‘TAX EXCEPTIONALISM’ : A SOUTH AFRICAN TAX LAW PERSPECTIVE.

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DECLARATION

I FEZILE TEMBE, hereby declare that I have read and understood regulations and rules governing the submission of Masters in Commercial Law dissertation, including those relating to the plagiarism as contained in the rules of this University. I further declare that except where indicated explicitly and/or in footnotes, this is work is my own and has never been submitted for any degree or examination in any other University.

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ABSTRACT

This study examines the manner in which South African courts approach the interpretation of fiscal legislation – by asking whether, courts are developing some sort of exceptional approach in statutory interpretation when it comes to tax law? This is the crux of the concept 'tax exceptionalism', the misconception that tax law is fundamentally different and therefore should not be governed by the same rule of statutory interpretation that generally apply in the interpretation of all other legislation. For the first time this study examines this concept from South African perspective. In the discussion, the study makes an analysis to the recent court decisions namely *Pienaar Bros, NWK* and *Brummeria* cases, and looks at the approaches employed in the interpretation of these cases as tax matters. It further asks whether the same conclusions would have been reached if the above cases were not tax cases.

Having considered the above decisions, the conclusion reached is that even after more than two decades of the Constitutional dispensation 'tax exceptionalism' still exists in South Africa, and evidenced by the constant creation of new rules that apply exceptionally in the interpretation of fiscal legislation and not in all other legislations.

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CHAPTER 1

1.1 INTRODUCTION

" Do not look into what the judges say, look into what they do", the words of Professor Johann Hattingh in his Statutory Construction lecture, to highlight the fact that judges may refer to one interpretive approach while following a completely different approach in reaching their decision. For decades, tax law has been regarded as being exceptional or fundamentally different from other areas of law – the misconception that a tax statute is not governed by the same rules of interpretation that govern all other statutes. However as early as 1975 the court in *Glen Anil Development* correctly rejected this notion – Botha J handing down the judgement said:

> [A]part from the rule that in the case of ambiguity a fiscal provision should be construed *contra fiscum*…which is but a specific application of the general rule that all legislation imposing a burden upon the subject should, in the case of an ambiguity, be construed in favour of the subject, there seems little reason why the interpretation of fiscal legislation should be subjected to a special treatment which is not applicable in the interpretation of other legislation..[1][own emphasis]

This approach was after reiterated in *SIR v Kirsch* where Coetzee J remarked that:

> [T]here is no particular mystic about tax law, ordinary legal concepts and terms are involved and ordinary principles of legal interpretation of statues fall to be applied''. [2]

It is the above cases that has created the impression for many, that 'tax exceptionalism' has died out in the South African tax law jurisprudence. For instance, Theo van Wyk, commenting a year later after *Glen Anil Development Corp* was decided, submitted that 'if there existed uncertainty as to the interpretation of fiscal legislation such uncertainty has been removed by Botha J dictum in the above case'.[3] This paper, however, submits that even after the *Glen Anil Development Corp* decision, there continues to be uncertainties in the manner in which fiscal legislation is interpreted and courts seems to constantly develop distinct rules of interpretation exceptionally for tax legislation. Accordingly, this paper suggest that an answer to this conundrum requires a careful look into what the courts/judges do rather than what they say.

In the persistence of uncertainties in the manner in which South African courts interpret fiscal legislation, which I believe is fuelled by the tax exceptionalist view, this study examines three

[1] *Glen Anil Development Corporation v SIR* 1975 (4) SA 715 (A), 37 SATC 319.
[2] *SIR v Kirsch* 1978 3 SA 93 (T), 40 SATC 95.
[3] Theo van Wyk 'Tax law: Interpretation of fiscal legislation' (1976) 105 *De Rebus* 455 at 455.

tax judgements namely: *Pienaar Bros, NWK* and *Brummeria* to show that courts have been inconsistent in their approach when interpreting fiscal legislation. In doing so I highlight that 'tax exceptionalism' exists in South Africa.

To develop this argument, an analysis is made to the High Court judgement in *Pienaar Bros*, where it was articulated for the first time that 'certainty' is not to be expected in fiscal legislation. In what follows, this paper analyses the application of substance over-form doctrine in the cases of *NWK* and *Brummeria*. This part of the paper looks closely into the approach of the court and critically asks whether the same outcome would have been reached if the above cases were not tax cases. Whether or not the above judgements were correctly decided is beyond the scope of this paper.

1.2 BACKGROUND CONTEXT OF THE STUDY

According to Daly the term 'exceptionalism' means ''as being the nature or forming an exception; out of the ordinary, unusual or special''.[4] 'Exceptionalism' as so understood often requires some sort of a distinct understanding and treatment towards a particular organisation or an area of law, which would in turn serve to justify that rules and regulations would apply somewhat differently.[5] In the context of statutory interpretation the term 'exceptionalism' has been predominantly associated with tax law to imply that tax is fundamentally different and thus not governed by the same rules of interpretation that generally apply in the interpretation of all other legislation.

The perception that tax is different can be traced as far back as the Roman Empire. The exceptionalist view of tax was notable by its absence from the Emperor Justinian's Corpus Juris Civilis.[6] In the Corpus Juris Civilis, the Emperor Justinian sought to codify all existing law in one text, in order for it to be found in one document and be applied uniformly throughout the Empire.[7] It is believed that by compiling all existing law in one text, the Emperor Justinian wanted to ensure transparency and uniformity in the application of the law. Hence the Corpus Juris Civilis contains mostly of what is known to be law today, such as

[4] Stephen Daly 'Tax exceptionalism: A uk perspective' (2017) 3(1) *Journal of Tax Administration* 95 at 1.
[5] Ibid.
[6] Alice G. Abreu and Richard K. Greenstein 'Tax as everylaw: Interpretation, enforcement, and the legitimacy of the irs' (2016) 69(3) *The Tax Lawyer* 493 at 499.
[7] Alice G. Abreu and Richard K. Greenstein 'Tax different: Not exceptional' (2019) 71(4) *Administration Law Review* 663 at 672-673.

contract, criminal and property law.[8] Although taxation had long existed and was a crucial area of law to the Roman Emperor, it was (*deliberately*) excluded from the Justinian's Code. The reason for its exclusion, is that taxation was perceived as an exclusive subject matter which was to be kept away from the public knowledge and instead retained as an Imperial prerogative.[9] By keeping taxation laws out of the codification, Justinian could ensure that the power to tax and to determine the manner of taxation was retained to himself and not open to the public.

'Tax exceptionalism' is not only old but also ubiquitous'.[10] A number of jurisdictions has had their fair share, battling with this phenomenon. In the United Kingdom, it was once a norm that literal approach of interpretation should apply in the interpretation of a taxing statute and not general rules of statutory interpretation.[11] In 1869 Lord Cains in *Partington v Attorney General*[12] described the literal rule of interpretation as follows:

> [I]f the person to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the law the case might otherwise appear to be. In other words, if there be an equitable construction is not admissible in a taxing statute where you can simply adhere to the words of the taxing statute.[13]

Also, the dictum of Rawlatt J in the case of *Cape Brandy Syndicate* has been referred to by the courts quite a number of times, where it was stated that 'in a taxing act one has to look at what is clearly said. There is no room for an intendment. There is no equity about tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used'.[14]

> Recently in the *Ingenious Media*[15] case where the court had to decide whether an 'off record' disclosure by then Secretary for tax at Her Majesty's Revenue Customs (HRMC) to journalist breached the provisions of section 18 of the Commissioners for Revenue and Customs Act of 2005 (CRCA) which prohibits HRMC officials from disclosing information held by HRMC.[16] The first two courts that heard the matter

[8] Ibid.
[9] Ibid at 5.
[10] Ibid at 6.
[11] Ibid at 4.
[12] *Partington v Attorney General* (1869) LR 4HL.100,122.
[13] Ibid.
[14] *Cape Brandy Syndicate v IRC* (1921) 1 KB.64, p 71.
[15] *R. (on the application of ingenious media and another) v. HRMC (Ingenious Media HC)* (2013) EWHC 3258 (admin), (2014) S.T.C 673. Facts have been summarised as they appear in Daly Stephen article above.
[16] Commissioners for the Revenue Customs Act 2005.

> decided in favour of the HRMC and held that there was a necessary connection between the function of the HRMC to collect tax in an efficient and cost-effective manner and the disclosure made by the secretary. The Supreme Court however overruled the above decisions and firstly noted that the HRMC's duty of confidentiality should be approached as a matter of discretion and that courts should not approach disclosure as if they are primary decision makers. Ultimately the court found that the actions of the secretary had resulted in breach of the HRMC's duty of confidentiality and that such breach will only be justified in extreme circumstances.[17]

The significance of the above case according to Daly lies on its demonstration of the distinct treatment given to the HRMC by court, when it simply accepted that the matter fell within its managerial discretion, when in fact the matter could have been considered against ordinary legal principles. Daly warns against this 'discretion' that it will lead the courts to overlook and not interfere in matters where HRMC officials are involved when in fact the proper course would be to pause and do thorough investigation on the matter.[18]

In the United States of America, academic authors often refer to an American 'tax exceptionalism' where there is a tendency to adopt and maintain different tax rules from those applicable in most of the states or the rest of the world.[19] In most countries, it is quite a norm for tax laws to undergo constitutional review and often held unconstitutional. In South Africa, tax laws are subject to constitutional review and once it has been established that a tax statute limits the fundamental rights, an enquiry follows on its legislative purpose, whether the deviation is proportional to the legislative purpose or whether it could be achieved by less restrictive means. [20] Since the *Macomber*[21] decision in 1920, the courts in the United States of America have never declared a federal income tax statute unconstitutional.

It is submitted that the reason for this exceptionalism is that the U.S court has been reluctant to constitutionalise tax law and come up with a well-developed doctrine of proportionality. [22] This failure of the U.S court to constitutionalise tax laws has resulted in several problems. According to Avi-Yonah one problem is that:

> [T]ax law is regarded as a technical subject fit only for specialists, rather than a subject at the heart of the relationship between the states and its citizen'.[23] Another

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[17] Ibid at 16.
[18] Ibid.
[19] Lawrence Zelenak 'Maybe a little special, after all?' (2014) Vol 63(8) *Duke Law Journal* 1897-1920 at 1901.
[20] Reuven Avi-Yonah 'Should u.s tax law be constitutionalized? Centennial reflections on eisner v. macomber (1920)' (2021) 16 *Duke Journal of Constitutional Law & Public Policy* 65 at 67-68.
[21] *Eisner v Macomber*, 252 U.S 189 [1920].
[22] Ibid at 21.
[23] Ibid.

> problem Avi-Yonah opines, is the fact that 'many deviations from equal protection remain unexamined and continue undebated because the Congress lack political power and willingness to limit them'.[24]

Prior to 1994, South African law of statutory interpretation was predominantly influenced by English law.[25] Because of the English law influence, South Africa like its counterparts above, used strict and literal approach as its guiding principle for the interpretation of fiscal legislation. Following the same approach of interpretation, South African Appellate Division for numerous times reiterated the Rowllat J decision in *Cape Brandy Syndicate* in a number of cases, such as *CIR v Frankel*,[26] *CIR v Simpson*[27] and *Cactus (Pty) Ltd v CIR* recently where Hefer J pointed out that:

> 'I am aware of the fact that an application of the concept of accrual which does not take account of commercial realities may operate harshly inasmuch as it requires that tax be levied on income which may be received only in the very distant future . . . *However, it is often said . . . that there is no equity in tax legislation (nor, I would add, complete rationality)*. The inequity of levying tax on income which will only be received in future is inherent in the system of receipts and accruals, which has been with us for many years. *As long as the system prevails inequitable results cannot always be avoided*. Of course, the Act must be interpreted and applied in the least onerous manner which its wording allows. *But, if the wording is clear, it must be applied however harsh the result might be*. The taxpayer's remedy is to arrange his affairs, so far as he is able, so as not to attract these results.'[28]

Apart from favouring the fiscus since equity and fairness played no part in the strict interpretation, the above decisions became the basis for the misconception that taxing statutes should be interpreted differently even in South Africa.

1.3 STATEMENT OF THE PROBLEM

Although 'tax exceptionalism' has been explicitly rejected by courts and academic scholars, the recent court judgements shows that South African tax jurisprudence still struggles with this. Even after almost three decades of the Constitutional dispensation, there continues to be uncertainties in relation to the approaches used when interpreting fiscal legislation and

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[24] Ibid.
[25] Fanyana Ka Mdumbe 'Has the literal/intentional/textual approach to statutory interpretation been dealt the coup de grace at last? Bato star fishing pty ltd v minister of environmental Affairs*'* (2004) 7 BCLR 687 (CC): Case Note (2004) 192 *SA Publikreg* 472-481 at 472.
[26] *CIR v Frankel* 1949 (4) SA 678 (A); 16 SATC 251.
[27] *CIR v Simpson* 1949 (4) SA 678 (A); 16 SATC 268.
[28] *Cactus Investments (Pty) Ltd v Commissioner of Inland Revenue* 1999 (1) SA 315; 61 SATC 43.

dealing with ambiguity. In this regard, the research problem is whether the courts are developing some sort of exceptional approach in statutory interpretation when it comes to tax law as opposed to other areas of law.

