

**A COMPARATIVE ANALYSIS OF THE MEANING OF “MINING OPERATIONS”
FOR INCOME TAX PURPOSES**

By Christine Fourie [FRXCHR013]

Minor dissertation presented in partial fulfilment of the requirements for the degree
Master of Commerce in Taxation specialising in the field of South African Taxation

Department of Finance and Tax

Faculty of Commerce

UNIVERSITY OF CAPE TOWN

Date of submission: 14 August 2017

Supervisor: Jennifer Roeleveld

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

Declaration

I, Christine Fourie, hereby declare that the work on which this thesis is based is my original work (except where acknowledgements indicate otherwise) and that neither the whole work nor any part of it has been, is being, or is to be submitted for another degree in this or any other university. I authorise the University to reproduce for the purpose of research either the whole or any portion of the contents in any manner whatsoever.

Signature:.....

Signed by candidate

..... Date:14 August 2017.....

ABSTRACT

The South African (“SA”) mining industry played (and continues to play) a pivotal role in the development of the SA economy. It is therefore no surprise that the industry has long been the beneficiary of favourable tax concessions. One of these favourable tax concessions is the 100% capital expenditure allowance. Access to this allowance is dependent on the interpretation of the definition of “mining operations” in section 1(1) of the Income Tax Act, No. 58 of 1962 (“the ITA”).

Currently, there is legal uncertainty in SA regarding the meaning of “mining operations”. This is so because central to the term “mining operations” is the term “mineral”, which is not defined in the ITA, nor does it have an ordinary fixed meaning. SA courts have further not authoritatively dealt with the meaning of “mining operations” despite being presented with the opportunity to do so in recent case law. This legal uncertainty is further fuelled by a recent draft interpretation note issued by the South African Revenue Service (“SARS”), expressing the view that quarrying operations for *inter alia* clay for brickmaking and limestone for the manufacture of cement, do not constitute “mining operations”. Practically, this legal uncertainty may act as a deterrent to mining companies incurring capital expenditure, essentially curbing the development of the SA mining industry.

This study seeks to analyse the different meanings attributed by SARS, SA academic writers and SA courts to the definition of “mining operations” (and the related meaning of “mineral”) for income tax purposes. The purpose of this analysis is to determine whether the extraction of clay for brickmaking and limestone for the manufacture of cement constitutes “mining operations”. Against this background, Australian legislation and case law on the interpretation of the term “mining operations” and “mineral” will be studied in order to draw a comparison between SA and Australia’s treatment of “mining operations”.

This study further interprets the meaning of “mining operations” through the application of the Savignian interpretation model in terms of which it is concluded that useful guidance can be sought by SA from Australian jurisprudence when interpreting the meaning of the term “mining operations” for income tax purposes and that the purposive test applied in Australia should be adopted by SA courts. Based on the application of this guidance, the key finding of this dissertation is that the extraction of clay for brickmaking and limestone for the manufacture of cement should in principle qualify as “mining operations” and that the capital expenditure incurred in this regard should be eligible for the 100% capital expenditure allowance.

TABLE OF CONTENTS

ABSTRACT	4
CHAPTER 1 : INTRODUCTION	8
1.1 Background and objectives	8
1.2 Research question and scope	13
1.3 Research methodology	14
1.4 Chapter Overview	15
CHAPTER 2 : PRINCIPLES OF STAUTORY INTEPRETATION	17
2.1 Introduction	17
2.2 Literal approach	20
2.3 Purposive approach	24
2.4 Teleological approach	26
2.5 Savignian’s model – from Du Plessis’ perspective	27
2.5.1 Grammatical technique	28
2.5.2 Contextual technique	29
2.5.3 Value technique	30
2.5.4 Historical technique	31
2.5.5 Comparative technique	31
2.6 Conclusion	32
CHAPTER 3 : THE MEANING OF “MINING OPERATIONS” AND “MINERAL” IN AN SA TAX LAW CONTEXT	34
3.1 Introduction	34
3.2 “include”, “any” and “every”	34
3.3 Mineral	36
3.4 A narrow view - SARS	37
3.5 A wider view	43
3.6 Recent jurisprudence on the meaning of “mining operations” - The Foskor case (2010) and the Marula Platinum case (2016)	46
3.6.1 The Foskor case	47
3.6.2 The Marula Platinum case	48
3.7 Conclusion	52

CHAPTER 4 : DEVELOPMENT OF LEGAL JURISPRUDENCE IN AUSTRALIA RELATING TO THE MEANING OF “MINING OPERATIONS” AND “MINERALS”	53
4.1 Introduction	53
4.2 Income Tax	53
4.2.1 The NSW case	54
4.2.2 The North Australian Cement case	56
4.3 Customs Act: Pre-1995	58
4.3.1 The Bell case.....	59
4.3.2 The Neumann Sands case	61
4.3.3 The Water Authority case	63
4.4 Customs Act: Post-1995.....	66
4.4.1 David and Goliath.....	68
4.4.2 The Adelaide Brighton case.....	73
4.4.3 The Midland Brick case.....	79
4.5 Conclusion	82
CHAPTER 5 : A SAVIGNIAN’S ANALYSIS OF THE DEFINITION OF “MINING OPERATIONS”	83
5.1 Introduction	83
5.2 Grammatical technique	83
5.3 Contextual technique.....	84
5.3.1 Extra-textual dimension.....	84
5.3.2 Intra-textual dimension	85
5.4 Value technique.....	86
5.5 Historical Technique	87
5.6 Comparative technique.....	90
5.7 Conclusion	93
BIBLIOGRAPHY	95

CHAPTER 1: INTRODUCTION

1.1 Background and objectives

Given South Africa's ("SA") position as a country with an abundance of mineral resources, it is no surprise that the mining industry was historically positioned as the main driver of the development of SA's economy.¹ With the discovery of gold in the Witwatersrand basin in 1886, the gold rush ensued and SA's economy boomed.² Through the provision of employment, the earning of foreign income and the generation of tax revenues for the *fiscus*, the mining industry made significant contributions to the development of the SA economy.

The mining industry is a cyclical industry inherently fraught with risk.³ A mine's lifecycle generally consists of four phases: exploration, development, production and mine closure.⁴ Significant capital investment is required during the exploration phase of a mine's life cycle. Revenues are, however, often delayed for decades to the end of the cycle.⁵ This mismatch between expenditure and revenue, coupled with the pivotal economic (notably the industry's contribution to the *fiscus*) and socio-political role the mining industry plays in SA, explains why the SA mining industry has long been the beneficiary of favourable tax concessions.⁶

One of these favourable tax concessions is the 100% capital expenditure allowance. In 1945, the legislature introduced a 100% allowance for upfront capital expenditure incurred by new gold mines provided the mining lease was granted after 28 February 1946.⁷ Various

¹ C. Smit, "The Role of Mining in the South African Economy," <https://www.sablog.kpmg.co.za/2013/12/role-mining-south-african-economy/> (accessed 21 June, 2017).

² Ibid.

³ Davis Tax Committee, "First Interim Report on Mining for the Minister of Finance," (2014), 41.

⁴ Ibid.

⁵ Ibid.

⁶ *Western Platinum Limited v Commissioner for the South African Revenue Service* 67 SATC 1, 2. (2005).

⁷ M. Van Blerk, "Mining Tax in South Africa," (Rivonia: Taxfax CC, 1992), C-7.

extensions to the mines qualifying for the 100% capital expenditure allowance were made over the years. However, it was not until 1972, that the 100% capital expenditure allowance was extended to *all* mines.⁸

The 100% capital expenditure allowance is found in section 15(a) read with section 36 of the Income Tax Act 58 of 1962 (“ITA”) and provides that a taxpayer may deduct 100% of its capital expenditure against income derived from the taxpayer’s “mining operations”. It is therefore essential that the taxpayer carries on “mining operations” in order to qualify for the 100% capital expenditure allowance.

Although the ITA defines “mining operations”, the term “minerals” (which is central to the former term’s definition) is not defined.⁹ The lack of a definition for “minerals” has led to differing interpretations by the South African Revenue Service (“SARS”) and taxpayers of the ambit of “mining operations”, with SARS naturally favouring a narrow interpretation and taxpayers favouring a wider interpretation.¹⁰

The recent shake-up in the mining industry due to events such as the 2008 financial crisis (leading to lower commodity prices and rising operational cost and prolonged labour strikes),¹¹ has led to a decline in the mining industry’s contribution to SARS’ tax revenues. PwC’s Mine 2017 reports that although the top 40 mining companies have “recovered from their race to the bottom” in 2017 by increasing their profitability and bolstering their balance sheets, there has been a significant decline in capital expenditure.¹² Capital expenditure fell by 41% from 2016 to a historical low of \$50 million.¹³ This is worrying considering that the

⁸ Ibid., C-8.

⁹ See section 1(1) of the *Income Tax Act*.

¹⁰ A. Myburgh, "The Taxation of South African Mining and Prospecting Companies: Certain and Predictable?," ENS, <https://www.ensafrica.com/news/The-Taxation-of-South-African-Mining-and-Prospecting-Companies-Certain-and-Pred?Id=1241&STitle=tax%20ENSight> (accessed 7 July, 2017).

¹¹ Notably the strike in Marikana where police shot dead 34 Miners.

¹² PwC, "Mine 2017, Stop. Think... Act," (2017), 4.

¹³ Ibid.

bulk of the capital expenditure incurred relates to sustainability efforts rather than the development of further mining operations.¹⁴

SARS on the other hand is facing increased pressure from National Treasury to increase tax revenues.¹⁵ This has led to SARS clamping down on taxpayers which (in SARS' view) do not carry on "mining operations" in terms of its narrow interpretation. In this regard, SARS has issued a draft interpretation note in which SARS submits that extracting materials such as, *inter alia*, clay for brickmaking and limestone for the manufacture of cement do not constitute "mining operations" as defined in the ITA as SARS is of the view that these substances do not constitute "minerals" ("draft IN").¹⁶

As the focus of this dissertation is on the extraction of clay for brickmaking and limestone for the manufacture of cement, it is useful to briefly refer to the common meaning of clay and limestone, the processes of brickmaking and cement manufacturing, as well as the capital assets used to extract clay and limestone. In this regard, the Oxford Dictionary of English define "clay" as follows:

a stiff, sticky fine-grained earth that can be moulded when wet, and is dried to make bricks, pottery and ceramics; sediment with particles smaller than silt, typically less than 0.002 mm.¹⁷

The three most common types of clay used in brickmaking are surface clay, shale clay and fire clay.¹⁸ Surface clays are found near the surface and constitute either recently formed sedimentary formations or are the result of the up thrusting of older deposits.¹⁹ Shale clays

¹⁴ Ibid.

¹⁵ Myburgh.

¹⁶ SARS, "Draft interpretation note on whether certain quarrying operations constitute mining operations," ed. SARS (2015).

¹⁷ "Oxford English Dictionary," ed. A. Stevenson and C. Soanes (Oxford: Oxford University Press, 2005).

¹⁸ The Detering Company, "General Overview of Brick Manufacturing," <http://www.detering.com/re-li/Brick-&-Stone/TDC-Additional-Brick-Information.pdf> (accessed 21 June, 2017).

¹⁹ Ibid.

are hardened sedimentary rocks made out of thin layers with sharp edges.²⁰ Fireclays are highly resistant to heat and are extracted at a deeper level than surface clays and shale clays.²¹

The brickmaking making process can be divided into six phases:²²

1. *Extraction of raw materials* – excavators are used to extract the clay materials after which the clay materials are loaded onto dump trucks for transportation from the quarry to the manufacturing site.²³
2. *Preparation* – the clay materials are grinded, milled and mixed with other substances to achieve the right consistency and homogeneity.²⁴
3. *Shaping* – extrusion dies are used to shape the clays into the desired brick shapes.²⁵
4. *Drying* – the clay bricks are dried to extract moisture and prepare the clays for firing.²⁶
5. *Firing* – the clay bricks are fired in a kiln at temperatures ranging between 1000°C and 1200°C depending on the type of clay and for 40 to 150 hours depending on the type of kiln used. After firing, the clays are cooled and ready for packaging.²⁷
6. *Packaging and delivering* – the bricks are packed for shipping and delivered to the client.²⁸

With regard to the meaning of limestone, the Oxford Dictionary of English gives the following definition:

a hard sedimentary rock, composed mainly of calcium carbonate or dolomite, used as building material in the making of cement.²⁹

²⁰ H. King, "Shale," <http://geology.com/rocks/shale.shtml> (accessed 21 June, 2017).

²¹ The Detering Company, 1.

²² Ibid.; Wienerberger, "The World of Brick Production," <http://clay-wienerberger.com/expertise/the-world-of-brick-production-> (accessed 21 June, 2017). International Labour Office, "Small-Scale Brickmaking," ed. International Labour Organisation, Technological Series (1984), 16.

²³ Era Stene (Pty) Ltd, "Mining Work Programme," Department Mineral Resources, 8.

²⁴ F. Kraukamp et al., "Clay Brick Manufacture," in *Clay Brick Technical Guide*, ed. The Clay Brick Association of South Africa (2015), 2.

²⁵ Ibid.

²⁶ Ibid., 3.

²⁷ Ibid.

²⁸ Ibid.

²⁹ "Oxford English Dictionary."

By definition, limestone is composed of 50% or more calcium carbonate. Other materials present in limestone in small quantities may include feldspar, quartz, clay minerals, pyrite and other minerals.³⁰

The cement manufacture process follows similar phases to the brickmaking process and can be outlined as follows:

1. *Extraction of raw materials* – the raw materials used in the manufacture of cement are limestone, clay and sand.³¹ Limestone is used for its calcium content, while the sand and clay are used for its aluminium, silica and iron content.³² Limestone is extracted either by surface stripping or the use of explosives. In surface stripping, the surface of the deposit is stripped using crawler tractors (large bulldozers) to extract the limestone.³³ Where explosives are used, drillers are first used to drill holes in the earth at the quarry site after which explosives are placed in the holes. The blasting separates the limestone deposit from the earth.³⁴ Wheel loaders and dump trucks are used to transport the limestone from the quarry to the manufacturing site.³⁵
2. *Proportioning, grinding and combining* – the ideal mix for cement is 80% limestone and 20% clay and sand. The mix is grinded and blended to produce a fine powder.³⁶
3. *Pre-heating* – the mix is pre-heated by the emitted gasses of the kiln in order to save energy.³⁷
4. *Heating* – the mix is heated at temperatures up to 1450°C.³⁸ This causes a chemical reaction called decarbonation in terms of which calcium dioxide is released and calcium

³⁰ H. King, "Limestone."

³¹ Lafarge South Africa Holdings (Pty) Ltd, "Manufacturing Process," http://www.lafarge.co.za/wps/portal/za/2_2_1-Manufacturing_process (accessed 21 June, 2017).

³² J. Afsar, "Cement Manufacturing Process," <http://www.engineeringintro.com/uncategorized/cement-manufacturing-process/> (accessed, 21 June 2017).

³³ Ibid.

