense of any “*doubtful*” expression in a section of a statute.

- 47 The Eighth Schedule was simultaneously inserted into the ITA to deal with *“Determination of Taxable Capital Gains And Assessed Capital Losses”*.<sup>16</sup>
- 48 In terms of paragraph 2(1) read with paragraph 11(1) of the Eighth Schedule, Capital Gains Tax is triggered by the disposal of an asset.<sup>17</sup>
- 49 With effect from 1 October 2001, any capital gain arising out of the disposal of an asset became taxable.
- 50 In terms of paragraph 3 of the Eighth Schedule, a capital gain arises when the proceeds of any disposal of an asset exceeds its base cost.
- 51 Capital gains attributed to trusts and trust beneficiaries is dealt with specifically in paragraph 80 of the Eighth Schedule.
- 52 Paragraph 80 distinguishes between the vesting by a trust of an asset in a trust beneficiary (Paragraph 80(1))<sup>18</sup> *vis-à-vis* the vesting of the capital gain arising out of the disposal of the asset by the trust (Paragraph 80(2)).
- 53 As correctly held by the Tax Court, Paragraph 80(1) does not find application in this matter. The Tax Court’s finding to this effect is not challenged by Thistle and does not form the subject of this appeal.<sup>19</sup>
- 54 Paragraph 80(2) finds application in this matter and provides that:
- “(2) Subject to paragraph 68, 69, 71 and 72 [none of which are applicable] where a capital gain is determined in respect of the*

---

<sup>16</sup> Inserted by section 38 of the Taxation Laws Amendment Act, 5 of 2001

<sup>17</sup> Paragraph 2(1) and 11(1) of the Eighth Schedule

*disposal of an asset by a trust in a year of assessment during which a trust beneficiary [other than any person contemplated in paragraph 62(a) to (e)] who is a resident has a vested interest or acquires a vested interest (including an interest caused by the exercise of a discretion) in that capital gain but not in the asset, the disposal of which gave rise to the capital gain, the whole or the portion of the capital gain so vested –*

*(a) must be disregarded for the purpose of calculating the aggregate capital gain or aggregate capital loss of the trust; and*

*(b) must be taken into account for the purpose of calculating the aggregate/capital gain or aggregate capital loss of the beneficiary in whom the gain vests.”*

55 Paragraph 80 is accordingly the sole determinant of how capital gains are to be taxed *vis-a-vis* trusts and beneficiaries.<sup>20</sup> It constitutes an exception to the default position that a trust must account for any capital gain or loss that arises when it disposes of an asset. It does so by attributing a capital gain made by the trust in which it arises to a resident beneficiary.

---

<sup>18</sup> *“Subject to paragraph 68, 69, 71 and 72 where a capital gain is determined in respect of the vesting by a trust of an asset in a trust beneficiary ... who is a resident, that gain –*

*(a) must be disregarded for the purpose of calculating the aggregate capital gain or aggregate capital loss of the trust; and*

*(b) must be taken into account for the purpose of calculating the aggregate capital gain or aggregate capital loss of the beneficiary to whom that asset was so disposed of.”*

<sup>19</sup> Tax Court Judgment, Vol 4 page 312 para 20 and 21

<sup>20</sup> The Supreme Court of Appeal in *Milnerton Estates Limited v C:SARS* 2018 ZASCA 155, at para 22, questioned the applicability of section 24 of the ITA (which is a general provision dealing with accrual of the purchase price of the property) applied for capital gains tax purposes because “*on its face the schedule seems to provide a self-contained method for determining whether a capital gain or loss has arisen*”.

### ***Amendment to Section 25B and the rationale thereof***

56 In 2004, section 25B was amended by the Revenue Amendment Act 32 of 2004. The amendment resulted in the opening words of section 25B(1) namely “*any income*” being changed to “*any amount*”. The reason for the change was captured in the Explanatory Memorandum<sup>21</sup> as follows:

56.1 *“Section 25B of the Income Tax Act 1962 regulates the taxation of income received by or accrued to a trust and provides for the flowthrough principle in the case where the income is received by or accrued to or in favour of a vested beneficiary. The question has been raised as to whether income is referred to in its ordinary meaning or as defined in section 1, meaning gross income less exempt income. If it refers to the defined term, section 25B is deprived of much of its force as an anti-avoidance measure in respect of offshore trusts.*

56.2 *It is proposed that the term “income” be replaced by “amounts” in order to clarify that the more general meaning of income is intended.” [our emphasis]*

57 In January 2020, section 25B was once again amended by the Taxation Laws Amendment Act, 23 of 2020 firstly by replacing the heading “***Income of trusts and beneficiaries of trusts***” with “***Taxation of trusts and beneficiaries of***

---

<sup>21</sup> Explanatory Memorandum on the Revenue Laws Amendment Bill of 2004 at clause 27, p63.