1.4 RESEARCH QUESTIONS

a. Does tax exceptionalism' exist in South Africa?
b. Would the outcomes of *Pienaar Bros*, *NWK* and *Brummeria* cases have been different if they were not tax cases?

1.5 RESEARCH OBJECTIVE

This study is an attempt to answer questions submitted, by discussing inconsistencies in the approaches followed by courts when deciding fiscal matters and ultimately determining whether courts develop an exceptional approach when interpreting fiscal legislation that does not apply to other areas of law in general.

1.6 RESEARCH METHODOLOGY

The research method involves the interpretative analysis of the law and the relevant provision of the Constitution, Income Tax Act No. 58 of 1962 and common law along with courts' decisions and published journal articles relating to the scope of the study. Consequently, this study is qualitative as opposed to quantitative in nature and the study applies a doctrinal research methodology.

1.7 LIMITATIONS OF STUDY

Although this study make reference to constitutional law provisions, it is noted that this is an exhaustive study in its own right. The study does not consider a detailed analysis of the Bill of rights clauses contained in the Constitution and how they interrelate with the provisions in the income tax legislation. Consequently, this study merely analyses various court decisions and academic authors views to determine whether exceptional rules apply in the interpretation of fiscal legislation.

1.8 CHAPTER OUTLINE

A question whether 'tax exceptionalism' exists in South Africa, requires a thorough investigation to the South African tax jurisprudence and a closer look into how courts approach the interpretation of fiscal legislation. for this reason, chapter two discusses the

High Court judgement of the *Pienaar Bros* in detail with specific emphasis to Fabricious J submissions in regard to the principle of certainty in the interpretation of fiscal legislation. Its further discusses the rationality standard of review as the only test employed to determine the constitutional validity of retroactive fiscal legislation. With reference to *De Beer* case chapter two takes an opportunity to consider the implications of the rationality test and how it echoes the 'tax exceptionalism' in the South African tax jurisprudence.

Despite the efforts of the earlier court's decision to keep the doctrine of substance over form intact, for more than a century. Recent judgements shows that there are still uncertainties in the application of this doctrine. With reference to the *NWK*, Chapter 3 considers the uncertainties in the application of this doctrine particularly in the context of fiscal legislation. Finally, Chapter 4 flowing from chapter 3, discuss *Brummeria* judgement and argues that more analysis should have taken place to examine the intention of the parties. Its further enquires why *Brummeria* case was not subject to the substance over form doctrine like other contract cases would have been.

CHAPTER 2: RETROACTIVE LEGISALTION: PIENAAR BROS

2.1 INTRODUCTION

The imposition of retroactive legislation in South Africa, by National Treasury and South African Revenue service (SARS) has become a commonplace in recent years, often resulting in undesirable consequences for taxpayers who have entered into transactions that were executed and completed at the time the retroactive legislation was enacted.[29] For purposes of this paper the term retroactive legislation refers to: 'legislation that operates backwards, that is to say, it is operative as of a time prior to its enactment, making the law different from what it was during the period to its enactment.'[30] Similarly in *S v Mhlungu & Others* retroactive legislation was understood to mean:

> [L]egislation which invalidates what was previously valid, or vice versa, which affects transactions completed before the new statute came into force.[31]

Some courts and academic authors have attempted to differentiate "retroactive" from "retrospective" legislation. For instance, Driedger, makes a distinction between two types of retrospectivity in law: 'retroactive law which operates as of time prior to its enactment and retrospective law which operates for the future only.'[32] Although this distinction describes the actual difference between the two concepts, it has been criticized heavily for its lack of normative and practical significance.[33] This is because whether retroactive or prospective, the change in the existing law will ultimately take place, impacting rights and citizens expectations. It should be noted that this paper is not aimed at examining distinction between these two terms, but rather focuses on the interpretation issues that arise as a result of retroactive operation of tax statutes.

Although retroactive laws have been part of the South African legal system and many other jurisdictions for a long time, they remain the most controversial in the law of statutory interpretation for a number of reasons. For Palmer and Sampford, 'the most important argument against retroactive laws is that they run counter to citizens expectations, formed on

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[29] Liesl Kruger 'Retroactive legislation: Do taxpayers have any recourse?' (2014) 5(1) *Business Tax and Company Law Quarterly* 15.
[30] Driedger, Elmer A *Construction of Statutes* 2 ed (1983) 186.
[31] *S v Mhlungu* 1995 (3) SA 867 (CC).
[32] Driedger op cit note 30.
[33] Palmer & Sampford op cit note 34.

the basis of existing law.'[34] Furthermore for Pratt Wade the main rationale for opposing retroactive laws follows their nature, - in that 'they change the rules of the game, after the game has been played'.[35] Apart from these obvious concerns, there is a presumption against retrospective operation of statutes designed to protect rights. In *Shewan Tomes & Co Ltd v Commissioner of Customs and Excise*, Schreiner ACJ pointed out that:

> 'There is also a presumption against reading legislation as being retrospective in a sense that while, it takes effect only from its date of commencement, it impairs existing rights and obligations, e.g by invalidating current contracts or impairing existing property rights. See *Cape Town Municipality v F Robb & Co Ltd* 1966 (4) SA 345 (C) at 351, per Corbett J.'[36]

The recent Pretoria High Court judgement in the *Pienaar Bros* case, facts of which are provided below, best illustrates this issue.

2.1.1 *Facts of pienaar bros*

> Pienaar Bros (Pty) Ltd operated a business of supplying and distributing protective clothing in various industries. At some point it decided to introduce a Black Economic Empowerment (BEE) Equity. According to advice from the legal experts, it was advised that it would be better to introduce such a BEE partner that would be able to buy into a new company, which would take over business from 'Old Co', to ensure that the new shareholders would not be exposed to any historical liabilities.[37] Moreover it was advised that 'Old Co' must enter into amalgamation transaction in terms of s 44 of the Income Tax Act,[38] to achieve the above commercial objectives in a tax efficient manner. Accordingly on 16 March 2007 the taxpayer (Previously called 'Serurubele Trading 15 (Pty) Ltd') and Pienaar Bros ('Old Co') entered into a sale of business agreement in terms of which the taxpayer acquired all assets of Pienaar

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[34] Andrew Palmer & Charles Sampford 'Retrospective legislation in Australia: Looking back at the 1980's' (1994) 22 *Federal law Review* 217- 177 at 229.

[35] Was discussed in an 1880 paper by William Pratt Wade: 'In all retroactive laws there must be an element of surprise, by which persons whose rights are affected are taken unawares. They are called upon to act in a manner different from what they have been led by the settled state of the law to anticipate. So repugnant is such a system of legislation to our nature sense of justice, that it has been stigmatized as more unreasonable than that adopted by Caligula, who was said to have written his laws in a very small character and hung them upon high pillars, the more effectually to ensnare the people'; See also Catherine Brown, Author J. Cockfield. 'Reflection of tax mistakes versus retroactive tax law: Reconciling competing vision of the rule of law' (2013) 61(3) *Canadian Tax Law Journal* 563 at 580.

[36] *Shewan Tomes & Co Ltd v Commissioner of Customs and Excise* 1955 (4) SA 305 (A).

[37] *Pienaar Brothers (Pty) Ltd v Commissioner for the South African revenue service* 2017 (6) SA 435 GP.

[38] Act 58 of 1962.

Bros.[39] As part of the consideration for the business Serurubele issued shares to Pienaar Bros at a value of the purchase price minus the liabilities which its assumed, referred to as the 'equity consideration'. On 1 April 2007 the business was transferred to Serurubele, and the purchase price was paid by creating the share premium.

At the time the transaction was made namely 16 March 2007, the tax consequences of such transaction were regulated in terms of section 44(9) of the Income Tax Act.[40] For amalgamation transactions to be completed, the old company had to be terminated. Accordingly, Serurubele distributed the share premium to its shareholders in proportion to their respective shareholding. Serurubele was then liquidated on 3 May 2007. The directors of Serurubele made a distribution to its shareholder of R29 500 000. The distribution was completed on the same date. On 7 May 2007, as part of the BEE transaction, the existing shareholders of Pienaar sold 25.1% of the issued share capital to a BEE partner namely Naha Properties (Pty) Ltd.[41]

At the time of the distribution (3 May 2007), the provision in paragraph (f) of the definition of a dividend in section 1 of the Income Tax Act excluded amounts that were distributed from the share premium account of a taxpayer. In addition, section 44(9) of the Income Tax Act allowed for the tax-free distribution of shares in the course of an amalgamation transaction. The parties in *Pienaar Bros* agreed that the distribution in question had not been a dividend as defined.[42] If this distribution had been a dividend as defined at the time it was made, the taxpayer would have been liable to pay Secondary Taxes on Companies ("STC"), and it would have been liable to submit a STC return by 30 June 2007.

Several legislative amendments were in the process of finalisation during the time of the transactions entered into by Pienaar Bros. In the budget speech of 20 February 2007, the Minister of Finance announced retroactive legislation in order to address tax avoidance arrangements that had resulted in a huge loss of revenue. While the Minister had not indicated exactly the nature of the loophole and how it was to be closed, SARS on 21 February issued a press release stating that the STC exemption

[39] *Pienaar Bros* case para 7.
[40] *Pienaar Bros* case para 6.
[41] *Pienaar Bros* case para 7.
[42] *Pienaar Bros* case para 10.

for amalgamation transactions contained in s 44(9) of the Income Tax Act, 1962, is withdrawn.[43] On 27 February 2007, SARS and National Treasury released a public comment, a Draft Taxation Laws Amendment Bill of 2007, which proposed a the deletion of ss 44(9) and (10) and deemed to have come into operation on 21 February 2007. On 7 June 2007 the Taxation laws Amendment Bill together with an explanatory memorandum, no longer proposed for the repeal of ss 44(9) and (10) but instead proposed the insertion of the new s 44(9A)- which deemed the resultant company equity share capital and share premium arising from amalgamation to be profit not of capital nature. Therefore, deeming any distribution made by the resultant company from the former capital arising from the amalgamation a dividend and subject to STC.

On 8 August 2007 the Taxation Laws Amendment Act was promulgated. Section 34(1)(c) of the amending Act inserted into s 44 of the Income Tax Act a new s 44(9). Furthermore, s 34(2) provided that s 44(9A) was deemed to have come into operation on 21 February 2007. On 6 December 2011 the commissioner of SARS launched an audit into Pienaar Bros tax affairs. On 13 December 2011 the commissioner issued an assessment for STC on Pienaar Bros.[44] In terms of this assessment, the commissioner claimed that the specific dividend cycle for STC purposes started on 23 September 2005 and ended on 3 May 2007.[45] In addition, the commissioner levied interest from 1 July 2007 to 5 January 2012. The taxpayer was now liable to pay STC on the R29 500 000 distribution made plus interest.

JUDGEMENT

The dispute before the court was whether the distribution of the amount of R29 500 000 made by Serurubele on 3 May 2007 was subject to STC based on the application of section 44(9A) of the Income Tax Act. Pienaar Bros contended that the only reason for SARS assessment was due to the retroactive amendment in the Act. Accordingly, Pienaar Bros sought to have SARS assessment namely 13 December 2011 declared invalid and set aside.

[43] *Pienaar Bros* case para 11, Withdrawal read as follows: 'the exemption for the amalgamation transactions permits loss of STC, rather than a deferral of tax, which is the intent of the amalgamation provisions.'
[44] *Pienaar Bros* case para 11.
[45] *Pienaar Bros* case para 12.

The court found that the passing of retroactive legislation in this case was constitutionally valid. In support of its finding the court relied on the following.

a. The court's foreign law comparisons makes it clear that retroactive law is permissible and indeed common place in countries based on the rule of law.[46]
b. In the context of tax statutes specifically, rigidity is not to be expected and the fiscus must be able to function effectively taking into account the changing demands of the society.[47] Furthermore, the court quoted with approval the *dicta* in *United States v Carlton*[48] by way of Justice Blackmun that 'tax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue code, also prospective changes in law may be unfair to certain person or institutions.'[49]
c. Finally, the court held that rationality test is the correct test to determine the constitutionality of legislation, which requires legitimate legislative purpose. The court then concluded that the government purpose was to remove the tax exemption in amalgamation transactions. And to do so retrospectively was justified because there was a loss of revenue.[50]

In what follows, part 2.2. reviews the above decision of the High Court and it effect on the interpretation of fiscal legislation in South Africa, particularly Fabricious J submissions with respect to the principle of certainty. Part 2.3 will discuss the rationality test, as a test to determine the constitutionality of retroactive legislation with reference to the *De Beer* case.