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid.

and silicon dioxide combine to form the primary ingredient for cement i.e. calcium silicate. The calcium silicate is formed in the shape of clinker.³⁹

5. *Cooling and grinding* – the clinker is cooled, grinded and gypsum is added to the mix. To form a fine powder which is known as cement.⁴⁰
6. *Packaging and delivering* – the cement is stored in silos and shipped in bulk.⁴¹ Some of the cement it is packed in 20kg to 40kg bags for clients who only need a small quantity of cement.⁴²

In both the brickmaking process and the cement manufacture process, expensive capital machinery such as excavators, dump trucks crawler tractors, and wheel loaders are used during the extraction phase. In this regard, the purpose of this dissertation is to determine whether these capital assets should in principle qualify for the 100% capital expenditure allowance. To achieve this purpose, this study will attempt to delineate the scope of the 100% capital expenditure allowance by analysing the meaning of the term “mining operations” for income tax purposes. Specifically, it will be considered whether (or when) the extraction of clay for brickmaking and limestone for the manufacture of cement will constitute “mining operations”. Should this question be answered in the affirmative, the above-mentioned capital assets should in principle qualify for the 100% capital expenditure allowance (assuming the other requirements are met).

1.2 Research question and scope

The main research question is whether the extraction of clay for brickmaking and limestone for cement manufacture constitute “mining operations” as defined in the ITA.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid.

Under the umbrella of the main research question, are the following ancillary questions:

- Whether the term “mining operations” should be given a wide or narrow interpretation.
- Whether “clay” and “limestone” are “minerals” for purposes of the ITA.

This analysis is limited to determining the meaning of “mining operations” for income tax purposes and references to legislation other than the ITA are merely for comparative purposes. The focus of this study is further limited to phase 1 of the brickmaking and cement manufacture process, and therefore, will not consider the difference between mining and manufacturing, including the question of where the mining operation ends and the manufacturing process begins.

1.3 Research method

In addressing the research question a doctrinal investigative method will be used. According to McKerchar, doctrinal research can be described as “the traditional or ‘black letter law’ approach and is typified by the systematic process of identifying, analysing, organising and synthesising statutes, judicial decisions and commentary.”⁴³

Applying the doctrinal investigative method, primary sources such as the ITA and SA case law dealing with the meaning of “mining operations” will be analysed and interpreted. Regard will further be had to secondary sources such as the principles of statutory interpretation, the ordinary dictionary meanings of these terms, other SA legislation that contain the aforementioned terms, SARS’ interpretation of these terms as evidenced in the draft IN, Australian legislation and case law where the meaning of these terms have been considered, and publications by SA and Australian researchers.

⁴³ M. McKerchar, "Philosophical Paradigms, Inquiry Strategies and Knowledge Claims: Applying the Principles of Research Design and Conduct to Taxation," *eJournal of Tax Research* 6 (1) (2008).

Comprehensive searches for primary and secondary sources were done on the LexisNexis Electronic Library database, SAePublications, Netlaw, Heinonline and Westlaw. Internet searches were also done for industry related knowledge. As all primary and secondary sources used contain information available in the public domain, no ethical considerations are necessary.

1.4 Chapter Overview

Chapter 2 provides a brief overview of the principles applicable to the interpretation of legislation, including a brief exposition of the Savignian interpretation model. The purpose of Chapter 2 is to outline the theories and methods which are used to determine the intention of the legislature with regard to specific legislative provisions, such as the ITA's definition of "mining operations" in section 1(1), and the capital expenditure allowance provisions contained in sections 15(a) and 36 of the ITA.

Chapter 3 analyses the meaning attached to "mining operations" by SARS, in SA case law and by SA academic researchers.

Against the justification for the use of foreign jurisprudence in statutory interpretation outlined in Chapter 2, Chapter 4 considers the development of legal jurisprudence in Australia relating to the meaning of "mining operations" and "mineral". Specific consideration is given to the meaning attached to these terms by the Australian Tax Tribunal ("the ATT") and Australian courts in the context of the Australian Customs Act, No. 6 of 1901 ("the Customs Act"). This could be meaningful as, the definition of "mining operations" in the Customs Act is similar to the definition of "mining operations" in the ITA.

Chapter 5 applies the Savignian interpretation model set out in Chapter 2. Under the Savignian analysis the approach adopted in Australia to interpret the meaning of "mining operations" is compared to SA's approach in order to determine whether clay used in brickmaking and limestone used in manufacturing cement are "minerals" for SA income tax

purposes. After such comparison, Chapter 5 concludes on whether guidance can be sought by SA from Australian jurisprudence when interpreting the meaning of the term “mining operations” for income tax purposes. Finally, Chapter 5 answers the research question and concludes whether the extraction of clay for brickmaking and limestone for the manufacture of cement in principle constitute “mining operations” for purposes of the ITA.

CHAPTER 2: PRINCIPLES OF STATUTORY INTERPRETATION

2.1 Introduction

The process of statutory interpretation involves the application of the body of rules used to determine and justify the meaning of a statute or statutory provision.⁴⁴ The “body of rules” referred to are rules and presumptions with their origin in the common law, the Interpretation Act, No. 33 of 1957 and in the Constitution of the Republic of South Africa, 1996 (“the Constitution”). Du Plessis gives the following explanation of statutory interpretation:

Statutory (and constitutional) interpretation is about construing enacted law-texts with reference to and reliance on other law-texts, concretising the text to be construed so as to cater for the exigencies of an actual or hypothesised concrete situation⁴⁵

According to Dickerson, the process of statutory interpretation is two-fold: Firstly, it involves the determination of the meaning of the text, and secondly, it involves the application of said meaning to an actual situation.⁴⁶ Although the process of statutory interpretation is a technical exercise, it is not mechanical, “but also involves a psychological and imaginative procedure using value judgements”.⁴⁷

The need for statutory interpretation arises due to the uncertainty of the meaning of legislative provisions. This is because “the written and spoken word are imperfect renderings of human thought, and in the case of legislation.... courts are obliged to use specific rules of interpretation to construe the meaning legislation.”⁴⁸

⁴⁴ J. De Ville, “Meaning and Statutory Interpretation” *THRHR* 62 (1999): 374.

⁴⁵ L.M. Du Plessis, *Re-interpretation of Statutes* (Butterworths, 2002). Du Plessis, L.M., *Re-Interpretation of Statutes* (Butterworths: 2002) 18.

⁴⁶ F.R. Dickerson, *The interpretation and application of statutes* (Little, Brown, 1975), 21-22.

⁴⁷ G.E. Devenish, *The Interpretation of Statutes* (Juta, Limited, 1992), 2.

⁴⁸ C.J. Botha, *Statutory Interpretation: An Introduction for Students* (Juta, 2005), 2.

What is clear is that the uncertainty is the result of language's inability to effectively and clearly convey the intention of the legislature.⁴⁹ This was acknowledged by Schreiner JA in *Savage v CIR* ("the Savage case")⁵⁰ where he said that "...what seems to be a clear meaning to one man may not seem clear to another."⁵¹

Due to the impact fiscal statutes have on taxpayers, any uncertainty with regard to tax will involve the interpretation of a statute, as all taxes are levied in terms of statute law.⁵² Statutory interpretation is especially relevant to determine the meaning of terms defined in legislation, as the meaning of these terms determine the parameters of the legislation.⁵³

A question that arises when interpreting fiscal legislation (as opposed to other legislation) is whether fiscal legislation is subject to special rules of interpretation? At first glance it may seem that this would be the case, however, Emslie is of the view that this perception is merely the result of the application of the general principles of statutory interpretation.⁵⁴ This view is confirmed in the *Pension Fund case* where the court does not draw any distinction between fiscal legislation and other legislation, or even between legislation and contracts:

Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence.⁵⁵ (Own emphasis.)

⁴⁹ E.A. Kellaway, *Principles of legal interpretation of statutes, contracts and wills* (Butterworths, 1995), 3.

⁵⁰ *Savage v Commissioner for Inland Revenue*, 4 South African Law Reports 400 (1951).

⁵¹ *Ibid.*, 410 F-G.

⁵² J. Tiley et al., *Comparative Perspectives on Revenue Law: Essays in Honour of John Tiley* (Cambridge University Press, 2008), 8. P.A. Swanepoel, "An Analysis of the Purposive Approach to the Interpretation of South African Fiscal Legislation" (University of Pretoria, 2012), 10.

⁵³ P.J. Badenhorst, "Mineral and Petroleum Resources Development Act 28 of 2002 : a geologist as devil's advocate for a change?," *Obiter* 29, no. 1 (2008): 35.

⁵⁴ T. Emslie, D. Davis, and S.J. Hutton, *Income Tax Cases and Materials* (Taxpayer CC, 1994), 17.

⁵⁵ *Natal Joint Municipal Pension Fund v Endumeni Municipality*, 4 South African Law Reports 593, para 18 (2012).

There are many different theories of statutory interpretation.⁵⁶ These theories are sometimes conflicting and sometimes complementary, but to an extent all these theories have overlapping principles.⁵⁷ Cowen points out that these theories are differentiated by their views on the intention of the legislature, the role of language in determining the meaning of words, the function of the judiciary in interpreting statutes and the time-frame in which legislation operates.⁵⁸

This chapter will consider three main theories of the interpretation of statutes (including fiscal legislation) in SA: the literal approach, purposive approach and the teleological approach. All three theories acknowledge the importance of the legislature's intention. The literal approach construes the legislator's intention from the words used. Consider for example, the dictum of Kotze J in *R v Kirk*⁵⁹:

We can only arrive at the intention of the legislature by construing the actual words used. We cannot insert words or assume intention.⁶⁰

In comparison, the purposive approach refers to intention in the broad sense. The intention of the legislature is established by determining the purpose of the legislation. For example, in *Stellenbosch Farmers' Wineries v Distillers Corporation (SA) Ltd*⁶¹ Van Blerk JA said:

om agter die betekenis van die woorde te kom, moet vasgestel word wat die doel was wat die wetgewer voor oë gehad het, en wat die rede vir die aanname van die artikel was" (To determine the meaning of words, the purpose of the legislator and the reason behind the introduction of the provision must be established; my translation).⁶²

The teleological approach goes even further than the purposive approach. In terms of the teleological approach the legislator's intention is determined with regard to the purpose of

⁵⁶ R. Sullivan and E.A. Driedger, *Driedger on the Construction of Statutes* (Butterworths, 1994), 252.

⁵⁷ G.E. Devenish, "Teleological evaluation: a theory and modus operandi of statutory interpretation in South Africa," *SAPL* 62 (1991): 62.

⁵⁸ D.V. Cowen, "Prolegomenon to a Restatement of the Principles of Statutory Interpretation " *TSAR* (1976): 150.

⁵⁹ *R v Kirk*, 564 (1914).

⁶⁰ *Ibid.*, 567.

⁶¹ *Stellenbosch Farmers' Wineries v Distillers Corporation (SA) Ltd*, South African Law Reports 458 (1962).

⁶² *Ibid.*, 473F.

the legislation read in the context of the values purported in the Bill of Rights. A classic example is found in *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd*⁶³ where Moseneke DCJ said the following:

It is by now trite that not only the empowering provision of the Constitution but also of the Restitution Act must be understood purposively because it is remedial legislation umbilically linked to the Constitution. Therefore, in construing “as a result of past racially discriminatory laws or practices” in its setting of section 2(1) of the Restitution Act, we are obliged to scrutinise its purpose. As we do so, we must seek to promote the spirit, purport and objects of the Bill of Rights. We must prefer a generous construction over a merely textual or legalistic one in order to afford claimants the fullest possible protection of their constitutional guarantees. In searching for the purpose, it is legitimate to seek to identify the mischief sought to be remedied. In part, that is why it is helpful, where appropriate, to pay due attention to the social and historical background of the legislation. We must understand the provision within the context of the grid, if any, of related provisions and of the statute as a whole including its underlying values. Although the text is often the starting point of any statutory construction, the meaning it bears must pay due regard to context. This is so even when the ordinary meaning of the provision to be construed is clear and unambiguous.⁶⁴ (Own emphasis.)

This chapter will conclude with an examination of Du Plessis version of Savigny’s method of statutory interpretation – a method of interpretation combining the literal, purposive and teleological approaches to statutory interpretation.

2.2 Literal approach

A classic formulation of the literal approach is found in the following passage by Innes J in *Venter v Rex*:⁶⁵

By far the most important rule to guide courts in arriving at [the legislature’s] intention is to take the language of the instrument, or of the relevant portion of the instrument, as a whole; and, when the words are clear and unambiguous, to place upon them their grammatical construction and to give them their ordinary effect.⁶⁶

⁶³ *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd*, 6 South African Law Reports, para 53 (2007).

⁶⁴ *Ibid.*, 53.

⁶⁵ *Venter v R*, 910 (1907).

⁶⁶ *Ibid.*, 913.

The primary rule of interpretation equates the intention of the legislator with the ordinary meaning of the statutory provision.⁶⁷ The ordinary grammatical meaning of words is found in dictionaries.⁶⁸ Dictionaries give various alternative definitions for words, however, it is accepted that the first definition is the meaning most commonly used.⁶⁹

The primary rule of interpretation may only be departed from in the following two situations:

1. Where the application thereof would “lead to an absurdity so glaring that it could never have been contemplated by the legislature”,⁷⁰ or “lead to a result which is “unjust, unreasonable, inconsistent with other provisions, or repugnant to the general object, tenor or policy of the case”.⁷¹ In such a case, the “golden rule”⁷² is invoked to modify the language; or
2. Where the language is ambiguous, where if so, the mischief rule is invoked. This rule envisages a consideration of the purpose of the legislature in enacting the legislation and the words are read in light of the apparent purpose of the legislation.⁷³

The language may be modified as follows in terms of the golden rule: If the “plain” meaning of the statutory provision would lead to an absurdity as described above, the interpreter may have regard to the so-called “secondary-aids”.⁷⁴ For example, the long title of a statute, headings of chapters and sections, the text in the other official language, etc.⁷⁵

⁶⁷ *Principal Immigration Officer v Hawabu*, 26, 31 (1936).

⁶⁸ Devenish, "Teleological evaluation: a theory and modus operandi of statutory interpretation in South Africa," 63.

⁶⁹ Ibid.

⁷⁰ *Venter v R*, 914.

⁷¹ *Volschenck v Volschenk*, 486, 488 (1946).

⁷² *Venter v R*, 914.

⁷³ "Teleological evaluation: a theory and modus operandi of statutory interpretation in South Africa," 65.

⁷⁴ Botha, 91. See also J.C. Bekker, C. Rautenbach, and N.M.I Goolam, *Politics, Socio-Economic Issues and Culture in Constitutional Adjudication* (Potchefstroom: Platinum Press, 2004), 24.

⁷⁵ Botha, 91.

Should the secondary aids prove insufficient to establish the intention of the legislator, the interpreter may resort to so-called “tertiary-aids” i.e. the common law presumptions.⁷⁶

The mischief rule was adopted in *Heydon's case*,⁷⁷ where Lord Coke posed four questions to assist in the determination of the meaning of a text:⁷⁸

- What was the legal position before the relevant Act was introduced?⁷⁹
- Against what mischief or defect in the legal position before the Act, is the Act directed?⁸⁰
- How does the Act address the mischief or defect?⁸¹
- What is the real reason for the remedy provided for in the Act?⁸²

The literal approach, also known as the “orthodox approach” to statutory interpretation, was adopted in SA law in 1875 by De Villiers, CJ in *De Villiers v Cape Divisional Council*.⁸³ The literal approach has its origins in English law and not Roman-Dutch law (on which our common law is based). SA courts traditionally favoured the literal approach to statutory interpretation when interpreting fiscal legislation.⁸⁴ For example, in *Cape Brandy Syndicate v Inland Revenue Commissioner*⁸⁵ Rowlatt J made the following remarks:

In a taxing Act one has to look merely at what is clearly said. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing to be implied. One can only look fairly at the language used.⁸⁶

⁷⁶ Ibid.