**trusts**” and by inserting the words “*other than an amount of a capital nature which is not included in gross income ...*”, after the opening words “any amount”.

58 The Explanatory Memorandum on the Taxation Laws Amendment Bill of 2020<sup>22</sup> specifically addressed the reason for this amendment as follows:

*“Sub-clause (a): The proposed amendment is a technical correction which seeks to correct the heading of this section and replaces the current heading “Income of trusts and beneficiaries of trusts” with the proposed heading “Taxation of trusts and beneficiaries of trusts” in order to provide clarity.*

*Sub-clause (b): The proposed amendment is a consequential amendment to the proposed amendment in the definition of “living annuity” in section 1 of the Act to make provision for the termination of a trust as the word “death” in the definition of “living annuity” is problematic as trusts cannot die but can only be terminated. Therefore, if the word “die” is only limited to the death of a natural person, there is an anomaly because a [sic] when a trust that was initially nominated as the owner of a living annuity upon the death of the original annuitant is subsequently terminated, such trust is unable to make payments to its nominees. In addition, it is a consequential amendment to the proposed amendment regarding the insertion of paragraph 3B of the Second Schedule that makes provision for the amount to be taxable in the trust immediately prior to the date of termination of the trust. Furthermore, some commentators have contended that section 25B(1) also applies to amounts of a capital nature (for example, proceeds on disposal of a capital asset). There is no substance in this contention because the Eighth Schedule contains specific provisions dealing with such amounts, but for the purposes of clarity it is proposed to exclude amounts*

---

<sup>22</sup> Explanatory Memorandum on the Taxation Laws Amendment Bill 2020 p58, clause 28.

*of a capital nature that are not deemed to be included in gross income from the ambit of section 25B(1)” [our emphasis]*

59 This court confirmed the admissibility of explanatory memorandas in Minister of Health & Another v New Clicks South Africa (Pty) Ltd & Others (Treatment Action Campaign & Innovative Medicines SA as Amici Curiae), where it was held that where explanatory memorandum explains why particular provisions were or were not included in the Act, it can be taken into account by a Court in interpreting the relevant provision.<sup>23</sup>

60 This is so because memorandum of explanation constitute the background material that is relevant to interpreting the provisions of the Act.<sup>24</sup>

61 In the circumstances, we submit that the amendment to section 25B in January 2020, by replacing the heading “*Income of trusts and beneficiaries of trusts*” with “*Taxation of trusts and beneficiaries of trusts*” and by inserting the words “*other than an amount of a capital nature which is not included in gross income ...*”, indicate what has at all material times been the intention of the Legislature. These

---

<sup>23</sup> Minister of Health & Another v New Clicks South Africa (Pty) Ltd & Others (Treatment Action Campaign & Innovative Medicines SA as Amici Curiae) 2006 (1) BCLR 1 (CC) para 200.

<sup>24</sup> Chirwa v Transnet Limited and Others (CCT 78/06) [2007] ZACC 23 para 48, 100 – 101. The Supreme Court of Appeal also had regard to the explanatory memorandum when interpreting the provisions of the LRA in Commission for Conciliation, Mediation and Arbitration and Others v Law Society of the Northern Provinces (005/13) [2013] ZASCA 118 para 11 – 13.

amendments were inserted merely for purposes of providing clarification. They did not change the law.

62 It is permissible to have regard to a later amendment to establish the meaning of a provision prior to its amendment. This was recently confirmed in Commissioner for South African Revenue Service v United Manganese of Kalahari (Pty) Ltd,<sup>25</sup>

where it was held that:

*“Where Parliament has clearly shown by later amending legislation what was meant by the earlier legislation under amendment and the amending legislation is passed explicitly for the purpose of clarifying the meaning, it is permissible as an aid interpretation to have regard to the meaning ascribed by the later legislation to its predecessor.”<sup>26</sup>*

63 To do so does not constitute retrospective application of an amendment.

64 On all of these basis, we submit that section 25B does not apply to taxation of capital gains by trusts. Such taxation is only regulated in terms of section 26A read with Paragraph 80 of the Eighth Schedule.