The High Court judgement of *Pienaar Bros* has received tremendous critiques following the passing of fiscal legislation with retroactive effect, particularly after more than 2 decades of constitutional democracy in South Africa. Hattingh comments that 'the court in *Pienaar Bros* seem to assume that the interest of the fiscus to collect revenue for public purpose outweighs the private interest of the taxpayer.'[51] While for Emslie, application of retroactive legislation to completed transactions displays a disregard of taxpayer's rights under the rule of law and

[46] *Pienaar Bros* case para 81.
[47] *Pienaar Bros* case para 36.
[48] *United States v Carlton* [1994) 512 US 26.
[49] *Pienaar Bros* case para 37.
[50] *Pienaar Bros* case para 99.
[51] Johann Hattingh 'Commentary, pienaar brothers (Pty) Ltd v commissioner for the south african revenue service and another' (2017) 20 *International Tax Law Review* 284 at 290.

the absence of tax morality.[52] Emslie further argues that 'there is a difference between the incorrect interpretation of the law (*which is later rectified by enacting legislation with retroactive effect*) and a change in law imposed by the legislature to effect transections that were complete before that change was made'.[53] [own emphasis] Whilst the former is acceptable, the latter is integrally wrong, he opines. To date, the *Pienaar Bros* decision has set a very controversial precedent in the interpretation of fiscal legislation. Instead of providing clear guidance, this decision has exacerbated complexities that already exist in tax law.

2.2 THE PRINCIPLE OF LEGAL CERTAINTY IN THE INTERPRETATION OF FISCAL LEGISLATION

The so-called 'retroactive legislation by press release' is by no means a new topic, nor the first time it has been used in response to fear that the fiscus would lose revenue as a result of a gap in the existing legislation. In the late 1970's, the Australian government resorted to retrospective taxation laws following the widespread use of tax avoidance schemes that were causing losses of billions of dollars in revenue. This was caused by a combination of political indifference, complex tax legislation, marketing of tax avoidance schemes and a lack of ethical tax obligation to pay taxes among many businesses and professions.[54] In fact, not only Australia but many other jurisdictions including *inter alia* United Kingdom and United States,[55] have adopted laws with retroactive effect as a mechanism to close the gap in legislation in fear of losing revenue.

In *Pienaar Bros*, however, what appeared to be different is that the court took a different direction, disregarding in my view long-standing principles, statutory presumptions and old

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[52] Hillary Botha & Chevon Marupen "Retrospective legislation: The pienaar brothers case' (2017) 8 *Business Tax and Company Quarterly* at 16, See also *The Taxpayer* Editorial April-May 2017.

[53] Ibid.

[54] Palmer & Sampford op cit note 34.

[55] For United States, in 1993 one of Bill Clinton's first measures as the incoming president was to enact the Omnibus Budget Reconciliation Act (OBRA). In the Act there were two controversial provisions: the first increases income tax rates both for corporations and certain groups of wealthy individuals. The second provision increased estate and gift taxes. Both these provisions were said to have retrospective effect to 1 January 1993, seven months prior to its enactment. For United Kingdom the insertion of sections 112(4) and (5) into the ICTA is the example of a retrospective taxation amendment that managed to combine an anti-avoidance objective and the protection of the reasonable reliance interest of a small number of taxpayers in 1988. This amendment followed the High court's decision in *Padmore v CIR* 62 TC 352, where the court upheld the validity of Double Taxation Agreements used to avoid paying taxes on foreign taxes. Taxpayers had formed artificial partnerships with UK resident partners arguing that the country where the partnership was resident prevented UK from assessing their share of profits on the basis that the partnership was an enterprise of another country. For a further discussion of the cases, see: Andrew Palmer and Charles Sampford '*Retrospective legislation in Australia: Looking back at the 1980's'* (1994) 22 *Federal law Review* at 152.

precedents, leading to even more uncertainties. To begin with, Fabricius J submitted that '**…***In the of context of tax statutes specifically, rigidity is not to be expected and fiscus must be able to function effectively taking into account changing demands of society*…'.[56] Two important things can be noted from the above submission. First, the exclusivity it gives to tax statutes, clearly evident in the careful use of the word '*specifically*', creating an assumption that the approach would have been different if the court was confronted with a different piece of legislation. Secondly, the overemphasis on the functioning of the fiscus as if it exists without limitations.[57] This position raises a number of questions about the principle of certainty in the interpretation of fiscal legislation. Does it imply that certainty applies to somewhat a lesser degree in fiscal legislation as opposed to all other legislation. if so, how less? And what exactly justifies this position?

2.2.1 *The principle of certainty encompassed in the rule of law*

Section 1(c) of the Constitution read together with section 2 provides that, South Africa is founded on the supremacy of the constitution and the rule of law.[58] The supremacy of the constitution stipulated in section 2, deems any law, or conduct inconsistent with the Constitution, invalid. On the other hand, the rule of law means according to Lord Bingham that 'all persons and authorities within the state whether public or private, should be bound by and entitled to the benefit of law publicly made, taking effect in the future and publicly administered by courts'.[59] The rule of law as one of the foundational values of our constitution holds within it the principle of legality that the law must be lawful, rational and certain. In *Pharmaceutical Manufacturers Association of South Africa*: *In re Ex Parte President of the Republic of South Africa*,[60] the principle of legality was confirmed to form part of the rule law and that it provides that every exercise of public power has to be both lawful and rational. A further element of the rule of law requires that law must be certain, that it is ascertainable in advance so as to be predictable and not retrospective in its operation, and it is applied equally without unjustifiable differentiation.[61]

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[56] *Pienaar Bros* case ibid para 37.
[57] Ibid at 52.
[58] The Constitution of the Republic of South Africa, 1996.
[59] Tom Bingham *The Rule of Law* (2010) 20.
[60] *Pharmaceutical Manufactures Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 20.
[61] Ibid.

Nowadays, legal certainty is commonly recognised as the cornerstone of states governed by the rule of law.[62] Being recognised both in national and international law, legal certainty holds that, the law must provide its subjects with the ability to regulate their conduct with less uncertainty and further protect them from the arbitrariness of the state.[63] For Avila,

> 'Legal certainty can be understood as 'certainty of law, both in the sense that for the law itself to be considered 'reliable law' it must have the objective qualities such as clarity and determinacy, and in the sense that for the law to be held 'certain' it must be applied by means of impersonal and uniform processes.'[64]

Given what legal certainty entails, it is important that the requirement of certainty is adhered to, both as a value and as it applies in interpretation of all statues in the whole legal system.[65] This is because certainty is what enable the law to perform its functions effectively, while on one hand maintaining a stable legal order and directing people's behaviour on the other. [66] To add on, Roubier believes that certainty is the foundation from which all others values flow, in that it disappears, and no other value survives. [67]

Before considering legal certainty as it applies specifically to tax law, it should be stressed that there is one concept of legal certainty, and it applies equally to tax. There are no two principles of legal certainty, one for tax law and the other that applies generally. In an attempt to understand the concept of legal certainty in the context of tax law, Avila explains "tax law certainty" as:

> 'A principle norm that requires the legislative, executive and judiciary to behave in ways that contribute more to the existence of a higher state of legal calculability and reliability based on complete knowability, from the perspective of a taxpayer and for their benefit, through the *juridico-rational* controllability of argumentative strictures that reconstruct general and individual norms, as an instrument that guarantees respect for their capacity to shape the present in a worthy and responsible manner and to plan the future strategically in a legally informed manner, without deceit, frustration, surprise or arbitrariness.'[68]

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[62] Alexander V. Demin 'Certainty and uncertainty in tax law: Do opposites attract?' (2020) 9 *Laws* 30. See also Leoni Bruno *Freedom and the Law* (1972).

[63] James R. Maxeiner 'Some realism about legal certainty in the globalisation of the rule of law' (2008) 31 *Houston Journal of International law* at 30, See also Hans Gribnau 'Equality, legal certainty and tax legislation in the Netherlands fundamental legal principles as check on legislative power: A case study' (2013) 9 *Utrecht Law Review* 54, points out that people value legal certainty and the predictability of the law protects those who are subject to it from arbitrary state interference with their lives. Furthermore, legal certainty allow individuals to plan their future.

[64] Humberto Avila *Certainty in Law* (2016) 72.

[65] Demin op cit note 62.

[66] Ibid at 63.

[67] Paul Roubier *Theorie Generale du droit* 2nd ed *Paris Sirey* (1957) 33.

[68] Avila op cit note 64 at 197.

Indeed, there is no difference between the ordinary 'legal certainty' definition above and the one provided by Avila. In both definitions there is a higher authority (*law maker or government*) which is required to carry out it functions in a manner which is known at the perspective of its subjects for their benefit, allowing them to plan their future and to abstain from that which is unlawful. Therefore, it is the general principle of certainty that applies throughout the legal system.

Now coming back to legal certainty as it applies specifically to tax law, it should be borne in mind that the requirement for certainty in fiscal legislation is by no means a new concept. This requirement has been long recognised by courts and formed part of the South African legal system. As early as 1774 in the case of *Vallejo v Wheeler* Lord Mansfield pointed out that:

> 'In all mercantile transactions the great object should be certainty: and therefore, it is of more consequence that a rule should be more certain, than whether the rule is established one way or the other. Because speculators in trade then know what ground to go upon.'[69]

This position seems to hold more logical sense, given that, in its nature taxation interferes with the taxpayers' rights to enjoyment of property. Thus, the lack of legal certainty requirement leaves taxpayers without protection against the arbitrariness of the state and also unaware of their rights and obligations. In addition, disregarding the requirement of certainty in the interpretation of fiscal legislation also demonstrates the limitation of the fundamental principle of taxation, that a taxpayer is entitled to arrange their affairs as to remain outside of the scope of the provisions of a Tax Act.[70] For Titus, the court's submission in the case of *Pienaar Bros* by way of Fabricius J with reference to *United States v Carlton,*[71] seems to indicate that the taxpayer cannot expect certainty in fiscal legislation because such legislation needs fluidity in order to meet changing society demands.[72]

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[69] V*allejo v Wheeler* (1774) 1 Cowp. 143, 153: 98 E.R. 1017.
[70] *CSARS v NWK* supra note 109 para 42.
[71] *United States v. Carlton* (1994) 512 U.S 26, in *United States v Carlton*, the United States Supreme Court, by way of Justice Blackmun said the following, and I agree, with due respect, in the context of the present debate that: 'Tax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code'. It was also pointed out, quite logically, that prospective changes in law may be 'unfair' to certain persons or institutions. In the context of tax statutes specifically, rigidity is not to be expected and the fiscus must be able to function effectively, taking into account changing demands of society.
[72] Afton Titus 'Pienaar brothers (pty) ltd v csars, retroactive legislation and the rule of law: Has south africa just taken a step back in its constitutional democracy?' (2019) 136 *SALJ* 414.

It is clear that the enactment of retroactive legislation that changes the law at a particular time to be what it was not as seen in *Pienaar Bros,* offends the principle of certainty under the rule of law which lies at the core of our constitutional dispensation. However, what seems to be unclear though is how specifically fiscal legislation passed the constitutional master having not met this requirement. With precedent such as *Glen Anil Development* stating clearly that, 'the decisive and overriding principle to be used when interpreting fiscal legislation is no different from that which is applicable in the interpretation of all other legislation',[73] it is difficult to understand why one should not expect certainty specifically in the interpretation of tax statute.

2.3 THE APPLICATION OF RATIONALITY TEST TO DETERMINE THE CONSTITUTIONALITY OF RETROACTIVE LEGISLATION

The same way the principle of legal certainty has been proven to be the fundamental element within the rule of law, the rationality element on the other hand (rationality test) has also played a significant role in the development of South African constitutional review. In *De Beer and Others v Minister of Corporate Governance* rationality test was said to answer the question whether: 'Is there a rational connection between the intervention and the purpose for which it was taken?' [74] The rationality test as so understood requires the exercise of power to be rationally connected to the purpose for which it was conferred.[75] In this regard, the test for rationality is therefore considered as a minimum standard of review, in that it takes into consideration only the relationship between the means and ends and not concerned whether some means will achieve the purpose better than others.[76] In *Pharmaceutical Manufactures,* The court dealt with issues relating to the power of courts to review and set aside a decision by the President of South Africa to bring an Act of Parliament into force.