⁷⁷ *Heydon's Case*, J36 Exchequer Reports, para 2-3 (1584).

⁷⁸ Ibid., para 2.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Ibid., para 3.

⁸³ *De Villiers v Cape Divisional Council*, Buchanan's Reports 50 (1875).

⁸⁴ J. Silke, "The Interpretation of Fiscal Legislation- Canons of Construction, Recent Judicial Comments and New Approaches," *AJ* (1995): 124.

⁸⁵ *Cape Brandy Syndicate v Inland Revenue Commissioner*, Law Reports, King's Bench 64 (1921).

⁸⁶ Ibid., 71.

Justification for the literal approach was found in the maxims, *judicis st ius dicere sed non dare*, meaning the court must state the law, not make it,⁸⁷ and *casa ommisus*, meaning only the legislature may supply an omission in a law.⁸⁸

The literal approach has several shortcomings. Firstly, it is based on the assumption that words have a fixed ordinary meaning separate from their context.⁸⁹ This assumption is easily disproved. The dictionary meaning of a term is usually taken as its ordinary meaning. However, dictionaries acknowledge that language has no intrinsic meaning and that the meaning of text is interdependent on context. Therefore, dictionaries contain alternative meanings of terms depending on the context in which the term is used.

Secondly, the literal approach is inherently subjective.⁹⁰ The legislator's intention is directly determined by the court's own understanding of the clarity of the legislative provisions.⁹¹ This is based on the flawed premise that the majority of legislative provisions are clear and only capable of one interpretation.⁹² As pointed out by Shreiner JA in the *Savage case*,⁹³ "...The 'literal' meaning is not something revealed to judges by a sort of authentic dictionary; it is only what individual judges think is the literal meaning".⁹⁴

Thirdly, valuable internal and external aids of interpretation and common law presumptions are treated as a measure of "last resort"⁹⁵ and only invoked where there is an obvious absurdity.⁹⁶ Thus Driedger is of the view that for the golden rule to be invoked, the absurdity must be obvious. However, as pointed out by De Villers JA in *Shenker v The*

⁸⁷ *Harris v Law Society of Cape of Good Hope*, 449, 451 (1917).

⁸⁸ *Ex Parte Slater, Walker Securities (SA) Ltd*, 4 South African Law Reports (1974). Botha, 95.

⁸⁹ Botha, 95.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ *Savage v Commissioner for Inland Revenue*. 1951 4 SA 400 (A).

⁹⁴ *Ibid.*, 410.

⁹⁵ Botha, 94.

⁹⁶ Sullivan and Driedger, 5.

*Master*⁹⁷ this is problematic as “what seems an absurdity to one man does not seem absurd to another.”⁹⁸ Furthermore our courts are reluctant to find that an absurdity exists and therefore require that the absurdity must be “utterly glaring”. However, as Cowen points out the distinction between an absurdity and an absurdity which is “utterly glaring” is inherently arbitrary.⁹⁹

Lastly, the role of the judiciary is stripped to mere enforcement of enacted law. Little room is left for judges to give effect to the intention of the legislature where the intention is not reflected in the letter of the law.¹⁰⁰

In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*,¹⁰¹ the Constitutional Court gave the pure literal approach its final blow by holding that the literal approach is no longer appropriate for two reasons: Firstly, section 39(2) of the Constitution requires an interpretation that advances the values crystallised in the Bill of rights, and secondly, a linguistic turn has taken place and regard must be shown to the context in which words appear.¹⁰²

2.3 Purposive approach

In terms of the purposive approach, the predominate factor in interpretation, is to give effect to the purpose of the legislature in enacting legislation, with reference to the words the legislature chose to use.¹⁰³ The purpose of the legislation should be determined with reference to the context in which the legislation was enacted.¹⁰⁴ In considering the context in which the

⁹⁷ *Shenker v The Master*, 136 (1946).

⁹⁸ *Ibid.*, 143.

⁹⁹ Cowen, 65.

¹⁰⁰ Botha, 95.

¹⁰¹ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*, 4 South African Law Reports 490 (2004).

¹⁰² *Ibid.*, para 86-92.

¹⁰³ *Glen Anil Development Corporation Ltd v Secretary for Inland Revenue* 4 South African Law Reports 715, 727G-H (1975).

¹⁰⁴ *Standard General Insurance Co Ltd v Commissioner for Customs and Excise* 2 South African Law Reports 166, 25 (2005). Botha, 97.

legislation was enacted, specific regard should be had to the social and political policy considerations underlying the enactment of the legislation.¹⁰⁵

As put by Devenish, the purposive approach acknowledges that the concept of the “intention of the legislature” is fiction, and looks further than the manifested intention to the very real purpose of legislation.¹⁰⁶ As acknowledged by Cowen it is well known that legislation is always enacted with a purpose.¹⁰⁷ Nugent and Lewis JJA, explain the purposive approach in *Standard General Insurance Co Ltd v Commissioner for Customs and Excise*¹⁰⁸ as follows:

Rather than attempting to draw inferences as to the drafter’s intention from an uncertain premise we have found greater assistance in reaching our conclusion from considering the extent to which the meaning that is given to the words achieves or defeats the apparent scope and purpose of the legislation...word must take its colour, like a chameleon, from its setting and surrounds in the Act.¹⁰⁹

The purposive approach is in line with South African Roman-Dutch law heritage. Roman-Dutch law jurists traditionally favoured a purposive approach to a literal approach when interpreting legislation. However, the purposive approach is not unproblematic. As Stinger points out:

[t]he purpose or reason for an act, may itself be the subject of controversy no less difficult to resolve than the ultimate question of intent or meaning.¹¹⁰

Mureinik further points out that where the purpose of a statute is iniquitous, a purposive interpretation may promote an iniquitous result.¹¹¹ The purposive approach, which although superior to the literal approach “fails to aspire to a higher coherence”.¹¹²

¹⁰⁵ Botha, 97.

¹⁰⁶ Devenish, "Teleological evaluation: a theory and modus operandi of statutory interpretation in South Africa," 70.

¹⁰⁷ Cowen, 160.

¹⁰⁸ *Standard General Insurance Co Ltd v Commissioner for Customs and Excise*

¹⁰⁹ Ibid., para 101.

¹¹⁰ C.D. Sands and N.J. Singer, *Sutherland Statutory Construction*, vol. 2A (Callaghan & Company, 1972), 40.

2.4 Teleological approach

Although the importance of context in interpreting legislation was recognised by SA academics before the advent of 1994, it was not until the introduction of the new constitutional order that courts applied a less formalistic purposive approach i.e. teleological approach. The teleological approach recognises the importance of an equitable interpretation when considering the purpose of legislation.

The Constitution mandates an approach to the interpretation of legislation that takes cognisance of constitutional values. Section 39(2) of the Constitution requires courts, tribunals or forums to promote the spirit purport, and objects of the Bill of Rights when “when interpreting any legislation, and when developing the common law or customary law.”¹¹³ The Constitution therefore necessitated the addition of an equitable element to the purposive approach, essentially transforming the purposive approach into a teleological theory.

According to Devenish a teleological approach has an ethical dimension and must be applied and construed wider than the purposive approach.¹¹⁴ He refers to the following words of Lord Denning to describe a teleological approach:

[w]henever there is a choice, choose the meaning which accords with reason and justice.¹¹⁵

The teleological approach is not unlimited. As Driedger points out:

[w]here the language of the legislature admits but one interpretation effect must be given to it whatever its consequences.¹¹⁶

¹¹¹ E. Mureinik, "Administrative Law in South Africa " *SALJ* 103 (1986): 624.

¹¹² Devenish, "Teleological evaluation: a theory and modus operandi of statutory interpretation in South Africa," 77.

¹¹³ Section 39(2) of the "Constitution of the Republic of South Africa," (1996).

¹¹⁴ "Teleological evaluation: a theory and modus operandi of statutory interpretation in South Africa," 77.

¹¹⁵ Lord Denning the discipline of Law 1979 22.

¹¹⁶ Sullivan and Driedger, 30.

However, this statement should be qualified in light of the new constitutional order by adding the caveat, “provided the interpretation is not inconsistent with the Constitution and the Bill of Rights.”

In applying the teleological approach, there is a risk that the actual language used in the legislative provision might be completely disregarded in order to further the purpose of the legislation. Such a complete disregard for the purpose of legislative text by the judiciary would infringe on the legislator’s law making powers.¹¹⁷ Where the legislative text is not in furtherance of the purpose of the legislation or the values enunciated in the Bill of Rights, the correct avenue would be for the courts to declare the provision unconstitutional in terms of section 172 of the Constitution.¹¹⁸ Furthermore, an infidelity to the legislative text actually used by the legislator would result in legal uncertainty.¹¹⁹

2.5 Savignian’s model – from Du Plessis’ perspective

The Savignian model was developed by Von Savigny to provide guidelines to interpreting pandectarian Roman law.¹²⁰ Although developed in 1840, the model takes into account the literal, purposive and teleological aspects of statutory interpretation. A slightly adapted Savignian model, comprising of five complementary, interrelated (and mostly overlapping) and practical techniques, is advocated by Du Plessis as a method of statutory interpretation in SA. These five techniques are elaborated on below.

¹¹⁷ The Doctrine of the Separation of Powers (“the doctrine”) is not explicitly acknowledged in the Constitution. It is, however, accepted that the doctrine is implicit in our Constitution’s design. Chaskalson P stated the following in *South African Association of Personal Injury Lawyers v Heath*, 1 Butterworths Constitutional Law Reports 77, para 22 (2001): “In the first certification judgment this Court held that the provisions of our Constitution are structured in a way that makes provision for a separation of powers. ... There can be no doubt that our Constitution provides for such a separation (of powers), and that laws inconsistent with what the Constitution requires in that regard are invalid”.

¹¹⁸ *Fourie and Another v Minister of Home Affairs and Another* 1 All South African Law Reports 273, para 31 (2005).

¹¹⁹ *Daniels v Campbell*, 7 Butterworths Constitutional Law Reports 735, para 83 (2004).

¹²⁰ See F.C. Von Savigny, *System Des Heutigen Romischen Rechts* (Gale, Making Of Modern Law, 2013), 206-62.

2.5.1 Grammatical technique

This technique recognises the importance of the language used in a provision and focusses on the ordinary rules of grammar and syntax in the interpretation of a provision.¹²¹ The technique recognises the principle that every word is important and that courts should give effect to every word, unless the court is of the opinion that the word is superfluous in light of the purpose of the legislation.¹²² Another important principle embedded in the technique is that word may not be added to or subtracted from legislative text.¹²³ This rule is based on the separation of powers principle which determines that it is the legislator's function to add or subtract words from the text and not the courts.¹²⁴ However, this rule is again subject to the caveat that where the purpose of the legislation is clear and demands an addition or subtraction from the text, courts may add or subtract to ensure that the legislative text is in line with the legislator's purpose.¹²⁵ Therefore, according to Botha this technique does not symbolise a return to literalism, but merely takes note of the importance of the language used in legislation.¹²⁶

The technique helps to limit the different meanings which could be attached to a provision by, for example, assuming that legislation is written in "ordinary language" and that technical language should be given a technical meaning.¹²⁷

To contrast ordinary language, Du Plessis refers to formal language which he described as "artificial language".¹²⁸ An example would be, the International Accounting

¹²¹ See *Association of Amusement and Novelty Machine Operators v Minister of Justice and Another* 2 South African Law Reports 636, 660F-G (1980). In this case it was confirmed that "ordinary meaning" means colloquial language.

¹²² *Keyter v Minister of Agriculture* Natal Law Reports 522 (1908). *Secretary for Inland Revenue v Somers* 2 South African Law Reports 138 (1968).

¹²³ Botha, 113.

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ Ibid., 108.

¹²⁷ L.M. Du Plessis, "The (re-)systemization of the Canons of and Aids to Statutory Interpretation," *SALJ* 122 (2005): 602. Also see *Kommissaris van Doene en Aksyns v Mincer Motors* 1 South African Law Reports 114 (1959).

Standards. It is created for the exclusive use of accountants and auditors and its meaning is closed. He further explains that legal language (in contrast to artificial language) is natural language, the meaning of which is constantly developing and expanding.¹²⁹

A question that arises is at what time should the ordinary meaning of words in existing legislation be determined? A strict approach was followed in *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein*¹³⁰ where the court held that words should be interpreted according to their meaning on the day the legislation was enacted. This decision, decided before the Constitution, was confirmed in 1999, after the advent of South Africa's Constitutional Order in *Minister of Water Affairs and Forestry v Swissborough Diamond Mines (Pty) Ltd*.¹³¹ Botha opines that our courts may be less rigid in the future.¹³² He refers to *Golden China TV Game Centre v Nintendo Co Ltd*¹³³ and the minority judgement in *Fourie v Minister of Home Affairs*,¹³⁴ where both courts decided that legislation should be given an updated interpretation in light of the fact that the legislation operates in a continuing time-frame.¹³⁵

2.5.2 Contextual technique

This technique can be divided into two dimensions: the intra-textual dimension and the extra-textual dimension. In terms of the intra-textual dimension, the meaning of a provision should be considered in the context in which the specific legislative provision appears, as well as in terms of the legislative scheme as a whole.¹³⁶ This allows courts to

¹²⁸ "The (re-)systemization of the Canons of and Aids to Statutory Interpretation," 602.

¹²⁹ Ibid.

¹³⁰ *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein*, 4 South African Law Reports 773 (1985).

¹³¹ *Minister of Water Affairs and Forestry v Swissborough Diamond Mines (Pty) Ltd*, 2 South African Law Reports 345 (1999).

¹³² Botha, 114.

¹³³ *Golden China TV Game Centre v Nintendo Co Ltd*, 1 South African Law Reports 405 (1997).

¹³⁴ *Fourie and Another v Minister of Home Affairs and Another*

¹³⁵ Botha, 114.

¹³⁶ Du Plessis, "The (re-)systemization of the Canons of and Aids to Statutory Interpretation," 604.604. See *Nasionale Vervoerkommissie van Suid-Afrika v Salz Gassow Transport (Edms) Bpk* 4 South African Law

consider the long title, pre-amble, headings, definition clauses, schedules etc. of legislation during the interpretation process.¹³⁷

The extra-textual dimension, refers to the “environment” in which the legislative provision is framed.¹³⁸ It refers to the social, political and economic context.¹³⁹ This allows a court to consider the Constitution, the Interpretation Act, the common law presumptions and canons of construction, etc.