65 These amendments were accordingly effected solely for purposes of clarifying what has always been the law i.e. that section 25B does not apply to capital gains tax and that the word “any amount” in section 25B(1) does not include capital gains, as these are specifically dealt with in the Eighth Schedule.

---

<sup>25</sup> Commissioner for South African Revenue Service v United Manganese of Kalahari (Pty) Ltd 2020 (4) SA 428 (SCA) 82 SATC 444 para 24

<sup>26</sup> CSARS v United Manganese of Kalahari (Pty) Ltd para 25; See also Nehawu v University of Cape Town & Others 2003 (2) BCLR 154 (CC) para 66

66 Against this background, we proceed to deal with Thistle's grounds of appeal.

### **SECTION 25B DOES NOT APPLY TO CAPITAL GAINS**

67 The gist of Thistle's submissions before this court is that before the 2021 amendment to section 25B, the phrase "any amount" was unqualified and thus included amounts of a capital nature and accordingly applied to capital gains.<sup>27</sup>

68 In essence, it contends that the capital gains that had vested in it arising out of the disposal of the capital assets by the Tier 1 trusts, fell within the purview of section 25B(1) and (2) of the ITA because the words "*any amount*" were of wide ambit and included capital gains as well.

69 We submit that this contention is misplaced as section 25B deals with income and is not applicable to capital gains. Capital gains are specifically dealt with in the Eighth Schedule and a taxable gain is included in taxable income by virtue of section 26A of the ITA.

70 The Eighth Schedule, which gives effect to section 26 of the ITA, provides a self-contained method for determining whether a capital gain or loss has arisen.<sup>28</sup>

71 A general provision dealing with income of trusts and how trusts are to be taxed cannot be applied over a specific provision and a specially tailored method. To

---

<sup>27</sup> FA, Vol 4 page 280 para 19 and 20

<sup>28</sup> Milnerton Estates Limited v Commissioner for the South African Revenue Service (1159/2017) [2018] ZASCA 155; 2019 (2) SA 386 (SCA) (20 November 2018) para 22

do so would simply render the specific provision (i.e. *in casu* section 26A and the Eight Schedule) redundant.

- 72 A “*capital gain*” is not “*any amount*” received by or accrued to or in favour of any person and consequently “*any amount*” cannot be a “*capital gain*.” This is so because of the manner in which a “*capital gain*” is determined. It is determined with reference to the proceeds on the disposal of an asset less its base cost. Accordingly, until such time that there are proceeds on the disposal of an asset less its base cost, “*any amount*” cannot be said to constitute a “*capital gain*.”
- 73 Capital gains tax is a form of taxation that is aimed at levying tax on the capital gains that taxpayers make. Prior to 1 October 2001 capital gains were not taxable, because capital gains fell beyond the ambit of the definition of “gross income” in section 1 of the ITA.<sup>29</sup>
- 74 By definition, gross income excludes amounts of a capital nature, and defines it as:

*“the total amount in cash or otherwise, received by or accrued in favour of [the taxpayer] during the year or period of assessment excluding receipts of accruals of a capital nature”*

- 75 Amounts of a capital nature are only included in gross income if they are specifically listed under the listed amounts in subparagraphs (a) – (n). Differently

---

<sup>29</sup> JS Wilcocks, *The concept of ‘disposal’ for the purposes of capital gains tax in South Africa*; Meditari Accountancy Research Vol. 10 2002 : 311–325 at page 312.

put, unless specifically listed under sub-paragraphs (a) – (n), amounts of a capital nature, of which capital gains is one, do not form part of gross income.

76 This much is accepted by Thistle, at paragraph 50.2 of their heads of argument, wherein they state that before the introduction of Capital Gains Tax, gross income included only income.

77 The exclusion of capital amounts from gross income is also emphasised in the general deductions formula, in section 11(a), which provides that:

*“General deductions allowed in determination of taxable income.—For the purpose of determining the taxable income derived by any person from carrying on any trade, there shall be allowed as deductions from the income of such person so derived—*

*(a) expenditure and losses actually incurred in the production of the income, provided such expenditure and losses are not of a capital nature;”*

78 “Income”, is in turn defined as the amount remaining of the gross income of any person for any year or period of assessment after deducting therefrom any amounts exempted from normal tax.