> The Constitutional Court had to decide two issues: firstly, whether the matter be determined solely under the common law in the High Court or was a question of constitutional validity to be determined by the Constitutional Court? Secondly whether the court have the power to review the President's decision, and if so, should it be set aside?

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[73] *Glen Anil Development Corporation Ltd* supra note 1.
[74] *De Beer* supra note 90.
[75] *DA v President of RSA* 2013 (1) SA 248 (CC) para 27; see also *Pharmaceutical Manufacturers Association of SA: In re: ex parte President of RSA and Others* 2000 (2) SA 674 para 85.
[76] *DA v President of RSA* supra note 75 para 27.

> On the first issue the court held that the control of public power by courts through 'judicial review' is and always been a constitutional matter. In deciding the second issue the court pointed out that the power was not an "administrative action', rather it was a power of a special nature closely linked to legislative function rather than administrative function. Therefore, fell outside the bounds of the public power as set out in the administrative justice clause in the Bill of Rights. Furthermore, court held however that such a power is not beyond reach of judicial review. Interestingly the court granted the order however not on the above grounds, but rather on the basis of rationality. In reaching to its decision the court held that bringing the Act into force on 30 April 1999, before necessary schedule were put in place, although done in good faith was objectively irrational and therefore infringed the principle of legality. The court then went further to lay down the test for rationality as follows:
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> 'It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to and the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.'[77]

In the *Pienaar Bros* case, the appellants in the matter sought to have an order in the High Court declaring s34 of the Taxation Laws Amendment Act[78] inconsistent with the Constitution, to the extent that it retrospectively provided that s 44(9A) of the Income Tax Act shall be deemed to have come into operation on 21 February 2007 and applicable to any reduction or redemption of the share capital or share premium of a resultant company. SARS had considered that on the basis of the possible Shoprite/Brait transaction that a number of similar transactions would occur, causing a risk to the fiscus. At the time the decision was made to close the loophole, there was pending a transaction that would have resulted in loss of approximately R1.5 billion of unpaid STC.[79]

The question then before the court was which standard of review applies when such retrospective legislation is enacted? The court submitted that there are two standards of review that apply when the constitutionality of legislation is challenged namely: rationality test, which applies to all legislation under the rule of law entrenched in section 1(c) of the

[77] *Pharmaceutical Manufactures* supra note 57 para 85.
[78] Taxation Law Amendment Act 8 of 2007.
[79] *Pienaar Bros* case para 84.

Constitution[80] and reasonableness or proportionality test which applies when the legislation limits fundamental rights in the bill of rights. In dealing with the rationality requirement the court found that it was eminently rational to pass legislation with retroactive effect to close the loophole.[81] In support of it finding the court relied on the following.

The court quoted with approval the passage in *Minister of Home Affairs v NICRO* (the court stressed in a s 36 limitation context):

> 'There may for instance be cases where the concerns to which the legislation is addressed are subjective and not capable of proof as objective facts. A legislative choice is not always subject to courtroom fact-finding and may be based on reasonable inferences unsupported by empirical data. When policy is in issue it may not be possible to prove that a policy directed to a particular concern will be effective. It does not necessarily flow from this, however, that the policy is not reasonable and justifiable. If the concerns are of sufficient importance, the risk associated with them sufficiently high, and there is sufficient connection between means and ends, that may be enough to justify action taken to address them'.[82]

The court further referred to *Law Society of South Africa and others v Minister of Transport and another* case, where it was said that:

> 'The requirement of rationality is not directed at testing whether a legislation is fair or reasonable or appropriate. Nor is it aimed at deciding whether there are other or even better means that could have been used. Its use is restricted to the threshold question whether the measure the law giver has chosen is properly related to public good it seeks to realise . . .'[83]

A number of issues arose following the application of this test to determine the constitutionality of retroactive fiscal legislation. In what follows this paper discusses three main issues relating to rationality test in the context of fiscal legislation namely:

- Rationality test as the only test applied.
- Rationality test as the minimum standard of review.
- Paternalistic approach in the application of the test.

For fiscal legislation as seen in the case in question, it is concerning that only the rationality standard of review was applied to challenge the constitutional validity of legislation. For Titus, legislation as such may also be reviewed through the legality principle, which form

[80] *Pienaar Bros* case para 81.
[81] *Pienaar Bros* case para 85.
[82] 2005 (3) SA 280 (CC) at para 35.
[83] 2011 (1) SA 400 (CC) at para 5.

part of the rule of law that requires laws to be certain and clear.[84] Indeed for a taxing statute one should expect the legality principle to be part of, if not the first standard of review to be applied when the constitutional validity of such legislation is being challenged. Not only by the demands of the rule of law but mostly because fiscal legislation interferes more in the private affairs of individuals than most legislations. Accordingly, this paper argues that this type of legislation should be reviewed with higher standards of the principle of legality in order to allow its subjects to be clear and certain about their position in law.

In addition to the above, is the issue of the intensity of the rationality test as a standard of review. The so-called rational scrutiny has been criticized by many including Gunther who argues that 'the rational review results in minimal scrutiny in theory and virtually none in fact'.[85] This was further confirmed by the court in *Khosa v Minister of Social Development* that 'the test for rationality is a relatively low one. As long as the government purpose is legitimate and the connection between the law and government purpose is rational and not arbitrary, the test will have been met'.[86] In the context of fiscal legislation, the main issue is that, under the rational basis of review retroactive tax legislation always serves a legitimate government purpose,[87] thus always passing constitutional master. The tax exceptionalism is notable in the courts hesitance to come up with a well-developed standard of review suitable to scrutinise tax legislation. Although the rational standard of review has proved to be problematic especially for tax legislation, the court insists on applying it while aware of its failures and the prejudice it brings to the taxpayer. Although South African tax law has been constitutionalised and subject to constitutional review like most countries, it is argued however that its approach is similar to that of the United States of America, in that the standard of review to which tax legislation is subject to is weak and often results in minimal scrutiny. After the *Pieanaar Bros* decision, it is difficult to see if the court will ever be able to declare the retroactive fiscal legislation unconstitutional.

It has been further argued that another challenge with the rationality review is that it blends functions of the judiciary and the executive. O'Regan J in her dissenting judgement in *New*

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[84] Ibid at 73.
[85] Gerald Gunther *Constitutional Law* 12 ed (1991) 462.
[86] *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) at para 67.
[87] D. Burton 'The constitutionality of retroactive change to code: United states v carlton' (1995) 48 *The Tax Lawyer* 509 at 513.

National Party[88] was critical of the narrow interpretation of the rationality test that was followed by the majority in the above case and argued that reasonableness must be included in the rationality review. For O'Regan, rational standard of review should be viewed as more than a mere connection between a legitimate government purpose and the means to achieve the said purpose. While this extends the boundaries of the functions of the court, it arguably maintains the entrenched separation of powers between the judiciary and the executive.[89] In other words, it keeps the judiciary from overstepping into the functions of the executive to make the law.

2.3.1 *De Beer and Others v Minister of Cooperative Governance and Traditional Affairs*

Finally, on the issue relating to the rationality test is the 'paternalistic approach' that was articulated in the *De Beer* Case. In the *De Beer*[90] case, the applicants in an urgent application sought to have the declaration of the National Disaster and lockdown regulations promulgated as consequence thereof both emanating from the Department of Cooperative Governance and Traditional Affairs set aside. The applicants contended that the declaration of the state of disaster was an 'irrational' reaction to the coronavirus[91] and that lockdown regulations themselves were irrational.[92] The court per Davis J noted that that, there were a number of inconsistencies in the regulations and found that most covid/19 lockdown regulations were not only distressing but 'irrational'.[93] In arriving at this decision, the court expressly stated that:

> 'If a measure is not rationally connected to the permissible objective, then the lack of rationality would result in such a measure not constituting a permissible limitation of a constitutional right in the context of section 36 of the Constitution'.[94]

Furthermore, in dealing with the question regarding the information that was before the decision maker as well as reason for the decision Davis J held:

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[88] *New National Party v Government of the Republic of South Africa & Others* (CCT9/99) 1999 (5) BCLR 489. where the court dealt with electoral rules that imposed a requirement that South African who wanted to vote had to be in possession of the identity document. The court per Justice Yacoob found that the legislative scheme was rational and thus constitutional.

[89] D Ellof 'The rationality test in lockdown litigation in South Africa' (2021) 21 *African Human Rights Law Journal* 1157-1180 at 1163.

[90] *De Beer and Others v Minister of Cooperative Governance and Traditional Affairs* (21542/2020) [2020] ZAGPPHC.

[91] *De Beer* case para 4.12.

[92] *De Beer case* para 6.4.

[93] De Beer case para 7.1-7.8.

[94] *De Beer* case para 6.1.

> 'The clear inference I draw from the evidence is that once the Minister had declared a national state of disaster and once the goal was to 'flatten the curve" by way of retarding or limiting the spread of the virus (all very commendable and necessary objectives), little or in fact no regard was given to the extent of the impact of individual regulations on the constitutional rights of people and whether the extent of the limitation of their rights was justifiable or not. The starting point was not "how can we as government limit Constitutional rights in the least possible fashion whilst still protecting the inhabitants of South Africa?" but rather 'we will seek to achieve our goal by whatever means, irrespective of the cost and we will determine, albeit incrementally, which Constitutional rights you as the people of south Africa, may exercise.'[95]

The court referred to this as 'paternalistic approach' rather than a constitutional justifiable approach. The 'paternalistic approach' in the exercise of power by the state in the above case was illustrated by the statement of the Director General that 'the powers exercised under the lockdown regulations are for public good. Therefore, the standard is not breached'.[96]

Although the *De Beer* decision has received a lot of criticism,[97] there is also a need to applaud Davis J in this case for a remarkable work in protecting the liberty and freedom of South Africans from the arbitrariness of the state and organs of state. For Ellof, the *De Beer* case is an important judgement in that 'it ensured checks and balances and that separation of powers in its constitutional framework functions well and in accordance with their constitutional obligations, even during the pandemic'.[98] This position has been confirmed by other jurisdictions that the rule of law disciplines the conduct of the executive even when the state of disaster arises. In a New Zeeland case of *Borrowdale v Director General of Health,* the foreign court held that:

> 'Even in time of emergency, however, and even the merits of the government's response are widely contested, the rule of law matters.'[99]

Similarly in the British case of *(FC) & Others v Secretary for the Home Department* the court by way of Lord Hoffman held that:

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[95] *De Beer* case para 7.17.
[96] *De Beer* case para 7.18.
[97] J. Brickhill 'Constitutional implications of Covid-19: The striking down of the lockdown regulations' available at:https://www.researchgate.net/publication/341931946_Constititional_implications_of_COVID19_The_striking_down_of_the_lockdown_regualtions_De_Beer_v_Minister_of_Cooperative_Governance (accessed 22 November 2021). According to Brickhill the major flaw in *De Beer* judgement is that Davis J having initially laid down the rationality test correctly, got it entirely wrong in the application. In that, part of the approach employed looks like proportionality test. In addition, Davis J adopted an approach that involved comparing regulations adopted, pointing out that some are stricter than others. for example, in para 7.1 "not allowing family members at the bedside of hospitalised patient but allowing 50 people at the funeral". For Brickhill, this is not testing rationality but reasonableness or proportionality.
[98] D Ellof op cit note 89.
[99] *Borrowdale v Director General of Health* 2020 NZHC 2090.

> 'Of course, the government has a duty to protect the lives and property of its citizen. But that is the duty it owes all the time and which it must discharge without destroying constitutional freedoms'.[100]

In regard to *Pienaar Bro,* it is clear that the court followed a 'paternalistic approach' rather than a constitutionally justifiable approach. For tax law purposes, a loss of revenue can be regarded as a state of disaster that requires government's urgent response and intervention by both SARS and the National Treasury. In the fear of losing revenue, fiscal legislation with retroactive effect was enacted and the court under a rational basis review declared it constitutionally valid merely because collecting revenue was for public good. As Davis J pointed out above, no consideration was given to the rights of South African taxpayers and how the new provision would affect their businesses. The court only focused on closing the gap in law as identified by the revenue authorities.

CONCLUSION

The high court judgement in Pienaar Bros has exposed long existing ills in the South African jurisprudence particularly in the interpretation of fiscal legislation. The sudden and unprecedented compromise of the principle of certainty, demonstrated in this case, is proof that South Africa as its counterparts, still embraces concept of 'tax exceptionalism' when interpreting fiscal legislation. This is evident by the heavy reliance on the United States case which is mostly known for suggesting that tax legislation should be interpreted differently. As pointed out above, the principle of certainty remains the cornerstone and the most important element of the rule of law and since there is no authority in law that suggests otherwise, the position of *Pienaar Bros* remains shacky and it is not clear whether it will survive the test of time.