2.5.3 *Value technique*

This technique recognises the importance of the Constitution is statutory interpretation and is an embodiment of section 39(2) of the Constitution. It provides that the purpose of legislation should be established against the background of the Constitution’s values. This technique is essentially a manifestation of the teleological approach to interpretation and is best described by Sachs J in *Coetzee v Government of the Republic of South Africa; Matiso v Commanding Officer, Port Elizabeth Prison*:¹⁴⁰

In my view, faithfulness to the Constitution is best achieved by locating the two-stage balancing process within a holistic, value-based and case-oriented framework. The values that must suffuse the whole process are derived from the concept of an open and democratic society based on freedom and equality, several times referred to in the Constitution. The notion of an open and democratic society is thus not merely aspirational or decorative, it is normative, furnishing the matrix of ideals within which we work, the source from which we derive the principle and rules we apply, and the final measure we use for testing the legitimacy of impugned norms and conduct. If I may be forgiven the excursion, it seems to me that it also follows from the principles laid down in *Makwanyane* that we should not engage in purely formal or academic analyses, nor simply restrict ourselves to ad hoc technicism, but rather focus on what

Reports (1983). In that case the court confirmed that, when a court interprets a specific legislative provision, the legislation should be considered in its entirety.

¹³⁷ "The (re-)systemization of the Canons of and Aids to Statutory Interpretation," 604.

¹³⁸ Ibid.

¹³⁹ Botha, 108.

¹⁴⁰ *Coetzee v Government of the Republic of South Africa; Matiso v Commanding Officer, Port Elizabeth Prison*, 4 South African Law Reports 631 (1995).

has been called the synergetic relation between the value underlying the guarantees of fundamental rights and the circumstances of the particular case.¹⁴¹ (Own emphasis, footnotes omitted).

The technique links with the historical technique, because as Du Plessis states, the technique allows the court to look to the present and the future when interpreting legislation, but with an awareness of the lessons learnt from the past.¹⁴²

2.5.4 Historical technique

The historical technique takes into account the factors which gave rise to the enactment of the legislation, as well as prior legislation. According to Du Plessis, this does not amount to a consideration of “historical facts”, but rather a consideration of the mischief toward which the legislation is aimed.¹⁴³ Although an important factor, Botha stresses that the historical perspective cannot be decisive on its own. This is because legislation is designed to operate indefinitely and therefore “should be interpreted in the continuing time-frame”.¹⁴⁴

2.5.5 Comparative technique

This technique was not included by Von Savigny himself, but rather was added to the four techniques over time.¹⁴⁵ This technique acknowledges that as an aid to interpretation, courts must consider international law and may turn to foreign law, when interpreting legislation. However, this does not mean that our courts are bound by the international law or foreign law they consider. As Chaskalson P said in *S v Makwanyane*¹⁴⁶:

we can derive assistance from public international law and foreign case law, but we are in no way bound to follow it.¹⁴⁷

¹⁴¹ *Ibid.*, para 46.

¹⁴² Du Plessis, "The (re-)systemization of the Canons of and Aids to Statutory Interpretation," 608.

¹⁴³ *Ibid.*, 610.

¹⁴⁴ Cowen, 156.

¹⁴⁵ Du Plessis, "The (re-)systemization of the Canons of and Aids to Statutory Interpretation," 611.

¹⁴⁶ *S v Makwanyane*, 6 South African Criminal Law Reports 1 (1995).

¹⁴⁷ *Ibid.*, para 39.

2.6 Conclusion

Wallis JA set out the current state of the law regarding the interpretation of statutes in *Natal Joint Municipal Pension Fund v Endumeni Municipality*¹⁴⁸. These principles are as follows:

- As a starting point, when interpreting documents (including fiscal legislation), the meaning of words should be determined with reference to the language actually used.¹⁴⁹
- Consideration should be given to the ordinary grammatical meaning of the words used as well as the rules of syntax.¹⁵⁰
- The language used should be considered in the context in which a provision appears.
- The apparent purpose of the provision should be established and taken into account when interpreting documents.¹⁵¹
- If a word or provision is capable of more than one meaning, each meaning should be weighed in light of the above factors.¹⁵²
- The process is objective and not subjective.¹⁵³
- Judges must give effect to the sensible meaning as opposed to an insensible and unbusiness-like meaning.¹⁵⁴
- However, where the sensible and business-like meaning is not compatible with the language actually used, judges must refrain from substituting the words actually used with what they regard to be sensible and business-like.¹⁵⁵

The principles enunciated by Wallis JA is similar to the techniques of the augmented Savigny model. However, Wallis JA did not emphasise that any interpretation must promote

¹⁴⁸ *Natal Joint Municipal Pension Fund v Endumeni Municipality*, para 18.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

the spirit, purport and objects of the Bill of Rights, therefore did not incorporate the value technique of the Savigny interpretation model. This is unfortunate, as the Savigny interpretation model provides a useful, systematic approach to the interpretation of statutes which takes cognisance of SA's constitutional values. It combines the literal approach, purposive approach and teleological approach to facilitate a holistic and comprehensive process of statutory interpretation.

After a consideration of the current interpretation afforded in SA and Australia to the term "mining operations", this study will apply the Savignian interpretation model to interpret the meaning of "mining operations" for SA income tax purposes.

CHAPTER 3: THE MEANING OF “MINING OPERATIONS” AND “MINERAL” IN AN SA TAX LAW CONTEXT

3.1 Introduction

Section 1(1) of the ITA defines the term “mining operations” as follows:

“mining operations and mining” include every method or process by which any mineral is won from the soil or from any substance or constituent thereof. (Own emphasis.)

From the outset it is clear that the definition of “mining operations” is framed in very general terms. This is evident from the use of words such as “include”, “every” and “any”. At first glance, this would seem to suggest that a wide interpretation of “mining operations” should be followed. However, the interpreting the definition of “mining operations” is complicated by the central position held by the undefined term “mineral”. As will be elaborated on below, not only is the term “mineral” undefined, there is also no general accepted meaning of the term. This has resulted in differing interpretations, both broad and narrow, of the definition of “mining operations”.

This chapter will analyse the elements of the definition highlighted in the definition above in order to determine the interpretation to be given to the definition of “mining operations”. This chapter will further consider the narrow interpretation held by SARS and a wider view expressed in case law and by academic writers. Finally, this chapter concludes with a brief analysis of recent case law concerning the meaning of “mining operations”.

3.2 “include”, “any” and “every”

The use of the word “include” in legislation has two possible purposes.¹⁵⁶ Firstly, it can be used to expand the ordinary meaning of a term.¹⁵⁷ This will normally be the case where the ordinary meaning of the term is well-known and the legislator wishes to indicate that the definition of the term for purposes of that legislation goes beyond that ordinary

¹⁵⁶ *R v Debele*, 4 South African Law Reports 570, 575B-75H (1956).

¹⁵⁷ *Ibid.*

meaning.¹⁵⁸ Secondly, it can be used to indicate that the definition of the term in the legislation is exhaustive.¹⁵⁹ In such a case, the word “includes” is used in place of the word “means” and it is accepted that the purpose is to make the ordinary meaning of the term clear and definite.¹⁶⁰

The context in which the word “includes” is used will determine whether the definition of the term is meant to be exhaustive or to expand the ordinary meaning of the term.¹⁶¹ However, as noted in *Jones & Co v CIR*,¹⁶² “‘includes’ as a general rule, is not a term of exhaustive definition...as a general rule...it is a term of extension”.¹⁶³

According to Innes JA in *Hayne & Co v Kaffrarian Steam Mill Co Ltd*¹⁶⁴ the ordinary meaning of “any” is that it “is an indefinite term which includes all of the things to which it relates.”¹⁶⁵ The word “any” has also been described as “a word of wide and unqualified generality”.¹⁶⁶

Depending on the context, the word “every” can be synonymous to the word “any”.¹⁶⁷ This is supported by the definition of “every” in the Dictionary of Legal Words and Phrases¹⁶⁸ which simply refers the reader back to every.¹⁶⁹ The Oxford Dictionary of English defines “every” as a “determiner used before a singular noun to refer to all the individual members of a set without exception”.¹⁷⁰

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

¹⁶⁰ Ibid.

¹⁶¹ *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division and Others*, 1 South African Law Reports 406, 17; 18 (2004).

¹⁶² *Jones & Co v CIR*, 1 (1926).

¹⁶³ Ibid., 5.

¹⁶⁴ *Hayne & Co v Kaffrarian Steam Mill Co Ltd*, 371 (1914).

¹⁶⁵ Ibid.

¹⁶⁶ *R v Hugo* 271 (1926).

¹⁶⁷ *Thompson v Kama; Stilwell v Kama*, 217 (1917).

¹⁶⁸ C.J. Claassen, "Dictionary of Legal Words and Phrases," (Durban: Butterworth & Co, 1976).

¹⁶⁹ Ibid., 33.

¹⁷⁰ "Oxford English Dictionary," 601.

3.3 Mineral

The Oxford Dictionary of English defines mineral as “a solid, naturally occurring inorganic substance; a substance obtained by mining”,¹⁷¹ whereas “mining” is defined as “the process of industry of obtaining coal or other minerals from a mine”.¹⁷²

The term “mineral” is not defined in the ITA and it is generally accepted that the term “mineral” has no fixed ordinary meaning. This is confirmed in the decision of *Falcon Investments Ltd v CD of Birnam (Suburban) (Pty) Ltd*,¹⁷³ where Rumpff JA quoted the following passage from Halsbury’s Laws of England with approval:

There is no general definition of the word ‘mineral’. The word is susceptible of expansion or limitation in meaning according to the intention with which it is used and the variety of meanings of which it admits is the source of all the difficulty in the attempts to frame any general definition.

It is a question of fact whether in a particular case a substance is a mineral or not, and for this purpose instruments between private persons are subject to the same rules of construction as statutes. Regard must be had not only to the words employed to describe the substance in question, but also to the relative position of the parties interested, and to the substance of the transaction or arrangement which the instrument or statute embodies.

The test of what is a mineral is what, at the date of the instrument in question, the word meant in the vernacular of the mining world, the commercial world, and among landowners, and in the case of conflict this meaning must prevail over a purely scientific meaning. There are, however, other circumstances to be taken into account. The intention with which the word is used may be inferred from the document itself or from consideration of the circumstances in which it was made.¹⁷⁴

The flexibility of the meaning of the term “mineral” and its central position in the definition of “mining operations, makes the definition of “mining operations” not very

¹⁷¹ Ibid., 1117.

¹⁷² Ibid.

¹⁷³ *Falcon Investments Ltd v CD of Birnam (Suburban) (Pty) Ltd and Others* 4SA 384 (1973).

¹⁷⁴ Ibid., 400.

helpful in determining the scope of the 100% capital expenditure allowance. This, coupled with the general nature of the words used in the definition (i.e. “includes”, “every” and “any”) has further increased uncertainty surrounding the meaning of the definition of “mining operations”. This uncertainty is the cause of the differing interpretations of the definition of “mining operations”.

3.4 A narrow view - SARS

SARS has adopted a narrow view which is set out in the draft IN. The draft IN has not been issued as final and the last due date for submissions was 30 April 2015.¹⁷⁵ The stated purpose of the draft IN is to provide guidance on whether the extraction of certain substances, including clay and limestone, constitute “mining operations” for income tax purposes.¹⁷⁶

In the draft IN, SARS refers to the historical purpose behind granting favourable tax concessions to the mining industry.¹⁷⁷ SARS emphasises that the concessions were made in light of the high risk and high initial capital expenditure involved in the mining industry and to encourage the recovery of minerals through mining operations.¹⁷⁸ Against this background, SARS follows a strict interpretation of the meaning of “mining operations” to ensure that the concessions are only available in respect of what it considers “actual” mining operations.¹⁷⁹

SARS relies on the following statement in *Western Platinum Ltd v CSARS*¹⁸⁰ to support its strict interpretation of “mining operations”:¹⁸¹

The fiscus favours miners and farmers. Miners are permitted to deduct certain categories of capital expenditure from income derived from mining operations. Farmers are permitted to deduct certain defined items of capital expenditure from income derived from farming operations. These are class privileges. In

¹⁷⁵ SARS, “Draft Documents for Public Comment,” <http://www.sars.gov.za/Legal/Preparation-of-Legislation/Pages/Draft-Documents-for-Public-Comment.aspx> (accessed 21 June, 2017).

¹⁷⁶ “Draft interpretation note on whether certain quarrying operations constitute mining operations,” 2.

¹⁷⁷ *Ibid.*, 2-3.

¹⁷⁸ *Ibid.*, 3.

¹⁷⁹ *Ibid.*

¹⁸⁰ *Western Platinum Limited v Commissioner for the South African Revenue Service*

¹⁸¹ “Draft interpretation note on whether certain quarrying operations constitute mining operations.”

determining their extent, one adopts a strict construction of the empowering legislation. That is the golden rule laid down in *Ernst v Commissioner for Inland Revenue* 1954 (1) SA 318 (A) at 323C-E and approved in *Commissioner for Inland Revenue v D & N Promotions (Pty) Ltd* 1995 (2) SA 296 (A) at 305A-B.¹⁸²

SARS separates the definition of “mining operations” into four elements i.e.:

- there must be a **method or process**;
- by which any **mineral**;
- is **won**;
- from the **soil** or from any **substance or constituent** thereof.¹⁸³

SARS takes a wide view on the meaning of “method” or “process” in the context of the definition of “mining operations”.¹⁸⁴ SARS is of the view that, as long as the operations are toward the recovery of a mineral, whether quarrying or not, the operations will constitute “mining operations”.¹⁸⁵ This view is supported by Van Blerk who argues that the general nature of words used in the definition of “mining operations” (i.e. “include”, “every” and “any”) make it irrelevant whether an operation constitutes quarrying (versus “mining”) or not.¹⁸⁶

The draft IN does not analyse the meaning of the element “won”. SARS interprets the term soil in the last element (i.e. “from the soil or from any substance or constituent thereof”) widely as meaning “earth”.¹⁸⁷ SARS refers to the following comments made by Van Blerk:¹⁸⁸

The use of the word *soil* in the definition of mining operations is rather puzzling if one considers that the general description of ‘soil’ is the relatively thin upper layer of earth in which plants grow. Very few mining activities take place in soil and the only logical conclusion is that the term was intended to have the same meaning as the word *earth* which is generally used in other

¹⁸² *Western Platinum Limited v Commissioner for the South African Revenue Service* para 1.

¹⁸³ "Draft interpretation note on whether certain quarrying operations constitute mining operations," 4.

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

¹⁸⁶ Van Blerk, 7-14.

¹⁸⁷ SARS, "Draft interpretation note on whether certain quarrying operations constitute mining operations," 11.

¹⁸⁸ *Ibid.*

definitions of the terms *mine* or *mining*, including the definition in the Sales Tax Act (see Appendix B).¹⁸⁹

“Constituent” is further interpreted to mean the waste removed through beneficiation in order to recover the mineral.¹⁹⁰

With regard to the element “mineral”, SARS undertakes a detailed analysis of the term due to its central position in the definition of “mining operations”. This study will focus on SARS’ interpretation of the mineral-element and not the other three elements identified above.

In analysing the meaning of “mineral” SARS acknowledges that, as there is no definition of “mineral” in the ITA, the word “mineral” should be given its ordinary meaning in the context of the subject matter in which it is used.¹⁹¹ SARS refers to the ordinary dictionary meaning, the definition in the Mineral Petroleum Resources Development Act, No. 28 of 2002 (“the MPRD Act”), case law and academic resources in an apparent attempt to support its narrow interpretation.¹⁹²

Although SARS refers to the ordinary dictionary meaning of “mineral” it does not attempt to use this as justification for a narrow interpretation. This is probably because the ordinary dictionary meaning of “mineral” is framed broadly. In this regard, it is submitted that, with reference to the definition of “mining operations”, the emphasis should lie on the second part of the dictionary definition i.e. a mineral is “a substance obtained through mining”.