79 Section 1(n), as part of the list of specific inclusions of amounts into gross income provides for a provision to be included in the ITA which specifically stipulates that such amounts form part of the taxable income. Gross income thus includes:

*“Any amount (whether of a capital nature or not) which in terms of any other provision of this Act is specifically required to be included in the taxpayers income”*

- 80 Once a provision is introduced in the ITA which specifically deals with taxation of a specific amount, the taxation of such amount must be dealt with through that specific provision and not through any other provision.
- 81 This is apparent from the different types of amounts that are dealt with throughout sections 25 and 26. To mention a few, section 25 deals with *"Income of Beneficiaries and Estates of deceased persons"*, section 25A deals with *"Determination of taxable income of Permanently Separated Spouses"*, section 25B deals with *"Income of trusts and Beneficiaries of Trusts"*, section 25BA deals with *"Amounts received by or accrued through portfolios of Collective Investment Schemes in securities and holders of Participatory interests in Portfolios"*, section 25BB deals with *"Taxation of REITS"*, section 25C deals with *"Income of Insolvent Estates"*, section 26 deals with *"Determination of Taxable income derived from Farming"*, and section 26A deals with *"Inclusion of Taxable Capital Gain in taxable income"*.
- 82 The inclusion of section 26A whilst section 25B is still in operation and had been a decade prior, indicates that section 26A was introduced to deal with that which was previously not dealt with in the Act and which was not included within the scope of taxable amounts i.e. capital gains tax.
- 83 At all material times prior to the inclusion of section 26A, the words *"any amount"* used throughout the Act and specifically in sections 1 and section 25B did not include capital gains.

84 “Any amount” as referred to in section 25B must accordingly be construed within the definition of “income”, which, in the absence of section 26A excludes amounts of a capital nature and thus capital gains tax.

85 Once it is accepted that the only reason why capital gains now forms part of taxable income is because of the introduction of section 26A, it should then follow that the taxation of capital gains can only be dealt with through section 26A read with the Eighth Schedule and no other provision.

86 The delineation of the trust’s taxable amounts is accordingly as follows:

86.1 the question of the tax on income which the trust pays over to the beneficiary is governed by section 25B of the Act, subject to section 7 of that Act (i.e. the anti-avoidance provision).

86.2 the capital gain element of the income is then regulated by section 26A and paragraph 80 of the Eighth Schedule which is also subject to the capital gains rules contained in paragraphs 68, 69, 71 and 72 of the Schedule.<sup>30</sup>

87 Sections 25B and 7 only apply to the income element of a taxpayer’s taxable income. The Eighth Schedule then contains the deeming rules that regulate the capital element of taxable income in paragraph 80.<sup>31</sup>

---

<sup>30</sup> Silke on South African Income Tax, para 12.37. LLM These, *The Common Law Conduit Pipe Principle: Should we retain this principle in our South African law?*, page 35; <https://researchspace.ukzn.ac.za/handle/10413/18447>;

<sup>31</sup> P Haupt Notes on South African Income Tax 809-815.

- 88 To use the words of Silke *“the Eighth Schedule mirrors the section 25B and 7 provisions in the context of CGT”*.<sup>32</sup>
- 89 It is accordingly unhelpful we submit, for Thistle to contend that the word “any” is wide and without limitation, and thus includes any possible amount conceivable. The word “any amount” within this context, can only mean an amount within the course and scope of section 25B, which deals specifically with income element of a trust’s taxable income and not with capital amounts.
- 90 Whilst the word “any” may ordinarily be a word of wide generality, it is in this instance limited by the subject-matter and the context within which it appears.<sup>33</sup>
- 91 As it was held in C:SARS v United Manganese of Kalahari (Pty) Ltd,<sup>34</sup> statutes have a context that may be highly relevant to their interpretation. Such context includes the context provided by the entire enactment and the legislative history of the statute, which provides useful background in resolving interpretational uncertainty.
- 92 As it was held by this honourable court in University of Johannesburg v Auckland Park Theological Seminary<sup>35</sup> *“it is not just for the sake of poetry that the old*

---

<sup>32</sup> Silke on South African Tax, para 12.37

<sup>33</sup> R v. Hugo 1926 AD 268 at 271; Commissioner For Inland Revenue v Ocean Manufacturing Ltd [1990] 2 All SA 422 (A) page 429

<sup>34</sup> C:SARS v United Manganese of Kalahari (Pty) Ltd (264/2019) [2020] ZASCA 16 (25 March 2020) para 17