This paper also had an opportunity to closely look at the rationality test as it applied in the *Pienaar Bros* case to determine the constitutional validity of retroactive legislation. From the above discussed cases there is no doubt that the rationality test has played a huge role in the development of South African constitutional review. Its significance is seen in a number of cases such as *Pharmaceutical Manufactures, DA President of RSA* and recently *De Beer*. The challenge, however, is that none of these cases dealt with tax legislation. Although the courts have maintained the manner in which they apply rationality test throughout these

[100] *(FC) & Others v Secretary of State for the Home Department* (2004) UKHL 56 [95].

cases, it is submitted that the rational standard of review seems to be weaker in the context of fiscal legislation. This is because under the rational standard of review retroactive fiscal legislation will always serve a legitimate government purpose. Thus, not only exposing existing rights of taxpayers but also places them at an absolute disadvantage with no remedies to protect them from the arbitrariness of the state. Unlike other pieces of legislation, that infringe the fundamental rights within the bill of rights, while they may be further reviewed under the strict review of reasonableness or proportionality test in section 36 of the Constitution. Matters emanating from a violation of section 25 rights by tax legislation does not have to face such level of scrutiny.

Although *De Beer* is not a tax case, it contains important aspects that can be useful to right the wrongs of the past cases such as *Pienaar Bros*. First, I commend Davis J for augmenting what was once pointed out by O'Regan that 'the rational standard of review should be viewed as more than a mere connection between a legitimate government purpose and the means to achieve the said purpose'.[101] In addition to the rationality enquiry, Davis J went further into examining the manner in which the decision maker carried out its powers. After a careful consideration of the decision maker's actions, the court found that the Director General used a 'paternalistic approach' rather than a constitutional justifiable approach when carried out his powers. The court warned against 'paternalistic approach' and emphasised that even at the state of emergency the state still has a duty to protect its citizen's rights and property. Similarly, in *Pienaar Bros* , the court had a duty to interpret legislation using ordinary rules of interpretation as articulated in *Glen Anil Development* in order to emphasise that even at the loss of the state's revenue, at the forefront of the state's priorities are the rights of the taxpayers.

[101] Ibid at 89.

CHAPTER 3: SUBSTANCE OVER FORM DOCTRINE-NWK CASE

3.1 INTRODUCTION

In *Ladysmith,* Hefer JA held that:

> [O]ne may arrange his affairs so as to remain outside the provisions of a particular statute, and that a court will not be deceived by the form of a transaction: it will rend aside the veil in which the transaction is wrapped and examine its true nature and substance.[102]

This is the crux of the 'substance over form doctrine', which is based on the common law principle encapsulated in the maxim plus *valet quod agitur quam quod simulate concipitur* literally interpreted as 'what is actually done is more important than that which seem to be done'. The doctrine consists of two elements namely:

a) The label principle where parties attaches a wrong label to a transaction but act in good faith and intend to give effect to a transaction *(to be discussed in chapter 4*) and
b) The simulation principle where the parties enter into a sham transaction.[103]

In regard to the latter, the parties to a transaction may for example simulate a transaction to resemble in form a lease whereas in actual fact, it achieves the result of a sale. As the tax consequences of a lease differ from those of a sale, if such transaction is brought before the court, the application of the doctrine will allow the court to disregard the form of the arrangement and give effect to the real intention of the parties.

The substance over form doctrine has been part of South African law for over a century. Although the doctrine is commonly applied in tax matters, it is important to note that its application is by no means limited to tax cases.[104] The doctrine generally applies in determining the legal implications of transactions and agreements entered into by parties. Despite being part our law for so long, there are still uncertainties around the application of this doctrine especially in tax matters. The recent cases demonstrates that the doctrine of substance over form is not consistently followed by South African courts in cases where the

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[102] -*Erf 3183/1 Ladysmith and Another v Commissioner for Inland Revenue* 1996 (3) SA 942 SCA.
[103] P Surtees & S Millard 'Substance, over form and tax avoidance' November/December (2004) *Accountancy SA* 14; See also Mandi Krebs *An Analysis of the Csars v Nwk and The Effect on the Substance Over Form Doctrine* (Unpublished LLM thesis, University of Pretoria, 2015) 2.
[104] Thabo Legwaila 'The substance over form doctrine in taxation: The application of the doctrine after the judgement in commissioner for the south African revenue service v nwk ltd 2011 (2) 67 (sca)' (2016) 28(1) *South African Mercantile Law Journal* 112-113.

statute in question is one that levies tax. The recent development of the doctrine in *NWK Ltd* case to require commercial substance, did not only cripple the long existing principles developed by previous courts over the years, but created more uncertainties in the application of this doctrine in tax matters.

3.2 DEVELOPMENT OF THE SUBSTANCE OVER FORM DOCTRINE

In 1910 South African courts, for the first time dealt with the 'simulation principle' in *Zandberg v Van Zyl.* In this case the court had to consider whether in terms of the existing contract between the two parties, the ownership of the wagon had in fact transferred or was merely held as security for a debt owed, to mean that ownership had not been transferred from one party to another.[105] The court per Innes JA laid down the basis of the doctrine as follows:

> 'Not infrequently, however (either to secure some advantage which otherwise the law would not give, or to escape some disability which otherwise the law would impose), the parties to a transaction endeavour to conceal its real character. They call it by a name, or give it a shape, intended not to express but to disguise its true nature. And when a court is asked to decide any rights under such an agreement, it can only do so by giving effect to what the transaction really is; not what in form it purports to be. The maxim then applies *plus valet quod agitur quam quod simulate concipitur*. But the words of the rule indicate its limitations. The court must be satisfied that there is a real intention, definitely ascertainable, which differs from the simulated intention. For if the parties in fact mean that a contract shall have effect in accordance with its tenor, the circumstances that the same object might have been attained in another way will not necessarily make the arrangement other than it purports to be.'[106]

Having regard to the above underlined aspects of the *Zandberg* decision, it is clear that the underlying principle in determining whether the transaction was a simulated one, rest upon the court being satisfied that there was a real intention, ascertainable and which differs from the simulated intention created by their agreement. After a careful consideration of the facts in *Zandberg* the court restored the judgement of the court *aquo* and concluded that the arrangement between the parties was that of a pledge and not a sale agreement. Thus, ownership did not pass from one party to another and that *Zandberg* as the creditor could attach the wagon.

Just over three decades after the *Zandberg* judgement was handed down, the 'simulation test' was further developed in *Randles Brothers.*[107] Here, the court had to determine the true

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[105] *Zandberg v Van Zyl* 1910 AD 302.
[106] *Zandberg* case para 309.
[107] *Customs and Excise v Randles Brothers & Hudson Ltd* (1941) AD 369.

intention of the importer of textiles by looking at the agreements concluded by the manufactures and the importers. Watermayer JA with reference to *Zandberg* held:

'A transaction is not necessarily a disguised one because it is devised for the purpose of avoiding the prohibition in the act or avoiding liability for tax imposed by it. A transaction devised for that purpose, if the parties honestly intend it to have effect according to its tenor, is interpreted by courts according to its tenor, and then the only question is whether, so interpreted it falls within or without the prohibition or tax'.[108]

The crux of *Randles Brothers* is that in determining whether a transaction between the parties is a simulated one, the crucial and often decisive question is whether the parties really intended to give it effect according to its tenor.

Subsequent to *Zandberg* and *Randles Brothers,* the SCA in 1996 delivered *Ladysmith* judgement[109] which became a leading case in respect of the substance over form doctrine prior to *NWK*.[110] The appellants in *Ladysmith* were two companies forming part of the same holding company (Holding Co) and registered title of a certain immovable property. The appellants had leased the property to the pension fund, where in terms of lease agreement the pension fund was permitted (but not obliged) to effect improvements on the appellant's property. The pension fund in turn let the property to the operating company and undertook to erect specified buildings on it in terms of the sub-lease. The fundamental issues then before the court was whether the erection of buildings on the industrial property leased by the taxpayer companies (appellants) to the pension fund occurred in circumstances which brought about an accrual of income to the taxpayers in terms of section 1, paragraph (h) of the Income Tax Act.[111] Furthermore, the court had to determine whether the parties actually intended that the agreements that they entered into should have effect. Hafer JA stated the fundamental issue as follows:

> 'I have quoted the relevant passages from the leading cases in full in order to reveal the fundamental flaw in a submission which tinged the entire argument for the appellants. It is to the effect that, once it is found that the parties to the present agreements actually intended to structure their arrangement in the form of a lease coupled with a sub-lease and a building contract, there is really an end to the matter, because in that event effect must be given to each agreement according to its tenor. This is plainly not so. That the parties did indeed deliberately cast their arrangement in the form mentioned must of course be accepted; that, after all, is what they had

[108] *Randles Brothers* case para 395-396.
[109] *-Erf 3183/1 Ladysmith* supra note 102.
[110] Thabo Legwaila 'Modernising the 'substance over form' doctrine: Commissioner for the south african revenue v nwk ltd' (2012) 24 *South African Mercantile Law Journal* 115-127.
[111] Ibid.

> been advised to do. The real question is; however, whether they actually intended that each agreement would *inter partes* have effect according to its tenor. If not, effect must be given to what the transaction really is.'[112]

After examination of the facts, the court found that the appellants have not shown that a right to have improvements effected as envisaged in paragraph (h) of the Act did not accrue to them. The court held further that there was another unexpressed, intention, and the legal substance of the agreements was other than what was reflected in the agreements. It concluded that it seems the purpose could have been to conceal the real or complete terms of what the parties truly intended but chose not to express.

3.2.1 *The position of the doctrine prior to NWK*

In regard to the above judgements, it appears that it was understood and repeatedly held by the courts that a transaction would not be regarded as simulated if the contracting parties genuinely intended that the contract would have effect according to its tenor. Courts maintained this principle even in instances where it was clear that the purpose of concluding the transaction in a particular form was to escape the provisions of the Act, which would otherwise be applicable.[113] This position is well demonstrated in *Randles Brothers* where Watermeyer JA held that 'if the parties honestly intend it to have effect according to its tenor, it will be interpreted by courts according to its tenor, and then the only question is whether, so interpreted', it falls within or without the prohibition or tax'.[114] It is also evident from *Ladysmith* that where parties have concluded multiple agreements forming part of their transaction, the court will have to be satisfied that, the parties actually intended that each agreement would *inter partes* have effect according to its tenor. If not, effect must be given to what the transaction really is.[115] Thus, if the parties intend that the agreement will have effect according to its tenor, then the substance will follow the form and the agreement will stand and if not, then substance contradicts the form, and the agreement will be disregarded.

3.3 NWK: 'COMMERCIAL SUBSTANCE' REQUIREMENT

As discussed earlier in the chapter, traditionally the courts when applying the substance over form doctrine, relied on the intention of the parties and whether they genuinely intended to give effect to their arrangement according to its expressed terms. In *NWK* however, it was stated that when determining whether the transaction is simulated, the court should go beyond

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[112] *Ladysmith* case para 953.
[113] Paul Daniels 'Will the real nwk please stand up!' (2013) 4 *Business Tax and Company Law Quarterly* 14-25 at 18.
[114] Ibid.
[115] Ibid.

the usual process of ascertaining the real intention of the parties and extend further to an analysis of the commercial substance or purpose of the transaction.

3.3.1 *Facts of: CSARS v NWK*[116]

Briefly summarised as follows:

NWK is a public company which formally operated as a co-operate society trading in maize hereto to be referred as *NWK*. Slab Trading Company Proprietary Ltd here to be referred as (Slab), a subsidiary of First National Bank dealt in financial instruments.[117] Slab entered into a series of agreements in which Slab advanced a loan to *NWK* amounting to R96 415 776. In terms of the loan agreement entered into by Slab and *NWK*, *NWK* would repay the loan to Slab over a period of five years by delivering 109 315 tons of maize at the end of the loan period.

In addition, it was agreed by the parties that interest would be payable on the principal loan amount at a fixed rate of 15.41 per cent. In this regard *NWK* issued promissory notes to Slab totalling an amount of R 74 686 861. To fund the loan Slab sold promissory notes to FNB at a discounted price for the sum of R45 815 776. In addition, Slab sold its right to take delivery of maize from *NWK*, to First Derivatives a division of FNB. First Derivatives then sold its right to take delivery of maize to *NWK* for the sum of R46 415 776, of which was payable immediately, but the delivery would take place in five years.

From 1999 to 2003, NWK claimed deductions in respect of interest payment it made to FNB. Initially deductions were allowed, however, in 2003 a new assessment was issued disallowing the deduction and further and imposed an additional tax as a penalty for making false statements in tax returns.