Further reference is made to two academic resources which define “mineral” i.e. the Dictionary of Mineral technology and Will’s Mineral Processing Technology.¹⁹³ The common factor between the two definitions is that minerals are substances which are

¹⁸⁹ Van Blerk, 7-9.

¹⁹⁰ SARS, "Draft interpretation note on whether certain quarrying operations constitute mining operations," 2.

¹⁹¹ Ibid., 5.

¹⁹² Ibid.

¹⁹³ Ibid.

homogeneous in composition, while substances such as rock are comprised of a variety of minerals and are found in large parts of the earth's crust.¹⁹⁴ The Dictionary of Mineral Technology¹⁹⁵ distinguishes minerals from substances such as rock which may contain many minerals.¹⁹⁶ In return, Will's Mineral Processing Technology¹⁹⁷ excludes clay from the definition of mineral based on the view that they are rocks and contain various minerals.¹⁹⁸

In this regard it should be noted that although SA courts have in the past relied on evidence presented by geologists in determining the meaning of "mineral",¹⁹⁹ this is only to determine the scientific meaning of the term and the meaning attributed to "mineral" by our courts remains the decisive legal meaning.²⁰⁰

SARS further refers to the definition of "mineral" in section 1 to of the MPRD Act,²⁰¹ where "mineral" is defined to mean:

... any substance, whether in solid, liquid or gaseous form, occurring naturally in or on the earth or in or under water and which was formed by or subjected to a geological process, and includes sand, stone, rock, gravel, clay, soil and any mineral occurring in residue stockpiles or in residue deposits, but excludes—
 (a) water, other than water taken from land or sea for the extraction of any mineral from such water;
 (b) petroleum; or
 (c) peat. (Own emphasis.)

As seen from the definition above, clay is specifically included in the definition of "minerals". According to SARS the wide definition of "minerals" in the MPRD Act should be read in light of the legislative purpose of the MPRD Act compared to that of the ITA.²⁰² SARS states that the purpose of the MPRD Act is to provide fair access and promote the

¹⁹⁴ Ibid.

¹⁹⁵ E.J. Pryor, *Dictionary of Mineral Technology* (London: Mining Publications, 1963).

¹⁹⁶ Ibid.

¹⁹⁷ B.A. Wills, *Wills' Mineral Processing Technology: An Introduction to the Practical Aspects of Ore Treatment and Mineral Recovery* (Elsevier Science, 2011).

¹⁹⁸ Ibid.

¹⁹⁹ *Minister of Land Affairs v Rand Mines Ltd*, 4 South African Law Reports 303 (1998).

²⁰⁰ *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein*, 791F; 804D-07C-D.

²⁰¹ SARS, "Draft interpretation note on whether certain quarrying operations constitute mining operations," 6.

²⁰² Ibid.

sustainable development of SA's mineral resources, while the purpose of the ITA is to collect taxes.²⁰³ It is SARS' view that due to the differing legislative purposes behind the MPRD Act and the ITA, the definition of "minerals" in the MPRD Act cannot be used when interpreting the meaning of "mineral" for income tax purposes.²⁰⁴

Further reference is made to the *obiter* statement by Fletcher Moulton LJ in *Great Western Railway Company v Carpalla United China Clay Company, Limited* ("the Great Western Railway Case"):²⁰⁵

If I were rash enough to venture a definition of 'mineral' I should say that it is any substance that can be got from within the surface of the earth which possesses a value in use, apart from its mere possession of bulk and weight which makes it occupy so much of the earth's crust. ... To dig out ballast and crushed stone and earth, a mere mixture of heterogeneous portions of the earth's crust, for the purpose of making embankments, where the material goes from one position in the earth's crust to another without modification or being submitted to any process of manufacture, does not seem to me to be making use of minerals, although no doubt the things you are handling were originally within the earth's crust. Such materials have not a value in use apart from their bulk and weight, and they are only used as being capable of forming a portion of the earth's crust in a new position. On the other hand, everything that has an individual value in use appears to me to be fairly called a mineral.²⁰⁶

It should be emphasised that it was not necessary for Fletcher Moulton LJ to define "minerals", and he did not attempt to provide a conclusive definition of minerals. This is evident from the opening words of the paragraph above. Notwithstanding, this paragraph does provide a useful test to determine the meaning of "minerals", i.e. the "value in use versus bulk" test. In terms of the "value in use versus bulk" test materials which have an individual value as opposed to a value when used in bulk, are considered to be minerals.²⁰⁷

²⁰³ Ibid.

²⁰⁴ Ibid.

²⁰⁵ Ibid.

²⁰⁶ *Western Platinum Limited v Commissioner for the South African Revenue Service* 231.

²⁰⁷ Ibid., 218.

SARS is of the view that the “value in use versus bulk” test is only useful for the extraction of stone and sand which do not have an individual value.²⁰⁸ This view is due to SARS’ acknowledgement that clay and limestone do have individual value apart from their value in bulk.²⁰⁹ According to SARS the correct test for determining whether a substance extracted is a “mineral”, is whether the substance is extracted for its inherent mineralogical qualities as opposed to its physical properties.²¹⁰ In this regard, SARS is of the view that, where a taxpayer extracts a substance for the purpose of recovering its constituent minerals, the extraction will constitute “mining operations”.²¹¹

SARS is further of the view that there is no scope to argue that clay used in brickmaking or limestone for building, road making, landscaping, construction or agricultural purposes are “minerals”.²¹² This is based on SARS view that in such cases, the clay and limestone is used not for its mineral content, but rather for its physical characteristics.²¹³ SARS does, however, note that clay, which is extracted for the purpose of recovering the mineral kaolin, or limestone, which is extracted for the purpose of recovering the mineral calcium carbonate, will constitute “minerals”.²¹⁴

In the draft IN SARS considers the ordinary dictionary meaning of the terms “mining operations” and “minerals”. However, SARS does not attempt a grammatical analysis of these terms. This is probably so, because a grammatical analysis would support a wider interpretation of these terms. SARS further refers to the historical purpose behind the favourable tax dispensation applicable to “mining operations” but uses this purpose in support of its narrow interpretation by arguing that a narrow interpretation is needed to guard

²⁰⁸ "Draft interpretation note on whether certain quarrying operations constitute mining operations."

²⁰⁹ Ibid.

²¹⁰ Ibid., 11.

²¹¹ Ibid.

²¹² Ibid., 11.

²¹³ Ibid.

²¹⁴ Ibid., 10.

against abuse by what SARS considers non-mining companies. No reference is made to an interpretation that promotes the spirit, purport and object of the Bill of Rights. SARS does consider foreign law (Australia) but does not purport to undertake a detailed analysis and comparison between the foreign law considered and SA law.

In light of the above, it is submitted that SARS interpretation approach most likely falls under the umbrella of a purposive approach to interpretation (albeit a flawed one). It is submitted that SARS, facing pressure from Treasury to increase its tax revenues, failed to take sufficient cognisance of the purpose behind granting the 100% capital expenditure allowance to the “mining industry”.

3.5 A wider view

In *Income Tax Case*, No. 909²¹⁵ Nyasaland Quarries and Mining Co Ltd (“Nyasaland”) quarried a gneiss which was crushed and screened to use in the manufacture of concrete.²¹⁶ The rock was extracted through surface works by drilling and blasting.²¹⁷ Nyasaland conceded that it could not be said to be carrying on “mining operations” in common parlance.²¹⁸ However, Nyasaland submitted that this was not the question before the court.²¹⁹ Rather the question is whether Nyasaland is carrying on “mining operations” as defined in section 2 of the Federal Income Tax Act, No. 16 of 1954 of Nyasaland (“the FITA”).²²⁰ This definition of “mining operations” in the FITA is substantially the same as the definition in the ITA and reads as follows:

“Mining operations” and “mining” include every method or process by which any mineral is won from the soil or any substance or constituent thereof.

²¹⁵ *Income Tax Case* No. 909, 24 South African Tax Cases 97 (1960).

²¹⁶ *Ibid.*, 97.

²¹⁷ *Ibid.*, 98.

²¹⁸ *Ibid.*, 97.

²¹⁹ *Ibid.*

²²⁰ *Ibid.*

With regard to the meaning of the term “mineral” as used in the above definition the court applied the “value in use versus bulk” test:

[T]he word mineral as used in the definition of 'mining operations' and 'mining' is used in the sense of any substance that can be got from within the surface of the earth which possesses a value in use, apart from its mere possession of the bulk and weight which makes it occupy so much of the earth's crust, and on the evidence I am satisfied that the stone quarried by the appellant has such an individual value in use.²²¹

The court further held there is nothing in the FITA which indicated that it was the legislator's intention to exclude the Nyasaland's type of quarrying operations from the definition of “mining operations” and upheld the taxpayer's appeal.²²²

The Collector of Taxes (“the COT”) appealed to the High Court of Nyasaland (“the HC”) arguing that gneiss is not a “mineral” and therefore not conducting “mining operations” as defined in the FITA.²²³ On appeal the HC held that the term “mining operations”, as defined in the FITA, is wider than the ordinary meaning of the term:

In Craies on Statute Law (5th ed., p. 197) it is stated that there are in statutes two forms of interpretation clause. In one, where the word defined is declared to mean so and so the definition is explanatory and prima facie restrictive. In the other, where the word defined is declared to include so and so, the definition is extensive. It is to be observed that in the various definitions contained in section 2 of the Income Tax Act, some of the clauses use the words ‘means’ and other the word ‘include’, so that the choice of words must be deliberate. In my opinion there can be no doubt whatever that in defining the expressions ‘mining operations’ and ‘mining’ as it has done, the legislature intended to give these expressions, when used elsewhere in the Act, a meaning wider than the ordinary everyday meaning of those terms. Moreover, the extension of the usual meaning of those expressions is obviously intended to be a wide one, for the words used are very general. ‘Mining operations’ and ‘mining’ are to include every method or process by which any mineral is won. It is hardly possible to imagine more general words.²²⁴ (Own emphasis.)

The HC expressed the view that the deliberate extension of the meaning of “mining operations” beyond its ordinary meaning points to the intention of the legislator to extend the

²²¹ Ibid.

²²² Ibid., 101.

²²³ *Commissioner of Taxes v Nyasaland Quarries and Mining Co Ltd*, 24 South African Tax Cases 579, 580 (1961).

²²⁴ Ibid., 582.

100% capital expenditure allowance to quarrying operations which would not be covered by the ordinary meaning of “mining operations”.²²⁵

The HC further approved of the court *a quo*’s application of the definition of mineral in the *Great Western Railway* case holding that “[t]his broad definition appears nowhere to have been overruled or criticized and seems to me to be as good a definition as can be found.”²²⁶ The HC held that, in applying this broad definition to the term “mineral” as used in the definition of “mining operations” in FITA, gneiss is a “mineral”.²²⁷

It was further argued on behalf of the COT that the court *a quo* erred in holding that the quarrying of gneiss for roadworks constituted the extraction of a mineral.²²⁸ According to the COT, the gneiss had no individual value in use as the taxpayer was merely moving parts of the earth from one place to another.²²⁹ The HC pointed out that this contention is incorrect.²³⁰ The court *a quo* found that the gneiss was used for roadworks, concrete, gardens paths and so forth.²³¹ The HC further pointed out that the taxpayer subjected the gneiss to a process of manufacture in order to make the gneiss suitable for use in the above purposes and therefore it could not be said that the taxpayer was merely moving a part of the earth’s crust from one place to another.²³² Based on this the HC dismissed the COT’s appeal.²³³

According to Van Blerk, given the Judgement in *COT v Nyasaland Quarries and Mining Company Ltd*,²³⁴ “minerals” must be interpreted fairly widely.²³⁵ Van Blerk adapts the definition of “minerals” from the *Great Western Railway* case (quoted with approval in *Nyasaland Quarries* case) to provide the following useful definition of the term:

²²⁵ Ibid., 586.

²²⁶ Ibid., 584.

²²⁷ Ibid., 585.

²²⁸ Ibid.

²²⁹ Ibid., 591.

²³⁰ Ibid., 591-92.

²³¹ Ibid., 585.

²³² Ibid.

²³³ Ibid., 586.

²³⁴ Ibid.

²³⁵ Van Blerk, 7-9.

A mineral is any substance that can be got from within the surface of the earth which possesses a value in use apart from its mere possession of bulk and weight.²³⁶

Van Blerk also lists case law where clay and limestone were either held to be minerals or not.²³⁷ However, as rightly mentioned by Van Blerk, the list does not take into account the context of the cases and these cases were not decided under the ITA or another act with a similar definition of “mining operations”.²³⁸ For that reason, this study will not consider the meaning attributed to “mineral” and “mining operations” in these cases.

A wider interpretation of the word “minerals” is also followed by Meyerowitz and Spiro who submit that “it is not only rock but also ground or sand used for industrial purpose or even for road building, (that) falls within the term mineral for the purposes of the Income Tax Act.”²³⁹

3.6 Recent jurisprudence on the meaning of “mining operations” - The Foskor case (2010) and the Marula Platinum case (2016)

In both the *CSARS v Foskor (Pty) Ltd* (“the Foskor case”)²⁴⁰ and the *CSARS v Marula Platinum Mines Ltd* (“the Marula Platinum case”)²⁴¹ the court was called upon to consider the distinction between “mining operations” and manufacturing. This distinction determines where “mining operations” end and the manufacturing process begins. It is therefore relevant in determining what taxation formula should be applied, and specifically, the capital allowances available to the taxpayer. While this distinction falls outside the scope of this study, the comments made by the courts in the *Foskor* case and the *Marula Platinum* case as

²³⁶ Ibid.

²³⁷ Ibid., 7-6; 7-7.

²³⁸ Ibid.

²³⁹ D. Meyerowitz and E. Spiro, *The Taxpayer's Permanent Volume on Income Tax in South Africa* (The Taxpayer, 1969), 1439.

²⁴⁰ *Commissioner for the South African Revenue Services v Foskor (Pty) Ltd*, 72 South African Tax Cases 172 (2010).

²⁴¹ *Commissioner of the South African Revenue Service v Marula Platinum Mines Ltd*, 2 South African Law Reports 398 (2016).

regard to the meaning of “mining operations” has fuelled uncertainty surrounding the interpretation of this phrase and thus deserve consideration.

3.6.1 *The Foskor case*

In *Income Tax Case*, No. 1836²⁴² the issue was whether the mineral ore extracted by Foskor (Pty) Ltd (“Foskor”) constitutes “trading stock”.²⁴³ “Trading stock” is defined in section 1(1) of the ITA as follows:

- (a) includes –
 - (i) anything produced, manufactured, constructed, assembled, purchased or in any other manner acquired by the taxpayer for the purpose of manufacture, sale or exchange by the taxpayer or on behalf of the taxpayer;
 - (ii) anything the proceeds from the disposal of which forms or will form part of the taxpayer’s gross income...(Own emphasis.)