<sup>35</sup> University of Johannesburg v Auckland Park Theological Seminary 2021 JDR 1151 (CC)

*adage, context is everything, holds true. In so many scenarios, words alone ring hollow. Context gives life and meaning to what is said or written".<sup>36</sup>*

93 It has repeatedly been held by our courts, that in interpreting legislation it is imperative that its purpose be analysed, regard must be had to the historical origin of the statute, the statute's broad objects and values which underlie it must be considered and regard must also be given to the part of the statute to which the provision appears or those provisions with which it is interrelated.<sup>37</sup>

94 On any possible basis and regardless of the generally wide scope of the words "any" and "amount", these words cannot make an amount as contemplated in section 25B to be that which it is not and which it was clearly not intended to be.<sup>38</sup>

95 Lastly, we submit that a specific provision has been made in section 26A of the ITA and the Eighth Schedule to deal with capital gains tax. It is thus impermissible to rely on a general provision that deals with income of trusts in general, whereas paragraph 80(1) and (2) specifically deal with capital gains arising from trusts and which are then attributed to the beneficiaries of the trusts.

96 Insofar as it may be contended that sections 25B and 26A read with paragraph 80 of the Eighth Schedule are perhaps contradictory, it is a well-established

---

<sup>36</sup> University of Johannesburg v Auckland Park Theological Seminary para 1 and 68. See also Capitec Bank Holdings Ltd & Others v Coral Lagoon Investments 194 (Pty) Ltd & Others ZASCA 99 (9 July 2021)

<sup>37</sup> Minister of Land Affairs v Slamdien (1 999 4 BCLR 413 (LCC) 422); S v Makwanyane 1995 3 SA (CC) 154

<sup>38</sup> Telkom SA Limited v The Member Of The Executive Council For Agricultural And Environment Affairs: Kwazulu-Natal, CASE NO 516/2000, 05 September 2002 SCA para 34

principle in law that the provision that is specific trumps the provision that is general.<sup>39</sup>

97 Our submissions are buttressed by the legislative history of the ITA and sections 25B and 26A in particular, which we deal with next.

### **PROPER INTERPRETATION OF PARAGRAPH 80(2)**

98 Paragraph 80, it is submitted, is the sole determinant of how capital gains are to be attributed to beneficiaries.<sup>40</sup> It constitutes an exception to the default position that a trust must account for any capital gain or loss that arises when it disposes of an asset. It does so by attributing a capital gain made by a trust in which it arises to a resident beneficiary.

99 The capital gain referred to in paragraph 80(2) arises when the proceeds of the disposal of an asset exceed the base cost of that asset.<sup>41</sup>

100 Consequently, what paragraph 80(2) contemplates is that where an asset has been disposed of (as in this case by the Tier 1 trusts) and a capital gain has arisen, and is then vested in a resident (in this case Thistle, which is a resident trust) that capital gain is disregarded for the purposes of calculating any aggregate capital gain or aggregate capital loss of the Tier 1 trusts but is taken into account for the purposes of calculating the aggregate capital gain or

---

<sup>39</sup> University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice And Correctional Services and Others [2015] 3 All SA 644 (WCC) para 90

<sup>40</sup> See by analogy Milnerton Estates Limited v C:SARS 2018 ZASCA 155, at para 22, where Wallis JA expressed doubt as to whether section 24 of the ITA applied for capital gains tax purposes because “*on its face the schedule seems to provide a self-contained method for determining whether a capital gain or loss has arisen*”.

<sup>41</sup> The definition of “*capital gain*” in paragraph 3 of the Eighth Schedule.

aggregate capital loss of the beneficiary in whom that gain vested (in this case Thistle).

101 But for the further distribution by Thistle to its own beneficiaries of the amounts of the capital gains that vested in it, the capital gain would have been taxed in Thistle's hands. It follows that what is in issue is whether the subsequent distribution by Thistle to its own beneficiaries of the amounts of the capital gains that had vested in it changes the position. We submit not.

102 The distribution by Thistle to its own beneficiaries did not arise as a result of the disposal of any asset by Thistle as contemplated by paragraph 80(2). All that Thistle did was to vest an amount equal to the capital gain that had vested in it to its beneficiaries. In doing so, Thistle did no more than award an amount in its bank account to its beneficiaries. Consequently, the further distribution by Thistle of the amounts of the capital gains that vested in it to its own beneficiaries did not alter the tax position that such capital gains be taken into account in its hands for the purposes of calculating its aggregate capital gain or aggregate loss.