Commissioner's Arguments

The commissioner contended that the loan was a mere paper exercise between the parties. In fact, neither Slab, NWK nor FNB intended to trade maize before and after the transactions were entered into.[118] According to the commissioner, the arrangements were put in place in order to conceal what was in reality a loan for R50 million as a loan for R96 415 776. The commissioner further argued that Slab was interposed as a party for the purpose of reducing

[116] *Commissioner for the South African Revenue Service v NWK Ltd* 2011 (2) 67 (SCA).
[117] *NWK* case para 1.
[118] *NWK* case para 27.

the liability for income tax.[119] In support of the above arguments the Commissioner submitted the following reasons:

- The value of maize at the time of delivery (in February 2003) was uncertain and the purchase for the maize was based on fictious value and was determined without reference to the value of maize on the date of conclusion of the contract.
- Furthermore, the risks associated with delivery of maize five years after the conclusion of the sale were great, the market was volatile. Yet no account had been taken of volatility, of arrangement for storage after harvest or costs of storage or transport. The commissioner added also that, the grade for the maize was not stipulated although it would materially affect it market value.[120]

NWK's Arguments

NWK in response, contended that the arrangements concluded between the parties were performed in accordance with their terms. With regards to the Commissioner's alternative argument regarding s 103(1) of the Act, *NWK* stated that no part of the arrangement had the effect of postponing or avoiding any tax liability and that the only reason *NWK* entered into the arrangement with Slab and FNB was to secure a loan.

Decision of the SCA

As a point of departure, Lewis JA dealt with the onus of proof as it is required in tax appeals. In regard to the first issue, it was held that in terms of s 82(b) of the Act[121] *NWK* bore *onus* of proving that the transactions were not simulated. As *NWK* argued that the agreements themselves serves as proof of true intention of the parties, the burden rested upon the commissioner to rebut the evidence presented by *NWK*.[122]

The court moved further onto the issue of simulation and reiterated the principle in *Westminster* that was cited by the court in *Ladysmith* that:

> 'It is trite that a taxpayer may organise his financial affairs in such a way as to pay the least tax permissible. There is in principle nothing wrong with arrangement that are tax effective, but there is something wrong with dressing up or disguising a

[119] *NWK* case para 26.
[120] *NWK* case para 28.
[121] Act 58 of 1962.
[122] *NWK* case para 38.

> transaction to make it appear to be something that it is not, especially if that has the purpose of tax evasion or avoidance of peremptory rule of law.'[123]

In determining whether the loan and other transaction were simulated the court per Lewis JA held as follows:

> 'In my view the test to determine simulation cannot simply be whether there is an intention to give effect to a contract in accordance with its terms. Invariably where parties structure a transaction to achieve an objective other than the one ostensibly achieved they will intend to give effect to the transaction on the terms agreed. The test should thus go further, and require an examination of the commercial sense of the transaction: of its real substance and purpose. If the purpose of the transaction is only to achieve an object that allows the evasion of tax, or of a peremptory law, then it will be regarded as simulated. And the mere fact that parties do perform in terms of the contract does not show that it is not simulated: the charade of performance is generally meant to give credence to their simulation.'[124]

After applying the commercial substance test to the transactions as stipulated above, the court concluded that there was no sensible commercial purpose in the transactions and *that NWK*'s real intention was to obtain a tax advantage.

3.4 UNCERTAINTY IN THE APPLICATION OF THE DOCTRINE

The *NWK* judgement has caused a stir in the whole tax community, coupled with unending debate amongst the commentators and taxpayers. On one hand it has been argued that the *NWK* case has modernised the doctrine of substance over form.[125] On the other hand, others are of the view that the court in the *NWK* case overturned the long-standing approach of the courts to disguised transaction without backing of authority.[126] Apart from the debate that has taken place following the *NWK's* judgement, one thing that is certain is the fact that there continues to be to uncertainty around the application of this doctrine in tax matters. Despite the efforts of the previous decisions to keep the doctrine intact for over 100 years prior to *NWK*, courts recently continue to dramatically change the doctrine of substance over form.

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[123] *NWK* case para 42.
[124] *NWK* CASE para 55.
[125] According to Legwaila, 'Modernising the "substance over form" doctrine' (2012) 24:1 *SA Merc LJ* 115 at 121, *NWK* modernised, the application of the substance over form doctrine. In that prior to *NWK* the application of the substance over form doctrine focused on the form that the taxpayers projected the transaction to be vis-à-vis the substance that was the real object of the transaction. If the parties intended to carry out what was agreed, the transaction could not be flawed. After *NWK*, the focus falls on the transaction, regardless of what the taxpayers intend to do. This case changes the view of the form that the taxpayers present the transaction to be as well as the substance that it is.' He further submitted however that the court, in introducing unconventional principles to this doctrine, may have overstretched the doctrine in order to apply it in the case because, for instance, commercial purpose should not be relevant when determining whether a transaction is simulated or not.
[126] E.B. Broomberg, A Century of Income Tax Jurisprudence in South Africa, in J. Hattingh, J. Roeveld and C. West, Eds., *Income Tax in South Africa: The first 100 Years*, Juta: Cape Town 2015.

In response to the Commissioner's contentions (discussed in detail above), *NWK* contended that the arrangements concluded between the parties were performed in accordance with their terms. From a mere reading of this contention, one can construe that *NWK* relied on the principles from previous decisions particularly *Randles Brothers* judgement where Watermayer JA stated that:

> 'If the parties honestly intend for it to have effect according to its tenor, it will be interpreted by courts according to its tenor, and then the only question is whether, so interpreted', it falls within or without the prohibition or tax'.[127]

However, to *NWK's* shock the court went on to apply a different test altogether. In essence, the court's decision in *NWK* is that a transaction will be regarded as simulated if it lacks commercial sense or purpose, notwithstanding that it was performed in accordance with its terms (as *NWK* contended).

As a point of departure, it is important to note that unlike in the United States,[128] the identical termed substance over-form doctrine in South Africa focuses on whether there is simulation, or a transaction disguised with an intention to hide its true nature. In South African law simulation is a question of genuineness where the courts undertakes a thorough investigation to the facts in order to determine the real intention of the parties. Thus, once it has been it been established that the parties genuinely intended their agreement to have effect according to its tenor, the enquiry must end, and the agreement must be deemed to be genuine, if not, it is simulated.[129] This principle was made emphatically in *Randles Brothers* that:

> 'A transaction is not necessarily a disguised one because it is devised for the purpose of avoiding the prohibition in the act or avoiding liability for tax imposed by it. A transaction devised for that purpose, if the parties honestly intend it to have effect according to its tenor, is interpreted by courts according to its tenor, and then the only question is whether, so interpreted it falls within or without the prohibition or tax.'[130]

For over a century, South African courts maintained this position in their enquiry on simulated transactions. At no point did the courts deem it necessary to take into consideration the commercial substance of the transaction to determine whether a transaction is simulated

[127] *Randles* supra note 107 para 395-396.
[128] See Benjamin Kujinga 'The economic substance doctrine against abusive tax shelters in the united states: Lessons for south africa' (2015) 2 *SA Merc LJ* 218 at 223-224, in the United States the substance over form doctrine incorporates the economic substance which means that the doctrine focuses on factors such as the business purpose of the transaction and its economic justifiability.
[129] E.D Liptak 'X (pty) ltd v csars: Another ride on the substance-over-form rollercoaster?' (2017) 8 *Business Tax and Company Law Quarterly* 16-25 at 20.
[130] Ibid.

or not. For Daniels, 'the statement made by the court in paragraphs 54,55,80 and 86 of *NWK* judgement by way of Lewis JA, significantly goes beyond a mere restatement of the law and in fact appears to completely abandon the normal simulation test developed in the earlier judgements.' He further argues that the use of the words "*the test must go further*" appears to suggest that the normal simulation test is no longer suitable, instead the court must apply commercial substance when examining legal substance of a transaction.[131] Daniels further points out that the court abandoned previously developed principles without a clear assertion that they were wrong.[132] This brings about the doctrine of stare decisis – from the maxim '*stare decis et non quieta movere*' directly translated as 'to stand precedent, and not to disturb settled points.'[133] Simply put; the doctrine of stare decisis embodies the idea that courts should not depart from their decisions, unless they were declared to be wrong or incorrect. Broomberg in his analysis, notes that the doctrine of stare decisis was purely ignored by the SCA in this case, in that no apparent ground or reasoning was submitted by the court to say that the previous judgements (*Zandberg, Randles Brothers and Ladysmith* case) were incorrect.[134]

It is for this this reason, that there is so much unpredictability around South African tax jurisprudence and the substance over form doctrine. The absence of error in the earlier judgements and then a dramatic departure in what has long been understood to be law, is a clear demonstration that the court in *NWK* had undertaken the duty of law making rather than simply interpreting the law. This is evidenced by the court's approach in *NWK* moving completely beyond the boundaries of what the law says and creating new principles. This also proves the desperation of courts in tax matters to bring the taxpayer within the tax liability. It is as if the main focus is no longer the applicability of the law to the issues in question, but rather making sure that the taxpayer is brought within tax liability. It is submitted that the said desperation in the court's approach does not only threaten the stare decisis doctrine but also limits certainty,[135] reliance and reliability of the law as discussed in chapter 2.

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[131] Daniels op cit note 113 at 22.
[132] Ibid.
[133] HR Hahlo & Ellison Kahn *The South African Legal System and Its Background* (1968) 214.
[134] In his paper E. Broomberg 'Nwk and founders hill' (2011) 60 *The Taxpayer* at 187.
[135] According to Stephan Ryan 'The balance between certainty and flexibility in horizontal and vertical stare decisis: Bosch v commissioner for south african revenue service' (2015) (132) *TSALJ* at 233-234, promotion of certainty is arguably the strongest. In that in common law system, the law is what court say it is, therefore it is crucial that the courts should not only speak with one voice but be consistent in their expression of the law. The common law element of South Africa's mixed legal system is such that much of the law is made by judges and

Furthermore, it was also pointed out numerous times that in the words of Lewis JA, there was confusion between tax avoidance and tax evasion. In paragraph 55 of the *NWK* judgement, Lewis JA stated that:

> '…The test should thus go further, and require an examination of the commercial sense of the transaction: of its real substance and purpose. If the purpose of the transaction is only to achieve an object that allows the evasion of tax, or of a peremptory law, then it will be regarded as simulated…'[136]

Such confusion in law especially by the SCA is concerning. This is because up to date, it is not clear whether this was a mere confusion of concepts or whether the court was in fact testing for something different under a totally different enquiry. However, what seems to be more problematic is the that for Broomberg, this assertion can never be brought into logic. This is because when corrected it will read as follows: 'if the purpose of the transaction is only to achieve an object that allows for the avoidance of tax, or of a peremptory law, then it will be simulated. For Broomberg this cannot be correct because it negates a well-established principle that allows taxpayers to arrange their affairs so as to pay the least taxes.[137]

3.5 MOVING FORWARD

Having regard to the above discussion, it is clear that *NWK* has left a massive misperception in the tax community as to whether simulation principles has changed in the context of tax avoidance. The recent cases reported respectively as *Bosch and Another v Commissioner for the South African Revenue Service*[138] and *Roshcon (Pty) Ltd v Anchor Auto Body Builders CC,*[139] become useful in this regard, as they provide an analysis of *NWK* approach in the context of simulated transactions. Thus, the next task is to ascertain whether the courts were able to provide clarity around the application of the doctrine moving forward.

The court in *Bosch* was confronted with a dispute which arose out of additional tax assessments relating to agreements. Despite being performed according to their terms, the agreements were deemed to be simulated on the basis that they lacked commercial sense. Davis J writing for the majority held (referring to paragraph 55 of *NWK*) that:

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therefore the need to maintain certainty in the law is as crucial in South Africa as it in other common law countries.

[136] *NWK* supra note 116 para 55.

[137] Ibid at 134.

[138] *Bosch and Another v Commissioner for the South African Revenue Service* 2013 (5) SA 120 (WCC).

[139] *Roshcon (Pty) Ltd v Anchor Auto Body Builders CC* 2014 (4) SA 319 (SCA).