Relevant to the determination of whether the mineral ore extracted by Foskor constitutes “trading stock” is the distinction between “mining operations” and manufacturing. The Gauteng Tax Court (“GTC”) held the following with regard to Foskor’s operations:

the essence of the aforementioned processes is the extraction or winning of the phosphates, without a different finished product emerging. What is sold to customers is the phosphates originally found in the phosphate-bearing ore, and that no different substance with different qualities has been produced. All that occurs is a process which liberates the mineral particles from the ore and which separates the mineral particles.²⁴⁴

Based on this the GTC concluded that as the phosphates occur naturally in the earth it is mined and not manufactured.²⁴⁵ The SCA disagreed with the GTC holding:

In my view, the submission that the phosphate minerals that occur naturally in the earth are contained in what is sold to fertilizer producers worldwide and that the end product was therefore not manufactured, is too simplistic. It ignores not only the complexity of the processes to which the ore was subjected but the fact that in the result several minerals are separated and sold independently. It also ignores the fact that before the process referred to the ore is not saleable but that what is produced thereafter has a worldwide

²⁴² *Income Tax Case*, No. 1836 71 South African Tax Cases 115 (2008).

²⁴³ *Ibid.*, para 20.

²⁴⁴ *Ibid.*, para 26.

²⁴⁵ *Ibid.*, para 29.

market. Put simply, the end products that emerge after the processes referred to above are significantly different from the raw ore.²⁴⁶

There are several problems with the SCA's judgement. Firstly the view expressed by the SCA is based on the erroneous assumption that minerals are contained in neat pockets in the earth.²⁴⁷ This is easily disproved. A company mining for platinum will not only extract platinum but also palladium, gold, rhodium, osmium, rhenium, iridium and ruthenium.²⁴⁸ Secondly, the effect of the SCA's judgement is that for trading stock purposes Foskor's operations will be treated as a manufacturing process, but as "mining operations" for all other provisions in the ITA.²⁴⁹ Thirdly, the SCA's judgement is based on the decision in *Richards Bay Iron & Titanium (Pty) Ltd & another v Commissioner for Inland Revenue* ("the *Richards Bay Iron* case").²⁵⁰ According to the SCA the main issue in the *Richards Bay Iron* case concerned whether the stockpiles were "manufactured" (and not mined), however, the parties in the *Richards Bay Iron* case never sought to distinguish between "mining operations" and manufacturing.²⁵¹ Instead, it was conceded by the parties that the stockpiles formed part of the manufacturing process.²⁵² The decision in the *Richards Bay Iron* case is therefore irrelevant to the facts in the *Foskor* case.

3.6.2 *The Marula Platinum case*

In *Income Tax Case*, No. 1875²⁵³ the main question before the court was whether section 23F(2)²⁵⁴ of the ITA applied.²⁵⁵ If so, the benefits claimed by the taxpayer, Marula

²⁴⁶ *Commissioner for the South African Revenue Services v Foskor (Pty) Ltd*, para 45.

²⁴⁷ L. Cloete, "A Critical Analysis of the Distinction Between Mining and Manufacturing for South African Income Tax Purposes" (Nelson Mandela Metropolitan University, 2010), 66.

²⁴⁸ *Ibid.*

²⁴⁹ *Ibid.*, 67.

²⁵⁰ *Richards Bay Iron & Titanium (Pty) Ltd & another v Commissioner for Inland Revenue* 58 South African Tax Cases 55 (1996).

²⁵¹ *Commissioner for the South African Revenue Services v Foskor (Pty) Ltd*, para 48.

²⁵² *Richards Bay Iron & Titanium (Pty) Ltd & another v Commissioner for Inland Revenue*

²⁵³ *Income Tax Case*, No. 1875, 77 South African Tax Cases 161 (2014).

²⁵⁴ Briefly, section 24F(2) applies where a taxpayer claimed a deduction for "trading stock" in terms of section 11(a) of the ITA in the current year or any prior year, and then disposed of the "trading stock" in the current year for consideration which will not fully accrue to the taxpayer in the current year. In terms of section 24M of

Platinum Mines Ltd (“the taxpayer”), in terms of sections 11(a) and 24M of the ITA would be nullified.²⁵⁶

The taxpayer operates a mine from which it extracts ore from the surface.²⁵⁷ The taxpayer’s operations consist of two phases.²⁵⁸ During Phase 1 the taxpayer extracts ore containing platinum, palladium, gold, rhodium, iridium ruthenium, nickel, copper and cobalt.²⁵⁹ During Phase 2 the ore is smelted to extract the mineral elements and produce a powder concrete.²⁶⁰ The taxpayer does not own the mine and does not sell the mineral ore it extracts in Phase 1. Instead, the taxpayer sells the powder concrete resulting from Phase 2, to a fellow subsidiary.²⁶¹ The taxpayer deducted the full amount of expenditure incurred in terms of section 11(a), but only included the amounts which accrued to him in terms of section 24M.²⁶² The taxpayer argued that nothing should be recouped in terms of section 23F(2) as the mineral ore does not constitute “trading stock” as it was never “acquired” by the taxpayer (as is required in terms of the definition of “trading stock” in section 1(1) of the ITA).²⁶³ The GTC agreed that with regard to Phase 1, the taxpayer merely took possession of the mineral ore and never acquired it and therefore section 23F(2) cannot apply.²⁶⁴

Following this, the Commissioner for SARS (“CSARS”) tried to bring the taxpayer’s operations into the definition of “trading stock” by arguing that the Phase 1 and Phase 2

the ITA the taxpayer would only include in “gross income” so much of the amount which has accrued in the current year. If section 23F(2) applies the taxpayer must disregard any part of the section 11(a) of the ITA deduction which exceeds the amount accruing to the taxpayer in the current year on disposal of the trading stock.

²⁵⁵ *Income Tax Case*, No. 1875, para 1.

²⁵⁶ *Ibid.*

²⁵⁷ *Ibid.*, para 4.

²⁵⁸ *Ibid.*, para 5.

²⁵⁹ *Ibid.*

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.*

²⁶² *Ibid.*, para 9.

²⁶³ *Ibid.*, para 28-29.

²⁶⁴ *Ibid.*, para 38; 45.

constituted a process of manufacture.²⁶⁵ The GTC disagreed with the CSARS holding that both Phase 1 and Phase 2 constitute “mining operations”.²⁶⁶ However, during Phase 2 the GTC held that the mineral ore is transformed into concentrate with a higher value and that the requirement of “acquisition” was also met.²⁶⁷ Therefore it was held that the concentrate constitutes trading stock and CSARS could recoup the deductions applicable to Phase 2 in terms of section 23F(2).²⁶⁸

CSARS appealed to the SCA. On appeal the main issue was whether the taxpayer’s operations constituted a manufacturing process and therefore amounted to “trading stock” as defined in section 1(1) of the ITA.²⁶⁹ The taxpayer argued that the processes were not that of manufacturing but rather constituted “mining operations” as defined in section 1(1) of the ITA.²⁷⁰

The SCA agreed with CSARS that the process was one of manufacture and not mining holding that:

Whilst the ITA does not define manufacturing, mining is defined as including ‘every method or process by which any mineral is won from the soil or from any substance or constituent thereof’. In my view (the taxpayer’s) submission fails to take proper account of the fact that Marula extracted the ore from the land for the purpose of utilising it to render an end product in the form of a concentrate. The ore was not intended to be disposed of in its original state, and was subjected to an intricate process, described above, which rendered an end product that was not only significantly different from the raw ore, but was a highly valuable commodity saleable on the open market. Seen in this context, the processes utilised by Marula to derive the concentrate from the raw ore, did not constitute the ‘mining’ of the concentrate, but its manufacture as was held in analogous circumstances in Richards Bay and Foskor.²⁷¹

²⁶⁵ Ibid., para 40.

²⁶⁶ Ibid., para 45.

²⁶⁷ Ibid.

²⁶⁸ Ibid.

²⁶⁹ *Commissioner of the South African Revenue Service v Marula Platinum Mines Ltd*, para 2.

²⁷⁰ Ibid., para 29.

²⁷¹ Ibid.

Based on this the SCA found that CSARS could recoup the deductions in both Phase 1 and 2.²⁷²

The judgement in the *Marula Platinum* case sparks the uncertainty toward the interpretation of “mining operations”.²⁷³ Ostensibly, the SCA is of the view that the correct test for determining whether a taxpayer is conducting “mining operations” is whether the ore is disposed of in its original state. There is no basis in the definition of “mining operations” for this conclusion. Further, it is common parlance that the extraction of minerals necessarily involves their separation from their ore and this separation forms an integral part of the mining process.

Although the judgement only purports to deal with deductions covered by section 23F(2) i.e. section 11(a) deductions, there is a concern that the application of the judgement may be extended to other provisions of the ITA, specifically the capital allowances.²⁷⁴

In any event, it was arguably not necessary for the SCA to pronounce on the meaning of “mining operations”.²⁷⁵ Instead, the concentrate could have been brought into the definition of “trading stock” under para (a)(ii) as the proceeds from the disposal of the concentrate would form part of Marula Platinum’s gross income.²⁷⁶ However, Marula Platinum argued against such an inclusion on the basis that Marula Platinum was conducting “mining operations”.²⁷⁷ It is thought that the SCA merely considered the meaning of “mining

²⁷² Ibid., para 30-34.

²⁷³ G. Meiring, L. Le Roux, and J. Pousson, "SA Court Decision on Application of Section 23F(2) to Mining Company," PwC, <https://www.pwc.co.za/en/assets/pdf/tax-alert-csars-v-marula-platinum-mines.pdf> (accessed 12 July, 2017); A. De Jager, 2016, <https://www.sablog.kpmg.co.za/2016/10/findings-sca-marula-case-mean-mining-industry/>.

²⁷⁴ Meiring, Le Roux, and Pousson.

²⁷⁵ S. Mathloma, "CSARS v Marula Platinum Mines - More than a Miner Problem," <https://www.bdo.co.za/en-za/insights/2017/tax/csars-v-marula-platinum-mines-more-than-a-miner-problem> (accessed 12 July, 2017).

²⁷⁶ Ibid.

²⁷⁷ Ibid.

operations” in order to counter this argument, and the SCA’s judgement should not be seen as creating precedent as regard to the meaning of “mining operations”.²⁷⁸

3.7 Conclusion

As seen from the discussion above, there is no legal certainty on how the definition of “mining operations” in the ITA should be interpreted. While SARS follows a narrow view, a wider interpretation is followed in the *Nyasaland Quarries* case and by academic writers. The considerable lack of SA jurisprudence dealing authoritatively with the interpretation of “mining operations” results in further legal uncertainty which has been aggravated by the recent decisions in the *Foskor* case and the *Marula Platinum* case.

Taxpayers conducting mining operations are now in an untenable position with regard to the tax treatment of capital expenditure incurred. There is a risk, in light of the *Foskor* case and *Marula Platinum* case that part of the operations which were anticipated to be “mining operations” are now classified by SARS as manufacturing operations. This will result in capital expenditure being claimable over a period of four or five years instead of 100% in year one. This could further lead to the re-characterisation of mining income as non-mining income, resulting in capital expenditure not being deductible against the re-characterised income. Given SARS’ aggressive stance toward applying understatement penalties in such cases, certainty as regard to the meaning of “mining operations” has become paramount to mining companies.

In light of the need for certainty surrounding the interpretation of the term “mining operations”, the position in Australia will be considered in order to determine whether Australian jurisprudence could provide useful guidelines to interpreted “mining operations” for SA income tax purposes.

²⁷⁸ Ibid.

CHAPTER 4: DEVELOPMENT OF LEGAL JURISPRUDENCE IN AUSTRALIA RELATING TO THE MEANING OF “MINING OPERATIONS” AND “MINERALS”

4.1 Introduction

The Australian Income Tax Assessment Act, No. 38 of 1997 (“the AITAA”) and the Customs Act refer to the terms “mining operations”. Uncertainty surrounding the interpretation of this term have been the subject of many disputes before the AAT, the High Court of Australia (“HCA”) and the Federal Court of Australia (“FCA”). This has resulted in a rich body of jurisprudence on the interpretation of the term “mining operations” which will be considered in detail below.

4.2 Income Tax

Subdivision 40-H of the AITAA provides for a 100% capital expenditure allowance for capital expenditure incurred on

- exploration or prospecting;
- mining and quarrying site rehabilitation;
- the payment of petroleum resource rent tax; and
- environmental protection activities.

To qualify for the 100% capital expenditure allowance the taxpayer must carry on “mining operations”. “Mining operations” is a defined term in the AITAA. The definition reads as follows:

“Mining operations” means mining operations on a mining property for extracting minerals (except petroleum) from their natural site...

The term minerals, also central to the definition of “mining operations” is not defined in the AITAA.

The predecessor to the AITAA, the Income Tax and Social Services Contribution Assessment Act 1936-1952 (the ITSSCAA²⁷⁹), provided a much more generous 100% capital expenditure allowance, similar to the ITA. Sections 122(1) and 122A provided the taxpayer with an election to deduct the full amount of capital expenditure incurred in connection with “mining operations upon a mining property”, in the year during which the expenditure was incurred. However, unlike the AITAA and the ITA, the ITSSCAA did not define “mining operations”. The ITSSCAA furthermore, like the AITAA and the ITA, also did not define “minerals”.

For purposes of this study two important cases were decided under the ITSSCAA on the interpretation of “mining operations” and “mineral” for income tax purposes: *New South Wales Associated Blue Metal Quarries Ltd v Federal Commissioner of Taxation* (“the NSW case”)²⁷⁹ and *North Australian Cement v Federal Commissioner of Taxation* (“the North Australian Cement case”)²⁸⁰.

4.2.1 The NSW case

In the NSW case New South Wales Associated Blue Metal Quarries Ltd (“NSW”) exercised the election in terms of section 122(1) read with section 122A of the ITSSCAA to deduct certain capital expenditure it incurred during the extraction of blue-metal.²⁸¹ The only question before the HCA was whether NSW carried on “mining operations upon a mining property”.²⁸²

The HCA followed a two-phased approach to determine whether NSW carried on “mining operations upon a mining property”, considering firstly, the nature of the substance extracted by NSW and secondly, the manner in which NSW extracts the said substance. It

²⁷⁹ *New South Wales Associated Blue-Metal Quarries Ltd v Federal Commissioner of Taxation*, 94 Commonwealth Law Reports 509 (1956).

²⁸⁰ *North Australian Cement Ltd v Federal Commissioner of Taxation*, 20 Australian Tax Reports 1058 (1989).

²⁸¹ *New South Wales Associated Blue-Metal Quarries Ltd v Federal Commissioner of Taxation*, 511.

²⁸² *Ibid.*

was found that NSW extracts basalts or dolerite, commonly known as blue metal or bluestone.²⁸³ The HCA further found that blue metal is normally won through open-cast workings (commonly known as “quarrying”) and not from subterranean workings (commonly known as “mining”).²⁸⁴ This, NSW argued, is irrelevant in determining whether NSW’s activities constitute “mining operations”.²⁸⁵ More and more, it was argued, technology has allowed open-cast workings to replace subterranean workings, however, the purpose of workings were the same and the equipment used remained substantially the same.²⁸⁶

With regard to the meaning of the word “mining” the court said the following:

The meaning of the words “mine” and “mining” like the word “minerals” is by no means fixed and is readily controlled by context and subject matter. Few words have occasioned the courts more difficulty than “minerals”, but in some degree that is because in legal instruments it is seldom, if ever, used in its accurate or scientific sense and yet the word possesses no secondary meaning at once accepted and definite. No doubt the word “mine” has also proved a source of difficulty, but the difficulties have been fewer and perhaps less persistent. The word seems always to have been somewhat indefinite in its application. Judicially, however, its primary meaning unaffected by context is taken to refer to underground workings and not open-cast workings or quarrying.²⁸⁷ (Own emphasis.)