103 Post accrual transactions do not affect and/or change the fact that the income accrued in the first place.<sup>42</sup>

104 Disposal and accrual should thus not be conflated with “the fate of the income”.  
*Silke* chapter 2.19 page 28 deals with this distinction and provides that:

*“the fate of the income after it has accrued or been received is therefore of no consequence to the tax gatherer. The ultimate destination of the income cannot affect its nature as income. Therefore if an dishonest employee embezzles the day’s takings his act can in no way destroy the accrual in favour of the employer. The takings formed part of the employer’s income the moment they accrued to or were received by him, and his subsequent loss of them could not take them out of the category of gross income.”*

105 The position would have been different had Thistle disposed of an asset (similar to what the Tier 1 trusts had done) such as, for an example, an immovable property owned by it and derived a capital gain from its disposal which it then

---

<sup>42</sup> Commissioner For Inland Revenue v Witwatersrand Association of Racing Clubs (1960) 3 All SA 167 (A) page 180. *“It is, I think, plain that it was respondent, and not anybody else, who was liable to discharge the debts attendant upon the holding of the race meeting. Equally, it was respondent, and not anybody else, who became entitled to the proceeds of the meeting. ...Conceivably the holding of the race meeting might have been so ordered, arranged and executed as to avoid attracting tax. I need express no opinion on that aspect of the matter. It is sufficient to say that the method actually adopted failed, in my opinion, to relieve respondent of liability to pay tax on the proceeds of the meeting. On the procedure in fact followed, the proceeds of the race meeting in law accrued to respondent beneficially...*

*... a moral obligation to hand over the proceeds to the charities did not destroy the beneficial character of the receipt of those proceeds by respondent. ... I accordingly hold that the £7,906 in issue accrued to respondent as income and, consequently, attracted tax in respondent’s hands”*

distributed to its own beneficiaries. In those circumstances that capital gain would be disregarded in its hands as contemplated by paragraph 80(2).

106 But that is not what occurred in the present matter. In this instance, Thistle's Tier 1 trusts had disposed of capital assets and then distributed the capital gains that were derived therefrom to Thistle who did no more than award and distribute those amounts to its beneficiaries. No capital gain was made by Thistle on the disposal of any asset and no such capital gain was vested in its beneficiaries.

107 Prior to an amendment effected by the Taxation Laws Amendment Act, 60 of 2008, the opening words of paragraph 80(2) read: "*Where a capital gain arises in a trust.*" This reference gave rise to ambiguity because it was arguable that a gain could arise by attribution in a trust which would then have enabled that trust to vest it in its beneficiary. The amendment made it clear that it was the beneficiary of the trust that disposed of the asset who had to account for the capital gain.

108 The Explanatory Memorandum<sup>43</sup> addressed the reasons for this amendment as follows:

*"Furthermore, the wording of paragraph 80(2) is more closely aligned with the wording of paragraph 80(1). Some commentators have suggested that a capital gain arising under paragraph 80(2) can be attributed through multiple discretionary trusts. This view has not been accepted and the amendment clarifies this by referring to a capital gain determined in respect*

---

<sup>43</sup> Explanatory Memorandum on the Revenue Laws Amendment Bill 2008, p129, clause 86

*of the disposal of an asset by a trust instead of a capital gain arising in a trust.”*

109 This is further fortified by the words “*that capital gain*” in relation to the trust beneficiary who acquires a vested interest thereto.

110 Had the legislature intended to attribute any capital gain made by a trust to its beneficiaries as a result of the disposal of an asset by another trust (in which the trust is a beneficiary), it could have easily done so. Instead, paragraph 80(2) limited the attribution to a trust beneficiary who acquires a vested interest in the capital gain made by another trust.

111 This interpretation is supported by the author, Philip Haupt<sup>44</sup> who commented on paragraph 80 as follows:

*“If a trust makes a capital gain during the year, and vests it in another trust, paragraph 80 deems the gain to be made by the other trust (as beneficiary). If this other trust distributes the gain to its beneficiaries, however, paragraph 80 does not apply. This is because the second trust did not dispose of an asset and so did not make the original capital gain, this means that the second trust cannot distribute the gain to its beneficiaries (for tax purposes). So even though the beneficiaries may become entitled to the gain in law, the second trust is still taxed on the gain. Section 25B, which*

---

<sup>44</sup> In his book “*Notes on South African Income Tax*” emphasises this principle in para 21.20.4 on p743 of the 2016 Edition.