> 'It appears that the intention of paragraph 55 is to point in the direction which the mandated enquiry must take place in such cases, namely, to examine the 'commercial sense' of the transaction. If there is no commercial rationale, in circumstances where the form of the agreement seeks to presents commercial rationale, then the avoidance of tax as a sole purpose of the transaction would present a powerful justification for approaching the sets of transactions in a manner undertaken by the court in *NWK*.'[140]

Davis J further argued that *NWK* should be read to fit within a century of established principles rather than constituting a dramatic rapture.[141] It is submitted that Davis J's and Wallis JA's views on *NWK* are problematic, in that they ignore the submissions made by Lewis JA in paragraph 55 which clearly show departure from the normal simulation test. For Ryan, the employment of the new test for simulation, or at least development of the test, proves that Lewis JA must have intended to change the existing principles of the substance over form doctrine.[142] Contrary to Davis J, Waglay J in his dissenting judgement viewed *NWK* as in fact a dramatic reversal of what has been consistently viewed to constitutes a simulated transition. He also pointed out that *NWK* cannot serve as precedent as it refers to tax evasion which was not an issue in *Bosch*.[143] What is problematic with Waglay J's argument, is that it seems to suggest that the error in the *NWK* judgement prevent it to be precedent on the lower courts.

Subsequent to *Bosch*, the SCA in 2014 handed down *Roshcon*, which also dealt with simulated transactions where the court had to determine the lawful owner of the trucks. In a separate judgement, Wallis JA took the opportunity to analyse *NWK*. In his attempt to explain *NWK*, he commented as follows:

> 'The earlier cases dealt with cases of agreements being dressed up in a particular form where the underlying intention of the parties was inconsistent with that form. In the income tax case, a different problem arises. In the income tax cases, the parties seek to take advantage of the complexities of income tax legislation in order to obtain a reduction in their overall liability for income tax. There are various mechanisms for doing this, but they all involve taking straightforward commercial transactions and adding complex additional elements designed solely for the purpose of claiming increased or additional deductions from taxable income, or allowances provided for in the legislation.'[144]

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[140] *Bosch* case at para 85.
[141] *Bosch* case at para 85; See also *Roshcon* case at para 32 As a point of departure Wallis JA briefly discussed *Zandberg*, *Dadoo* and *Randles* Judgements and concurred with Davis J's view that 'nothing subsequently in any of the judgement of this court (Supreme Court of Appeal) in respect of simulated transactions, alters those principles in any way or purports to do so.'
[142] Ryan op cit note 135.
[143] *Bosch* case at para 105.
[144] *Roshcon* case at para 33.

I respectfully agree with Broomberg's view that the above explanation is in itself far more problematic than *NWK*.[145] The assertion that a different problem arises in the income tax cases is not only incorrect but appears to suggest that the approach of courts to simulated transactions in income tax cases is different from the approach employed in other cases. It is also worth noting that *NWK* was not the first income tax case to be handed down by South African courts. If the court in *NWK* was not satisfied with the approach adopted in *Zandberg* and *Randle Brothers,* (given that they are not tax cases) reference could have been made to *Ladysmith* not only on the basis that it was a leading case prior *NWK* but because it is an income tax case. A further challenge in Wallis JA' explanation is found in the following statement:

> 'The analysis by Lewis JA of the transaction in *NWK* clearly demonstrates that a range of unrealistic and self-cancelling features had been added to a straightforward loan. They served no commercial purpose, were based on no realistic valuation of the different elements of the transaction and were included solely to disguise the nature of the loan and inflate the deductions that *NWK* could make against its taxable income.'[146]

Wallis JA in the above explanation submits that *NWK* demonstrates that, there had been unrealistic features added to a straightforward loan that had no commercial purpose but solely added to give *NWK* a tax benefit. This assertion seems to suggest that the commercial sense test was applied only to those unrealistic and self-cancelling features. And that is not what happened in *NWK*. In *NWK* the court dealt with the transaction in its entirety and not the single features.

CONCLUSION

It is clear that South African courts have not been consistent in their approach to simulated transactions. In regard to the above discussion, it is evident that the doctrine of substance over form has always been understood by courts to involve a thorough investigation in the intention of the parties to determine whether a transaction is simulated or not. This is also evident from three crucial judgements of the SCA namely, *Zandberg*, *Randles Brothers* and *Ladysmith* where it was made emphatically clear that a transaction would not be regarded as simulated if the contracting parties genuinely intend that the contract would have effect

[145] Broomberg op cit note126 at 36.
[146] *Roshcon* case at para 33.

according to its tenor. This position was enforced by courts even where it was clear that the purpose of concluding a transaction in a particular form was to escape the provisions of the relevant Act. At no point, did the court deem it necessary to have regard to the commercial substance of transaction to determine whether it was simulated or not.

Lewis JA's assertion in *NWK* that 'the test should thus go further and require an examination of the commercial sense of the transaction' has been viewed by many as a clear departure from what has always been viewed to constitute a simulated transaction. Despite *Bosch* and *Roshcon*'s efforts to bring about clarity on *NWK*, it is still difficult to accept that the SCA in *NWK* did not intend to alter the long-established principles forming part of the doctrine.

CHAPTER 4: SUBSTANCE OVER FORM CONTINUED: CSARS V BRUMMERIA RENAISSANCE CASE

4.1 INTRODUCTION

It was submitted above that South African courts have not been consistent in their approach to the doctrine of substance over form in tax matters. The decision of the SCA in *Brummeria*[147] is no different to many alarming decisions that has been handed down by the court recently. While *NWK* was criticized for what the court did, what appears to be a matter of concern in *Brummeria* however, is what the court did not do. This chapter examines the SCA's approach in *Brummeria* in accepting without a thorough investigation whether the contract reflected the real intention of the parties and further argues that more analysis should have taken place through the substance over form enquiry to examine the true intention of the parties. It further asks why was *Brummeria* case not subject to the substance over form enquiry as other contract cases would have been? Before the analysis is made, it is necessary to set out the background of the case.

4.1.1 *Facts of Brummeria*

The respondents were respectively Brummeria Renaissance (Pty) Ltd, Palms Renaissance (Pty) Ltd and Randpoort Renaissance (Pty) Ltd. The companies have since 1988 developed retirement villages as contemplated in the Housing Development Schemes for Retired Persons Act.[148] The respondents entered into a contract with potential occupants in terms of which the company obtained an interest-free loan to finance the construction of the units in the retirement village. While lenders were granted a life-long occupation rights to the units, the ownership of the units remained with the company. The loan had to be repaid to the lender upon termination of the agreement or upon the death of the occupant, if married then upon the death of the surviving spouse.

Commissioner's contentions

Upon assessment of the companies, the appellant (Commissioner) argued that the benefit of rights to interest-free loan had a money value and objectively formed part of the company's gross income in terms of s 1 of the Income Tax Act.

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[147] *CSARS v Brummeria Renaissance (Pty) Ltd* 2007 (6) SA 601 (SCA), 69 SATC 205
[148] *Brummeria* case at para 1.

Respondent's contentions

Conversely the respondents contended that the interest-free loan did not result in any amount being 'received' by them as contemplated in the definition of gross income. Respondents further argued that the decision in *CIR v People's Stores (Walvis Bay) (Pty) Ltd*, where the court held that, income in a form other than money can be included in the gross income, cannot be used in support of Commissioner's argument, as the interest-free right could not be turned into money by the company.

Decision of the SCA

In ITC 1791 (2005)[149] the court had previously held that the companies received no moneys on the loan which were used to produce any income, and that the commissioner had therefore assessed the companies on notional income. It was further held that the benefit obtained by the companies had no independent existence from the liability to repay the moneys borrowed.

Upon appeal, the SCA overruled the decision of the Tax Court and held that the right to use borrowed funds interest-free did in fact constitute receipt or accrual that has a money value and therefore is an amount that should be included in the taxpayer's gross income. In support of its argument, the court referred to *Cactus Investment* where Hefer JA said the definition of gross income:

> 'Includes, as explained in *Commissioner for Inland Revenue v People's Store (Walvis Bay) (Pty) Ltd*, not only income actually received, but also rights of a non-capital nature which accrued during the relevant year and are capable of being valued in money.[150]

The court also took the opportunity to clarify the position in *Stander*[151] in regard to the convertibility of the benefit into money. The court held that the question of whether a receipt or accrual in a form other than money has a money value is the primary question, whether such receipt or accrual can be turned into money is but one of the ways in which it can determined whether or not this is the case. It therefore does not follow that if the receipt or accrual cannot be turned into money, it has no money value. [152]

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[149] 67 SATC 230.
[150] *Brummeria* case at para 11, see also *Cactus Investment* supra note 29.
[151] 1997 (3) SA 617 (C).
[152] *Brummeria* case at para 15.

4.2 THE COURT'S APPROACH IN *BRUMMERIA*

The essence of the *Brummeria* judgement is that the value of the right to retain and use loan capital for a period of time, without paying interest constituted an 'amount' which had accrued to the companies and that its value on an objective basis, must be included in their gross income as contemplated in s 1 of the Income Act.[153] This is evident in Cloete JA's assertion that 'it can hardly be doubted, that in a modern commercial world, a right to retain and use loan capital for a period of time, interest free is a valuable right'.[154] At the core of the dispute in *Brummeria,* was question relating to the convertibility principle as articulated by House Lords in *Tenant v Smith*[155]and in *Stander v CIR.*[156] Here it was held that 'an 'amount' cannot qualify for inclusion in gross income unless it is either money or that which is convertible into money'. The SCA in *Brummeria* however rejected this view in *Stander* case, and held that the convertibility principle is contrary to what has been held in *Peoples Stores* and *Cactus investments* that 'all that is required is that rights of a non-capital nature "are capable of being valued in money'.[157]

It is clear from the court's approach, that the basis for the conclusion reached in the *Brummeria* case, was that the companies incurred no interest on loans received from the potential occupants. However, what was not considered by the court is whether the parties did in fact enter into an interest-free loan agreement. This is because the court simply accepted without a proper investigation to the facts whether the contract reflected the true intentions of the parties. The features of the contract as they appear in the judgement provided as follows:

a) Each company obtained an interest-free loan from a potential occupant in order to finance the construction of unit in a particular retirement village by the company in question;
b) …
c) The lender was granted the right of life-long occupation of the unit, whilst ownership remained with the company and;
d) The company was to repay to the occupant upon cancellation, of the agreement or death of the occupant's death.[158]

[153] Act 58 of 1962.
[154] *Brummeria* case at para 12.
[155] *Tenant v Smith* [1982] AC 150, 8 TLR 434, 3TC 158.
[156] *Stander* supra note 151.
[157] Brummeria case at para 15. This principle was accepted and applied by the court in *CSARS v KWJ Investments Services (Pty) Ltd* 81 SATC.
[158] *Brummeria* case at para 3.

The payment of the loan upon cancellation of the agreement or death of the occupant, as provided in clause (d) above, factually places the lender of the moneys at same position as they were in before the contract had been concluded. While on the other hand, clause (c) granted ownership of the units to the companies in exchange for the life-long right to occupy the units as consideration. With the companies having paid the loan amount and taking ownership of the units, a number of questions arises as to the nature of the retirees benefit to occupy the units. Who paid for the benefit to occupy the units and how was it paid for? The court did not take this into consideration.

4.3 SUBSTANCE OVER-FORM ENQUIRY: LABEL PRINCIPLE

It must be borne in mind that before the court can consider tax implications, the true nature of the transaction must be enquired to determine whether it is in substance what the parties purport it to be. Contrary to the simulation principle discussed in the previous chapter, the label principle involves parties who in good faith attach a wrong label to their transaction and intend to give effect to it.[159] Similar to a number of aids used by courts to interpret and apply the law, the label principle has been used by the courts to identify the true nature of the agreements entered into by the parties before considering tax implications thereof. While there may be no evidence of sham in an agreement,[160] this enquiry allows the courts to examine the transaction and attach a correct label to it.

The following cases best illustrates the implications of this enquiry. In *CIR v Conhage*[161] the commissioner had refused to allow deduction for rental paid in terms of the leaseback as expenditure incurred in the production of income and invoked the provisions of s 103 of the Income Tax Act,[162] contending that the agreements between the parties were not what they purported to be. In regard to the nature of the agreements the commissioner further argued that, despite the form of agreements, the taxpayer did not sell and lease-back its equipment but in substance borrowed the purchase price from Firstcorp.[163] Before considering tax implications, the court looked into the intention of the parties to decide whether it was in fact a sale and leaseback agreement and not an outright sale. After a careful examination to the

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[159] T S Emslie, D M Davis & Hutton *Income Tax Cases and Materials* 3 ed (2001) 897.
[160] It must be noted that both SARS and the courts that heard the matter in *Brummeria*, confirmed that the agreements were genuine. That is to say that the parties acted in good faith and genuinely believed that they entered into an interest-free loan agreement.
[161] *Conhage v CIR (Pty) Ltd* 1999 (4) 1149 (SCA), 61 SATC 391.
[162] Act 58 of 1962.
[163] Ibid at 161.

facts, the court found that the transactions made perfectly good business sense and is indeed what they purported to be. [164] Contrarily in *Secretary of Inland Revenue v Hartzenburg*,[165] the court disagreed with the parties and held that, what they had concluded was a mere substitution of the old deed of sale and not cancellation which extinguished the *jus in personam ad rem acquirendam* as contemplated in s 5(2)(a) of the Transfer Duty Act.[166]

For *Brummeria,* the above cases indicate that a further enquiry to the facts should have taken place before considering tax implications. An enquiry as to why the loans were interest-free in the modern commercial world where charging of interest on loans was necessary. In addition, it was necessary to examine the parties' intentions with regard to the life-long rights to occupy the units. Lastly, considering the fact that ownership of the units remained with the companies, the court also had to investigate whether the parties then intended to make available free accommodation for the occupants? If YES, what is the nature of that benefit in hands of the occupants, did it not itself constitute 'amount' in the hands of the occupants? If NO who paid for the benefit and how was it paid for?