The HCA found it conclusive that blue metal was always extracted through open-cast workings and that no-one in Australia speaks of a blue-metal mine or of a blue-metal quarry as “mining property”.²⁸⁸ Therefore, it was held that NSW’s operations did not constitute “mining operations upon a mining property”.²⁸⁹

Although the HCA applied a narrow interpretation to the term “mining operations”, it is submitted that the HCA did not purport to lay down a general rule that the extraction of

²⁸³ Ibid., 521.

²⁸⁴ Ibid.

²⁸⁵ Ibid.

²⁸⁶ Ibid.

²⁸⁷ Ibid., 522.

²⁸⁸ Ibid., 524.

²⁸⁹ Ibid.

substances through open-cast workings would never constitute “mining operations”. This is supported in the decision of the court *a quo* per Kitto J, where he expressed the view that it would not be unreasonable to hold that the extraction of blue metal constitutes mining, but that in NSW’s case it would unnaturally stretch the language to hold that NSW’s extraction of blue metal constitutes “mining operations”.²⁹⁰ Furthermore, the HCA referred with approval to cases where it was said that the extraction of gold through open-cast workings would never be called a gold quarry.²⁹¹ Rather it would naturally be called a gold mine.²⁹² According to the HCA, this is because traditionally gold is recovered through subterranean workings and therefore the extraction of gold has become associated with the process of mining.²⁹³

4.2.2 *The North Australian Cement case*

In the *North Australian Cement* case the FCA had to decide whether North Australian Cement Ltd (“NACL”) was carrying on “mining operations” as envisaged in section 122(1) of the ITSSCAA.²⁹⁴ In this regard, based on the decision in the *NSW* case, NACL’s main argument was that it would not be an unnatural stretch of language to describe its operations as “mining operations”.²⁹⁵

The FCA proceeded to consider what is meant by “mining operations” in section 122(1) of the ITSSCAA, confirming that the section refers to the phrase “mining operations on a mining property” in its ordinary sense and not any technical sense.²⁹⁶ The FCA quoted

²⁹⁰ *Ibid.*, 514.

²⁹¹ *Ibid.*, 524.

²⁹² *Ibid.*

²⁹³ *Ibid.*

²⁹⁴ *North Australian Cement Ltd v Federal Commissioner of Taxation*, para 1.

²⁹⁵ *Ibid.*, para 18.

²⁹⁶ *Ibid.*, 21-24. See also *The Commissioner of Taxation of the Commonwealth of Australia v. I.C.I. Australia Limited*, 127 Commonwealth Law Reports 529, 579 (1972).

with approval case law²⁹⁷ where it was held that the ordinary meaning of “mining operations” is “flexible rather than fixed”, allowing the phrase to accommodate technological change.²⁹⁸ Based on this, the FCA held that ordinary usage of the phrase must be determined at the time the capital expenditure was incurred.²⁹⁹ It was further held that although scientific and professional terminology may be relevant, it cannot be decisive.³⁰⁰

According to the FCA, the is the “informed general usage” test, as applied by the court *a quo*, is the correct test to determine whether NACL is conducting “mining operations”.³⁰¹ The informed general usage test considers the “way in which the deposits occur, the character of the material recovered and the use to which it may reasonably put”³⁰² in order to determine whether a taxpayer is conducting “mining operations”.³⁰³

On the facts the FCA found that NACL extracts limestone for the manufacture of cement and that none of the limestone extracted was used as stone for building or agriculture.³⁰⁴ The FCA applied the informed general usage test and found that NACL extracted limestone for its chemical qualities to use for the manufacture of cement as opposed to limestone extracted for its physical attributes to use as building materials or in agriculture.³⁰⁵ The FCA finally held that it would not be a stretch of the language to describe NACL’s operations as “mining operations” and not quarrying operations.³⁰⁶ Conclusive to the FCA’s decision was the view that the phrase “quarrying operations” is normally used to

²⁹⁷ See *Federal Commissioner of Taxation v Reynolds Australia Alumina Limited* (1987) 77 ALR 543 at p, 77 Australian Law Reports 543, 549 (1987). *The Commissioner of Taxation of the Commonwealth of Australia v. I.C.I. Australia Limited*, 579.

²⁹⁸ *North Australian Cement Ltd v Federal Commissioner of Taxation*, para 23.

²⁹⁹ *Ibid.*, para 35.

³⁰⁰ *Ibid.*, para 37.

³⁰¹ *Ibid.*, para 39.

³⁰² *North Australian Cement Limited v Federal Commissioner of Taxation*, 119 Commonwealth Law Reports 353, 362 (1969).

³⁰³ *North Australian Cement Ltd v Federal Commissioner of Taxation*, para 39.

³⁰⁴ *Ibid.*, para 50.

³⁰⁵ *Ibid.*, para 70.

³⁰⁶ *Ibid.*, para 75.

obtain materials in bulk for their physical attributes, while the phrase “mining operations” is normally used to describe the extraction of a substance for its chemical qualities.³⁰⁷

The *North Australian Cement* case is the *locus classicus* on the application of the informed general usage in determining the meaning of “mining operations” in the context of the ITSSCAA where “mining operations” is not a defined term. However, as will be seen below, the application of the informed general usage test has been extended to the Customs Act which does contain a definition of “mining operations”.

4.3 Customs Act: Pre-1995

In 1982, a new section 164 was inserted in the Customs Act which introduced the Diesel Fuel Rebate (“DFR”) scheme in terms of which a DFR would be paid for expenditure on fuel used in “mining operations”. Section 164(7) defined “mining operations” (until 1997) as follows:

“mining operations” means-
 (a) exploration, prospecting or mining for minerals; or
 (b) the dressing or beneficiation (at the mining site or elsewhere) of minerals, or ores bearing minerals, as an integral part of operations for their recovery,
 and includes -
 ...
 but does not include quarrying operations carried on for the sole purpose of obtaining stone for building, road making or similar purposes. (Own emphasis.)

The core part of the definition of mining operations is “mining for minerals”.³⁰⁸ Section 164(7) further defined “minerals” (until 1995) as follows:

“minerals” means minerals in any form, whether solid, liquid or gaseous and whether organic or inorganic.

³⁰⁷ See *ibid.*, para 70-75.

³⁰⁸ *In Re Midland Brick Company (Pty) Ltd and Chief Executive Officer of Customs*, 178 Commonwealth Law Reports, para 13 (2001).

Three important judgements were decided in terms of the definitions of “mining operations” and “minerals” as they stood up until 1995: *Re Collector of Customs v Bell Basic Industries Ltd* (“the Bell case”),³⁰⁹ *Collector of Customs v Neumann Sands (Victoria) (Pty) Ltd* (“the Neumann Sands case”),³¹⁰ and *Re Water Authority of Western Australia and Collector of Customs* (“the Water Authority case”).³¹¹

4.3.1 *The Bell case*

In the *Bell* case the question before the FCA was whether Bell Basic Industries Ltd (“Bell Basic Industries”) was conducting “mining operations” as defined in section 164(7) of the Customs Act and qualified for the DFR for diesel fuel used in said “mining operations”.

The facts of the Bell case were as follows: Bell Basic Industries extracts a stone called black granite for another company called Black Granite (Pty) Ltd.³¹² Although geologically the stone is known as dolerite, black granite is a scarce resource, holding particular aesthetic interest thereby increasing demand for its use in cladding in building and use as monumental stone.³¹³ At the time of the Bell case, unpolished slabs of black granite sold for about \$4000 per cubic meter.³¹⁴ Extracting black granite without damaging the valuable stone requires specialised equipment, extraction methods and skill.³¹⁵

Bell Basic Industries applied for the DFR for diesel fuel used in the extraction of black granite. The Collector of Customs refused the DFR application by Bell Basic Industries contending that black granite is not a “mineral” and therefore, Bell Basic Industries’ extracting operations do not constitute “mining for minerals”.

³⁰⁹ *Re Collector of Customs v Bell Basic Industries Ltd* 20 Federal Court Reports 146 (1988).

³¹⁰ *Collector of Customs v Neumann Sands (Victoria) (Pty) Ltd* 136 Australian Law Reports 584 (1996).

³¹¹ *Re Water Authority of Western Australia and Collector of Customs* 37 Administrative Law Decisions 600 (1995).

³¹² *Re Collector of Customs v Bell Basic Industries Ltd* para 4.

³¹³ *Ibid.*

³¹⁴ *Ibid.*

³¹⁵ *Ibid.*

The FCA, in considering the meaning of “minerals” held that, given the generality of the definition of “minerals” in the Customs Act and the inclusion of “gaseous” in the definition, any substance which by informed general usage is seen as a mineral was intended by the legislature to be covered by the definition of “minerals”.³¹⁶ This is so, it was held, even though such substance might not be a mineral in the scientific sense.³¹⁷ Based on this the FCA found no reason to disturb the AAT’s finding that black granite was a mineral.³¹⁸

The FCA further considered whether Bell Basic Industries’ operations could be described as “mining for minerals”.³¹⁹ The FCA agreed with the reasoning of the AAT that commercially, Bell Basic Industries’ operations constitute “mining”.³²⁰ The AAT based its decision on the fact that specialised methods and equipment are required to remove the large overburden to extract black granite.³²¹ This, the AAT found, is very different from extracting common dolerite.³²² Furthermore, the AAT held that, at the time of extraction of the black granite, it was common in Australia to speak of such extraction operations as “mining operations” and not “quarrying operations”.³²³ The FCA agreed with the AAT’s reasoning confirming that Bell Basic Industries was “mining for minerals” and dismissed the appeal by the Collector of Customs.³²⁴

The FCA in the *Bell* case confirmed that the informed general usage test (as established in the context of the ITSCCAA in the *North Australian Cement* case) may be applied in the context of the Customs Act.

³¹⁶ Ibid., para 8.

³¹⁷ Ibid.

³¹⁸ Ibid., para 9.

³¹⁹ Ibid., para 10.

³²⁰ Ibid.

³²¹ Ibid., para 11.

³²² Ibid.

³²³ Ibid.

³²⁴ Ibid., para 12.

4.3.2 *The Neumann Sands case*

In the *Neumann Sands* case, the question before the FCA was whether Neumann Sands' sand dredging operations constituted "mining operations" as defined in section 164(7).³²⁵ Specifically, the FCA had to decide whether Neumann Sands was "mining for minerals" as contemplated in paragraph (a) of the aforementioned definition.³²⁶

The Neumann Sand's case was heard as an appeal by the Collector of Customs from the decision of the AAT. The AAT and made the following findings:

- Neumann Sands extracted sand for industrial purposes to use in concrete manufacture.³²⁷
- Neumann Sands requires that the sand constitute 90% silica (an industrial mineral) and be free from lignite.³²⁸
- Neumann Sands carried out extensive tests to ensure that the sand extracted met the Australian standard.³²⁹
- The methods used by Neumann Sands to extract the sand could properly be described as mining.³³⁰

Based on the above findings the AAT held that Neumann Sands was "mining for minerals" as contemplated in the definition of "mining operations" in section 164(7)(a) of the Customs Act.³³¹

On appeal the Collector of Customs contended that the AAT made an error in law by applying the following test laid down in *Boral Bricks (QLD) Ltd v Australian Customs Service* ("the *Boral Bricks* case").³³²

³²⁵ *Collector of Customs v Neumann Sands (Victoria) (Pty) Ltd* para 3,7.

³²⁶ *Ibid.*, para 3,7.

³²⁷ *Neumann Sands Victoria Pty Ltd and Australian Customs Service*, Austlii, para 4 (1995).

³²⁸ *Ibid.*

³²⁹ *Ibid.*, para 32.

³³⁰ *Ibid.*, para 47.

³³¹ *Ibid.*

Whilst the definition imposes a purposive test; the legislation does not by its combined effect mean that rebate is payable only to persons or companies whose operations are designed to win material from which will be extracted raw minerals. The rebate is also payable where the mining operations result in the winning of a product, the end use of which is dependent upon, inter alia perhaps, its mineral content. That the operator does not in advance, by chemical testing or otherwise, place himself in the position of being able to give a specific and detailed identity to that content, does not mean that his operations are outside the scope of legislation.³³³ (Own emphasis.)

The Collector of Customs contended that the “statutory test is whether the relevant operations are mining for minerals and not whether the operations are ones which result in the mining of a product the end use of which is dependent upon, amongst other things, its mineral content.”³³⁴ In this regard the FCA held that it is not necessary to consider whether the test formulated in the *Boral Bricks* case is correct or not.³³⁵ This is so because the reasoning of the AAT is based on the informed general usage test as formulated in the *North Australian Cement* case.³³⁶ This is evident from the following statement by the AAT “we must look at the way in which the sand occurs, its character and the use to which it may be reasonably put”.³³⁷

The FCA further confirmed the finding in the *Bell* case that the mere fact that the informed general usage test was formulated in the *North Australian Cement* case in the context of the ITSSCAA and not the Customs Act, does not make the application thereof in the context of the Customs Act in the *Neumann Sands* case erroneous in law.³³⁸

In this regard it should be noted that, unlike in SA, the distinction between questions of fact and questions of law remain relevant in Australia. The FCA will only overturn a

³³² *Boral Bricks (Qld) Ltd v Australian Customs Service* 18 Administrative Law Decisions 456 (1988).

³³³ *Ibid.*, para 23.

³³⁴ *Collector of Customs v Neumann Sands (Victoria) (Pty) Ltd* para 14.

³³⁵ *Ibid.*

³³⁶ See *North Australian Cement Ltd v Federal Commissioner of Taxation*, 362-63.

³³⁷ *Neumann Sands Victoria Pty Ltd and Australian Customs Service*, para 45. *Collector of Customs v Neumann Sands (Victoria) (Pty) Ltd* para 15.15.

³³⁸ *Collector of Customs v Neumann Sands (Victoria) (Pty) Ltd* para 17.

decision by the AAT if the AAT made an error of law.³³⁹ Importantly, an incorrect finding of fact does not constitute an error of law.³⁴⁰ Therefore, as there was no error of law, the FCA dismissed the appeal from the Collector of Customs on the basis that the decision of the AAT was not reasonably open to question.³⁴¹

4.3.3 *The Water Authority case*

The Water Authority of Western Australia (“the Water Authority”) uses diesel fuel in extracting groundwater from under the ground and pumping it into storage.³⁴² Either just before storage, or just after pumping the groundwater into storage, the Water Authority adds chlorine to the extracted water.³⁴³ The Collector of Customs refused the Water Authority’s DFR application for the diesel fuel used in extracting the water from underground. Water Authority appealed the Collector of Customs’ decision. On appeal, the AAT had to decide three questions:

1. Whether Water Authority is extracting a “mineral” as defined in section 164(7) of the Customs Act?³⁴⁴
2. Whether Water Authority is “mining”?³⁴⁵
3. And if so, whether Water Authority could be said to be “mining for minerals” as contemplated in the definition of “mining operations” in section 164(7)(a). According to the AAT the third question must be answered by applying the “characterisation

³³⁹ *Price Street Professional Centre Pty Ltd v Commissioner of Taxation* 243 Administrative Law Reports 728, para 22 (2008).

³⁴⁰ *Minister for Immigration and Multicultural and Indigenous Affairs v Al-Miahi* 65 Administrative Law Decisions 744, 745 (2001).