*deals with the vesting of income by a trust, and the conduit pipe principle, do not apply to capital gains”.*

112 In the circumstances, where the Tier 1 trusts disposed of the assets and vested the capital gains arising therefrom in Thistle, it is Thistle that is taxed on such gains, not its beneficiaries.

### **COMMON LAW CONDUIT PIPE PRINCIPLE DOES NOT APPLY IN THIS MATTER**

113 Thistle contends that the conduit pipe principle applies to all amounts that are distributed by trustees to beneficiaries and that the SCA misapplied the conduit pipe principle through its interpretation of section 25B.<sup>45</sup>

114 Again there is no merit to this contention. When the Legislature introduced capital gains tax in 2001, it would have been fully aware of the conduit pipe principle. It elected to introduce paragraph 80 of the Eighth Schedule, in order to limit its application to capital gains generated from the sale or disposal of assets as set out in paragraph 80 and nowhere else.

115 Paragraph 80 accordingly codifies the application of the conduit pipe principle insofar as it relates to trusts and capital gains attributed to beneficiaries.

116 Neither the Armstrong nor Rosen judgments (which are relied upon by Thistle) are authority for the proposition that the common law conduit pipe principle would

---

<sup>45</sup> FA, Vol 4 page 275 para 6, page 284 para 28 and page 286 para 33

remain in extant and would be applicable to capital gains even after the adoption of a specific legislative mechanism as contained in paragraph 80.

117 It is a sound principle of interpretation that it should be assumed that the Legislature is aware of the law. On this basis, it must be assumed that the Legislature was aware of the common law conduit pipe principle at the time that it enacted paragraph 80 of the Eighth Schedule. We submit that this assumption can readily be made having regard to the historical developments relating to the taxation of trusts and their beneficiaries as set out above.

118 Also, we submit that paragraph 80 was deliberately worded in the manner in which it was having regard to the legislature's knowledge and the recognition, that following Phillip Frame Will Trust *supra*, a trustee of a discretionary trust was no longer an "*administrative conduit pipe*" for tax purposes. A trust was clothed with its own separate legal persona and was a taxable entity in its own right. It is the beneficial owner of its assets until disposed of and the difficulties surrounding economic double taxation that faced Armstrong and Rosen, no longer arose.

119 With the adoption of paragraph 80 to the Eighth Schedule, there is no basis to apply the common law conduit pipe principle to capital gains that are attributed to trust beneficiaries, to the exclusion of paragraph 80.

120 It is thus apparent that the Legislature had taken a clear policy decision to the effect that all capital gains that are attributed to trust beneficiaries must be determined in accordance with paragraph 80. Otherwise it is superfluous.

121 As it was held by this court in Minister of Health & another v New Clicks South Africa (Pty) Ltd,<sup>46</sup> once the Legislature has passed a statute with the intention to codify a subject matter, a party cannot then avoid the provisions of the statute by going behind it and seeking to rely on the common law. It held in this regard that:

*“Nor is it possible to sidestep the Act by resorting to the common law. This, too, is logical, since statutes inevitably displace the common law. The common law may be used to inform the meaning of the constitutional rights and of the Act, but it cannot be regarded as an alternative to the Act’.”*

122 The insistence on applying the conduit pipe principle in disregard of the clearly defined limitations that are contained in paragraph 80 results in a conflict between the ITA and the common law.

123 In the case of a conflict between a statute and the common law, the statute takes precedence.<sup>47</sup>

124 If that was not the case, there would not be a purpose in enacting legislation to merely confirm what the common law says without more.

---

<sup>46</sup> Minister of Health and Another No v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and another as amici curiae) 2006 (2) SA 311 (CC) para 95 - 97

<sup>47</sup> Tshwane City V Link Africa And Others 2015 (6) SA 440 (CC) para 46 and 134

125 Once a statute is passed to give effect to an obligation, absent a challenge to the validity of such statute, section 165 of the Constitution then obliges the court to interpret and apply such statute.<sup>48</sup>

126 We accordingly submit that the conduit pipe principle insofar, as it applies to taxation of capital gains by trusts has been codified and limited in paragraph 80 of the Eighth Schedule and subject to the stipulations contained therein. Thistle's reliance on the common law as it was prior to paragraph 80 is thus misconceived.