The absence of the substance over-form inquiry in *Brummeria* makes it difficult to see how the court reached its conclusion that this was an interest-free loan. As the court closed the matter before taking into account a number of possible outcomes the transaction could have fallen under. I now turn to consider how *Brummeria* could have been decided, had the court scrutinised the agreements under the substance over-form enquiry. I refer to the writings of two academic authors whom I believe did not only thoroughly analyse the case, but also answered the questions brought forward in this paper.

Firstly, Rudd in his paper questions whether the life-long rights of occupation granted to the retirees did not itself constitute interest, that is to say that the loans were in fact not interest free – but instead paid interest in kind.[167] In support of his argument, Rudd referred to s 24J of the Income Tax Act[168] which provides for the incurral and accrual of interest. Particularly s 24J(10)[169] stipulates that 'any amount referred to in this section includes considerations in a form other than cash'. For Rudd the life-long right granted to the occupants in *Brummeria*

[164] Ibid.
[165] 1966 (1) SA 405 (A).
[166] Transfer Duty Act 40 of 1949.
[167] Reinhard Rudd 'The tax treatment of interest in kind: The brummeria case revisited' (2019) 31 *SA MERC LJ* 435 at 436-451.
[168] Act 58 of 1962.
[169] Act 58 of 1962.

although not stipulated in the contract, constituted 'interest' as contemplated in the Income Tax Act.[170] This is because the contract stipulated that the company would in exchange of a loan provide a life-long right to the units as consideration. When viewed from this point view, it is clear that the loans were in fact not interest-free. It should be noted, however that the requirements in s 24J must first be met before the provisions can be applied.

Titus, on the other hand viewed, the interest-free component in *Brummeria* from the lease perspective. To begin with, she submits that three elements needs to be present for an agreement to be regarded as lease namely: temporary use and enjoyment of the premises by the leasee, premises needs to be identified and rent must be payable for use and enjoyment. [171] It is evident in *Brummeria* that the use and enjoyment of the units was not permanent but instead effective until the date of cancellation or death of the occupant. In addition, the contracts stipulated expressly that the life-long right to the units was to be granted within the large development of Randpoort Renaissance Security Estate, which satisfies the second element of a lease. Interestingly for the third requirement, Titus notes that there has been a divergence in our law in regard to the strict rule of the Roman and Roman Dutch law that rental must be in the form of money.[172] As a result of this divergence in law, she argues that contracts that shows features of lease should be accepted by courts as valid lease contracts, even if rent is paid in kind or in a form other than money.[173] Simply put, there was in reality a lease agreement where the occupant was a leasee and the companies were lessors, in terms of which the interest-free component was treated as 'rent' in a form other than money.

What can be deduced from the above submissions is that they both traced the interest-free component of the loan agreement to determine the real intention of the parties. Although concluded on different reasoning, they both successfully have shown that the interest-free component might have been a payment in kind for the life-long right to occupy the units, which means that it was not purely an interest-free loan.

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[170] Ibid.
[171] Afton Titus 'The different permutations of csars v brummeria: Was it something other than an 'interest-free' loan?' (2013) 129 *The South African Law Journal* 236 at 245.
[172] Ibid at 171. See also F P Van den Heever *The Partiarian Agricultural Lease in South African Law* (1943) 10 .
[173] Ibid.

4.4 WHY WAS *BRUMMERIA* NOT SUBJECT TO SUBSTANCE OVER-FORM ENQUIRY?

What was it about *Brummeria* that the court just accepted that this was an interest-free loan without an inquiry whether the contract reflected the real intentions of the parties? Would things have been different if *Brummeria* was not a tax matter? Before commenting whether the court decision was justified or not, it must first be determined whether the court succeeded in its approach, that not paying interest on a loan constitutes an amount.

4.4.1) "Does the *Brummeria* Judgement help the understanding of the concept 'amount'?"[174]

In *Brummeria*, the court approached the interest-free component of the loan, from a gross income point of view. In order to be successful in this enquiry, the court must have done one of two things: either overrule traditional understanding of the concept 'amount' as previously understood by the courts or help develop the understanding of the concept 'amount'. To begin with, Jansen van Rensburg argues that not paying interest is neither a personal right nor any other form of property, thus it cannot be said to constitute an 'amount' for purposes of gross income.[175] It was further made emphatically clear that interest is only payable if the parties agree thereto. Where no agreement was present, as in *Brummeria*, it would be false to submit that the borrower has obtained a benefit or right not to pay interest.[176] In other words, the court in *Brummeria* did not only fail to thoroughly enquire the real intention of the parties but also failed in its approach to show that not paying interest which was not charged constituted a right or a benefit in the hands of a borrower, that can be regarded as an amount. The *Brummeria* decision as it stands neither helps nor develops the concept "amount" as previously understood by court for purposes of income tax.

4.4.2) *Could the companies deduct 'interest' as such in Brummeria?*

This second question asks whether the companies could have qualified for deduction of interest in terms of s 11(a) of the Income Tax Act[177] given that it was not charged? S 11(a) provides that '…there shall be allowable as deduction from income of such a person; expenditure and losses actually incurred in the production of income, provided that such

[174] The heading taken from Enelia Jansen van Rensburg article referenced here below.
[175] Enelia Jansen van Rensburg 'Commissioner, south african revenue services v brummeria renaissance (pty) ltd and others: Does the judgement benefit an understanding of the concept "amount"?' (2008) 1 *STELL LR* at 46.
[176] Ibid.
[177] Act 58 of 1962.

expenditure and losses are not of capital nature'.[178] The first requirement thus for an amount to be deductible, is that it must constitute 'expenditure'. In *CSARS v Labat Africa* the SCA held that 'the word 'expenditure' must be given its ordinary meaning to mean an action of spending funds, disbursements, or consumptions, and hence the amount of money spent'.[179] In the context of the Act[180], it is clear that interest incurred constitutes an expenditure or loss that could qualify for deduction under the provisions of s 11(a).[181] In *Brummeria* however, no interest was charged on loans, which means that no amount would qualify as deduction. It would have been a different scenario if the parties had initially agreed on interest, but it was never actually paid. In that case, the so-called benefit would have been evident from both the taxpayer's and commissioners' point of view. That is to say that a certain amount was payable as interest, but it was never paid, therefore as a result of not paying that amount a borrower has obtained a benefit.

In regard to the above discussion, it clear that the court failed to show clear basis for its conclusion that not paying interest on loan constitutes a valuable right, from both the gross income and deduction point view. This is because the so-called right or benefit had no value in the hands of the companies as the parties never agreed on interest. The value of what the taxpayer could have incurred on interest cannot be said to have been a valuable right or a benefit as the court found. The so-called right or benefit only became valuable from the commissioner's point of view, after the assessments and investigations on how much the companies could have spent on interest payment became clear. It is therefore difficult to understand how the court reached the conclusion that this was in fact a valuable right and constituted an amount for purposes of gross income.

It seems therefore that Mezansky was correct in his submission that '*Brummeria* seems to be one of those cases where the court had no option but to find a reason to tax the companies'.[182] Echoing this submission is Cohen who applauded the SCA for its decision in *Brummeria*, contending that ignoring non-cash benefits is to undermine the most important objective of the income tax, which is not only to collect revenue but to ensure that the tax burden is

[178] Act 58 of 1962.
[179] 72 SATC 75.
[180] Act 58 of 1962.
[181] Ibid.
[182] Ernest Mezansky 'Sometimes even nothing is taxable in south Africa' (2008) *Bulletin for International Taxation* at 116.

apportioned so that those who earn high income can pay more as they have the ability.[183] Therefore in order to apportion the tax burden fairly, benefits such as housing, cars and vacation trips must be included in the taxpayer's gross income.[184] The court's decision seems to resonate more with this argument, more especially its submission that it can hardly be doubted that benefit or a right not to pay interest is a valuable right in the modern commercial world. It appears the court compared the agreement of the parties in *Brummeria* with ordinary agreements and concluded that the taxpayer in this case must also incur some loss of moneys if not as interest at least as tax so as to be at the same level as those who entered into ordinary interest-bearing loan agreements. The substance over-form enquiry on the other hand, would have led to a totally different results, thereby, allowing the taxpayer to enjoy the benefits of not paying interest and ultimately being in a far more advantageous position than most taxpayers who enter into ordinary interest-bearing loans.

CONCLUSION

Despite the long-standing principle in our law that, that which qualifies as an 'amount' must either be money or be convertible into money, the court in *Brummeria* deviated from this understanding and approached the interest-free loan component from gross a income point of view. It concluded that the right not to pay interest constitutes an 'amount' which must be included in the taxpayer's gross income. What is more concerning, however, is that the court reached its conclusion without examining properly whether the agreement was in fact an interest-free loan agreement as the parties purported. In the absence of the substance over-form enquiry, *Brummeria* raises even further questions about the interpretation of tax legislation in South Africa.

[183] Stephen Bruce Cohen 'Does brummeria sweep clean? A us tax-law perspective' (2009) 489 *The South Africal Law Journal* at 490.
[184] Ibid.

CHAPTER 5: CONCLUSION

A closer look into what courts do rather than what they say, makes it clear that the concept of 'tax exceptionalism' is far from dead in the South African tax jurisprudence. Although it has been rejected by court and commentators, the three above judgements are a clear demonstration that South Africa is not out the woods yet from its literal interpretation roots(?) even after more than two decades in the Constitutional dispensation. Similar to the U.S court the *Pienaar Bros* decision created serious - doubt whether the court will ever declare fiscal legislation with retroactive effect unconstitutional. What makes matters, even worse however, is that this decision has left an impression that tax legislation is not subject to the rule of law which is meant to protect the subjects from the arbitrariness of the state.

If the courts are not creating new rules like in *Pienaar Bros*, they deviate from the long-established ones. *NWK* and *Brummeria* decisions clearly demonstrate the latter. The doctrine of substance over-form was articulated for the first time in the *Zandberg* case where the court dealt with simulation principle. Subsequent to *Zandberg,* numerous cases were decided following the same doctrine and its principle. Because of the constant development, it became a standing principle for the court to examine the intention of the parties and declare the agreement as pure where parties intended to give it effect. The court in *NWK* did only not deviate from this principle but pronounced a new test of 'commercial substance' without overruling the old principle.

5.1 VIEWS ON TAX EXCEPTIONALISM IN SOUTH AFRICA

It is almost three decades of the constitutional dispensation in South Africa and our courts are still struggling with the concept of tax exceptionalism. During the course of my research and writing of this paper, I came across several writings of the prominent tax scholars and practitioners on this subject. On one hand the tax exceptionalists argue that 'the idea of 'tax exceptionalism' does not arise from a mere theory, that because of its nature and goals, it should be subject to different rules but rather arises from experience and path-dependent development of the tax system'. On the other hand, the anti-tax exceptionalists have also been consistent in their view that there is nothing special about tax law and continue to celebrate court judgements that demotes tax law from its high place. In my view as convincing as both arguments are, there is one aspect that I find to be missing in the debate between the tax exceptionalists and the anti-tax exceptionalist. The fact that tax in this context, is not only viewed as a vehicle to collect revenue but also as being 'law'. Tax[ation] on its own and not

being law, would simply involve putting into place structures that will help the tax collector to track as much income as possible in order to ensure that most of revenue is collected. This brings about the complex nature of the tax system as most scholars have pointed out. However, tax as law on the other hand, is a totally different issue, which involves not only the state's power to tax but also taxpayer's rights.

As mentioned above, at the heart of the constitution lies foundational values with the principle of legality, that law must be lawful, rational, and certain. The uniqueness of tax law whether by way of its nature or complexity does not preclude it from the above requirements demanded by the constitution. lately our courts have been disregarding fundamental principles of the rule of law, not only putting taxpayers at a disadvantage but also adding uncertainties in the South African tax jurisprudence. It will therefore, become crucial for the courts to let go of the idea of 'tax exceptionalism' and adhere to the constitution in order to maintain reliability in our law.

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