127 On this basis, the appeal falls to be dismissed.

## **CONCLUSION**

128 In the circumstances, we submit that:

128.1 The application for leave to appeal falls to be dismissed;

128.2 Alternatively, the appeal itself falls to be dismissed.

128.3 In either event, SARS seeks an order for costs, including the costs of two counsel.<sup>49</sup>

**M A CHOHAN SC**

**L KUTUMELA**

Respondent's Counsel  
Chambers, Sandton  
2 October 2023

---

<sup>48</sup> National Credit Regulator v Opperman and Others 2013 (2) BCLR 170 (CC) para 99 – 100

<sup>49</sup> See: Aviation Union of South Africa and Another v South African Airways (Pty) Ltd and Others 2012 (1) SA 321 (CC) para 127; Equity Aviation Services (Pty) Ltd v CCMA 2009 (1) SA 390 (CC) paras 58-59

---

## LIST OF AUTHORITIES

---

1. Milnerton Estates Limited v Commissioner for the South African Revenue Service (1159/2017) [2018] ZASCA 155; 2019 (2) SA 386 (SCA) (20 November 2018)
2. Steenkamp NO v Provincial Tender Board of the Eastern Cape 2007 (3) SA 121 (CC)
3. Commissioner for South African Revenue Service v United Manganese of Kalahari (Pty) Ltd 2020 (4) SA 428 (SCA) 82 SATC 444
4. National Education Health and Allied Workers Union v University of Cape Town and Others 2003 (3) SA 1 (CC)
5. Marshall and Others v Commissioner, South African Revenue Service [2018] ZACC 11
6. Trustees of the Phillip Frame Will Trust v CIR 1991 (2) SA 34W, 53 SATC 166
7. CIR v Friedman and Others NNO 1993 (1) SA 353A, 55 SATC 39
8. Armstrong v Commissioner of Inland Revenue 1938 (AD) 343
9. President of the Republic of South Africa and Another v Hugo (CCT11/96) [1997] ZACC 4; 1997 (6) BCLR 708; 1997 (4) SA 1 (18 April 1997)
10. Huang v Bester NO 2012(5) SA 551 (GSJ)

11. Minister of Health & Another v New Clicks South Africa (Pty) Ltd & Others (Treatment Action Campaign & Innovative Medicines SA as Amici Curiae) 2006 (1) BCLR 1 (CC)
12. Chirwa v Transnet Limited and Others (CCT 78/06) [2007] ZACC 23
13. Commission for Conciliation, Mediation and Arbitration and Others v Law Society of the Northern Provinces (005/13) [2013] ZASCA 118
14. R v. Hugo 1926 AD 268
15. Commissioner For Inland Revenue v Ocean Manufacturing Ltd [1990] 2 All SA 422 (A)
16. University of Johannesburg v Auckland Park Theological Seminary 2021 JDR 1151 (CC)
17. Capitec Bank Holdings Ltd & Others v Coral Lagoon Investments 194 (Pty) Ltd & Others ZASCA 99 (9 July 2021)
18. Minister of Land Affairs v Slamdien (1 999 4 BCLR 413 (LCC) 422)
19. S v Makwanyane 1995 3 SA (CC) 154
20. Telkom SA Limited v The Member Of The Executive Council For Agricultural And Environment Affairs: Kwazulu-Natal, CASE NO 516/2000, 05 September 2002 SCA
21. University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice And Correctional Services and Others [2015] 3 All SA 644 (WCC)
22. Commissioner For Inland Revenue v Witwatersrand Association of Racing Clubs (1960) 3 All SA 167 (A)

23. Minister of Health and Another No v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and another as amici curiae) 2006 (2) SA 311 (CC)
24. Tshwane City V Link Africa And Others 2015 (6) SA 440 (CC)
25. National Credit Regulator v Opperman and Others 2013 (2) BCLR 170 (CC)
26. Aviation Union of South Africa and Another v South African Airways (Pty) Ltd and Others 2012 (1) SA 321 (CC)
27. Equity Aviation Services (Pty) Ltd v CCMA 2009 (1) SA 390 (CC)

### **Academic Writings**

28. Silke on South African Income Tax,
29. LLM These, *The Common Law Conduit Pipe Principle: Should we retain this principle in our South African law?*; <https://researchspace.ukzn.ac.za/handle/10413/18447>;
30. P Haupt Notes on South African Income Tax
31. JS Wilcocks, *The concept of 'disposal' for the purposes of capital gains tax in South Africa*; Meditari Accountancy Research Vol. 10 2002 : 311–325