³⁴¹ *Collector of Customs v Neumann Sands (Victoria) (Pty) Ltd* para 20.

³⁴² *Re Water Authority of Western Australia and Collector of Customs* para 4.

³⁴³ *Ibid.*, paras 7;13.

³⁴⁴ *Ibid.*, para 20.

³⁴⁵ *Ibid.*

test”, outlined in *Neumann Dredging Co Ltd (trading as Neumann Contractors) v Collector of Customs (QLD)*.³⁴⁶

On the first question, the Water Authority and the Collector of Customs accepted that groundwater is a “mineral” for purposes of the definition in section 164(7) of the Customs Act.³⁴⁷ With regard to the second question, the ATT held that as the mining industry regards the extraction of underground water through “pumping”, as “mining”, it was satisfied that Water Authority is “mining” for purposes of section 164(7) of the Customs Act.³⁴⁸

The remaining question for the AAT to decide was whether Water Authority’s operations satisfied the characterisation test. In terms of the characterisation test, Water Authority will only qualify for the DFR if it is evident that Water Authority’s purpose in conducting its operations is to extract the mineral, groundwater³⁴⁹. The Collector of Customs contended that Water Authority’s purpose in conducting its operations was to provide the community with water and not to extract the mineral, groundwater.³⁵⁰

The AAT was satisfied that Water Authority’s purpose in conducting its operations was to extract the mineral, groundwater. The AAT further found that no diesel fuel was used to add chlorine into the water, however, in some cases, the diesel fuel was used to pump groundwater which had already been chlorinated. Therefore, the only further question was whether the addition of chlorine altered the character of Water Authority’s operations

In answering this question the court referred to the following paragraph in *Abbott Point Bulk Coal Pty Ltd v Collector of Customs* (“the Abbott case”):³⁵¹

Whether an activity falls within the definition of 'mining operations' as defined in s.164(7) of the Customs Act 1901 is a

³⁴⁶ Ibid., para 29.

³⁴⁷ Ibid., para 23.

³⁴⁸ Ibid., para 28.

³⁴⁹ Ibid., para 30.

³⁵⁰ Ibid., para 31.

³⁵¹ *Abbott Point Bulk Coal Pty Ltd v Collector of Customs*, 35 Federal Court Reporter 371 (1992). *Re Water Authority of Western Australia and Collector of Customs* para 33.

question of fact. So too is the question of when recovery is complete. In each case a commonsense and commercial approach has to be taken to the question having regard to the evident purpose of the legislation, to make rebates available to promote the exploitation of mineral deposits in Australia. However, a point is reached where the mineral has been recovered and what is done with it thereafter is the use or processing of it for its better use as a mineral... The process of recovery includes, in our view, those steps which are taken by a miner before sale, by whatever process, to remove the mineral from that in which it is embedded or with which it is intermixed. Such a process comprehends the refining of minerals or ore to remove impurities naturally occurring in the material as it has been mined. Once the process of separation or refining has been completed, to subject the mineral product to a process or procedure designed purely to facilitate its better use as so separated or refined or to render it more readily or advantageously marketable is not in our view part of the recovery process.³⁵² (Own emphasis.)

The AAT found that the recovery process ended when the groundwater was pumped into storage and that as the addition of chlorine after storage does not use diesel fuel it does not change the character of Water Authority's activities as mining for "minerals". The AAT further found, in line with the *Abbott* case, that where chlorine is added before storage and chlorinated water is pumped using diesel fuel, Water Authority's operations still constitute "mining for minerals". Based on this, the AAT held that Water Authority is entitled to the DFR for diesel fuel used in extracting groundwater.

The AAT in the Water Authority case did not refer to the informed general usage test. Rather, the AAT applied a purposive test in terms of which the purpose of the DFR applicant in extracting the substance is decisive. In this regard, where the purpose of the DFR applicant is to extract a mineral, the DFR applicant will be considered to be "mining for minerals" and therefore conducting "mining operations".

³⁵² *Abbott Point Bulk Coal Pty Ltd v Collector of Customs*, 378-79.

4.4 Customs Act: Post-1995

In 1995, the definition of “minerals” in the Customs Act was amended as follows:

“minerals” means minerals in any form, whether solid, liquid or gaseous and whether organic or inorganic, except:
(a) sand, sandstone, oil, slate, clay (other than bentonite or kaolin), basalt, granite, gravel, water; or
(b) limestone (other than agricultural use limestone)
 (Own emphasis.)

Clause 3 of the Explanatory Memorandum to the Customs and Excise Amendment Bill, 1995 states that the purpose of amending the definition of “minerals” is to:

...exclude from eligibility for the payment of rebate diesel fuel for use in extracting certain materials from the ground because they are valuable as extracted, rather than for the purpose of recovering their inherent mineral qualities.³⁵³ (Own emphasis.)

The second reading of the Minister emphasises that the definition of “minerals” was amended to exclude operations which “simply involve the extraction of sand, sandstone, soil, clay, granite, water and the like”.³⁵⁴ (Own emphasis.) The Minister further added:

Until recently, the Administrative Appeals Tribunal and the Federal Court have held the view that the term ‘mining for minerals’ in the [A]ct’s definition of ‘mining operations’ introduced a purposive test requiring a rebate claimant to demonstrate that the purpose of the claimant’s operations was to obtain a mineral or minerals embedded in the material that was extracted.

For instance, there was a clear distinction between the extraction of sand per se and the extraction of sand with a view to obtaining from it minerals such as rutile, zircon or almandite.

The meaning of ‘mining operations’ was therefore considered to be reasonably well settled until a recent decision of the Administrative Appeals Tribunal on the issue of extracting sand for use in the making of concrete or for use as bedding sand in the construction industry. The Tribunal decided that the extraction of such sand was eligible for rebate. Claims have also been received for rebate on diesel fuel used in the pumping of ground water to be supplied as drinking water to towns.

³⁵³ "Explanatory Memorandum to the Customs and Excise Amendment Bill," (1995), 2.

³⁵⁴ "House of Representatives Official Hansard," ed. House of Representatives, Thirty-Seventh Parliament First Session - Seventh Period (1995), MC 1477.

These are, in the Government's view, uses well beyond the intent of the Scheme, which was and is to deliver an assistance measure to mainstream mining pursuits. Accordingly, in item 7 of Schedule 1 to the bill, the Government has proposed to amend the definition of 'minerals' to exclude sand, sandstone, earth, soil, clay (other than bentonite or kaolin), basalt, granite, gravel, limestone or water. The exclusion is consistent with the principal mining legislation of the States and would bring about a transparent distinction between mining for minerals and operations that cannot, in the ordinary sense, be regarded as mining. Where these materials are extracted for the purpose of recovering a mineral, the extraction will remain eligible for rebate.³⁵⁵ (Own emphasis.)

It is thought that the *Neumann Sands* case and the *Water Authority* case led to the amendment of the definition of "minerals".³⁵⁶ This is supported by the Minister's second reading set out above.

In 1997 the definition of "mining operations" was also amended to read as follows:

"mining operations" means

(a) exploration, prospecting or mining for minerals, or the removal of overburden and other activities undertaken in the preparation of the site to enable mining for minerals to commence; or

(b) operations for recovery of minerals, being:

(i) mining for those minerals including the recovery of salts by evaporation; or

(ii) the beneficiation of those minerals; or ores bearing those minerals;

and includes

...

but does not include:

(x) quarrying or dredging operations to the extent that the purpose of the operations is to obtain materials for use in building, road making, landscaping, construction or similar purposes. (own emphasis.)

The 1997 amendment broadened the definition of "mining operations" to specifically include preparatory activities. However, the relevant part of the definition for this study i.e. "mining for minerals" remained unchanged.

³⁵⁵ Ibid., MC 1478.

³⁵⁶ *Chief Executive Officer of Customs v Adelaide Brighton Cement Ltd*, 139 Federal Court Reporter 147, para 36 (2004).

The following important cases were decided in terms of the amended definitions of “minerals” and “mining operations” and will be discussed below: *Goliath Portland Cement Co Ltd v Chief Executive Officer of Customs* (“the Goliath case”)³⁵⁷, *David Mitchell Ltd v Chief Executive Officer of Customs* (“the David Mitchell case”)³⁵⁸, *CEO of Customs v Adelaide Brighton Cement Ltd* (“the Adelaide case”)³⁵⁹ and *In Re Midland Brick Company (Pty) Ltd and Chief Executive Officer of Customs* (“the Midland case”)³⁶⁰.

4.4.1 *David (Mitchell) and Goliath*

Goliath Portland Cement Co Ltd (“Goliath”) uses limestone to manufacture cement. Goliath extracts the limestone at Railton in Tasmania.³⁶¹ The Railton-site contains deposits of more than 90% calcite.³⁶² To make cement, heat is applied to the calcite in order to separate calcium oxide (lime) from calcium dioxide (waste).³⁶³ David Mitchell Ltd (“David Mitchell”) uses similar methods to extract limestone at Loongana and Lilydale also for the purpose of manufacturing cement.

In both the *Goliath* case and the *David Mitchell* case, the Chief Executive Officer of Customs (“the CEO”) refused to pay the DFR, contending that Goliath’s and David Mitchell’s operations are directed at extracting limestone and that, as limestone is excluded from the definition of minerals, Goliath and David Mitchell are not “mining for minerals”. Therefore, the CEO contended Goliath and David Mitchell are not conducting “mining operations” as required in order to claim the DFR.

³⁵⁷ *Goliath Portland Cement Co Ltd v Chief Executive Officer of Customs*, 45 Australasian Tax Reports 96 (2000).

³⁵⁸ *David Mitchell Ltd v Chief Executive Officer of Customs*, 46 Australasian Tax Reports 433 (1999).

³⁵⁹ *Chief Executive Officer of Customs v Adelaide Brighton Cement Ltd*.

³⁶⁰ *In Re Midland Brick Company (Pty) Ltd and Chief Executive Officer of Customs*.

³⁶¹ *Goliath Portland Cement Co Ltd v Chief Executive Officer of Customs*, para 1-2.

³⁶² *Ibid.*, para 2.

³⁶³ *Ibid.*

The AAT's approach in both cases was to determine whether Goliath and David Mitchell extracted the limestone for its inherent mineral content. The AAT found in favour of both Goliath and David Mitchell, holding that:

- the purpose of Goliath's and David Mitchell's operations are to extract lime;³⁶⁴
- limestone is an "ore" therefore a mineral as defined;³⁶⁵
- Goliath and David Mitchell are "mining for minerals";³⁶⁶ and
- based on the above Goliath and David Mitchell are conducting "mining operations".³⁶⁷

In both cases the CEO appealed against the decisions of the AAT. The appeals were first heard by the single judge of the FCA who found in favour of the CEO. In the *Goliath* case,³⁶⁸ Heerey J upheld the CEO's appeal from the AAT's decision holding that:

If 'limestone' has been expressly excluded from the statutory definition of 'minerals' it seems to me to follow inexorably that the essential and defining component of limestone, namely calcite, must also be excluded. One cannot mine for calcite without mining for limestone, and vice versa. Goliath's argument requires treating the exclusion as if it read '(other than agricultural use limestone or limestone where what is sought is not the limestone as such, but a mineral that is found in the limestone)'.³⁶⁹

Heerey J found it instructive that the legislator excluded limestone for agricultural use from the limestone-exclusion and bentonite and kaolin from the clay-exclusion.³⁷⁰ According

³⁶⁴ *Goliath Portland Cement Co Ltd; Shaw Contracting Pty Ltd and CEO of Customs*, 766, para 104 (1998). *David Mitchell Ltd; Loongana Lime Pty Ltd and CEO of Customs*, 69, para 58 (1998).

³⁶⁵ *Goliath Portland Cement Co Ltd; Shaw Contracting Pty Ltd and CEO of Customs*, para 104. *David Mitchell Ltd; Loongana Lime Pty Ltd and CEO of Customs*, para 58.

³⁶⁶ *Goliath Portland Cement Co Ltd; Shaw Contracting Pty Ltd and CEO of Customs*, para 104. *David Mitchell Ltd; Loongana Lime Pty Ltd and CEO of Customs*, para 58.

³⁶⁷ *Goliath Portland Cement Co Ltd; Shaw Contracting Pty Ltd and CEO of Customs*, para 111. *David Mitchell Ltd; Loongana Lime Pty Ltd and CEO of Customs*, para 58.

³⁶⁸ *Chief Executive Officer of Customs v Goliath Portland Cement Co Ltd*, 666 (1999).

³⁶⁹ *Ibid.*, para 25.

³⁷⁰ *Ibid.*, para 26.

to the Heerey J, this is an indication that Parliament intended that there be no “further exception for clay (or limestone) with reference to its components”.³⁷¹

In the *David Mitchell* case, Ryan J agreed with the reasoning by Heerey J in the *Goliath* case holding that the extraction of limestone for its calcite content could not be said to be “mining operations”.³⁷² Ryan J further considered whether by characterising David Mitchell’s operations as the recovery of calcite (as opposed to the recovery of limestone for its calcite content) David Mitchell’s activities could amount to “mining operations”.³⁷³ Ryan J found it unnecessary to answer this question as David Mitchell extracts limestone and not calcite.³⁷⁴ This is because nothing was done to separate the calcite from the limestone once extracted.³⁷⁵ Ryan J also did not accept that lime is a “mineral” based on the statutory construction of the definition of “mineral” as being something “mined for”.³⁷⁶ Therefore, Ryan J held that David Mitchell was not “mining for minerals” and upheld the CEO’s appeal.³⁷⁷

An interesting anomaly was pointed out by David Mitchell in the *David Mitchell* case: where marble, which is metamorphosed limestone, is extracted for the purpose of producing lime, it will qualify for the DFR, while the extraction of limestone for the same purposes will not qualify.³⁷⁸ In answer to this, Ryan J replied with a response characteristic of a literalist view of statutory interpretation coupled with a strict interpretation of the judiciary’s role in law-making:

That anomaly, if it be one, results from the intractable language of the definition of “minerals” and the express exception therefrom of “limestone”. If

³⁷¹ Ibid., para 26-29.

³⁷² *Chief Executive Officer of Customs v David Mitchell Ltd*, 1611, para 23 (1999).

³⁷³ Ibid., para 24-37.

³⁷⁴ Ibid., para 37.

³⁷⁵ Ibid.

³⁷⁶ Ibid., para 38-45.

³⁷⁷ Ibid., para 46.

³⁷⁸ Ibid., para 47.

policy considerations mandate the removal of this suggested anomaly, they will be for Parliament, and not the Court, to implement.³⁷⁹

After Ryan J's decision in the *David Mitchell* case, Goliath lodged a further appeal to the full court of the FCA. Goliath contended that Heerey J erred in holding that lime was covered by the exclusion of limestone from the definition of "minerals".³⁸⁰ Goliath further submitted that the purpose was to recover calcite from limestone and overall lime.³⁸¹

The full court emphasised that the test is whether the object of Goliath's operations were to recover a "mineral" and it is after recovery of this "mineral" that the "mining operations" ends.³⁸² The full court held that it could not be said that "lime" was a "mineral" recovered as it was not obtained by mining.³⁸³ Furthermore, Goliath's object was to recover limestone and not calcite and therefore it is unnecessary to consider whether the exclusion of limestone includes an exclusion of limestone's constituents.³⁸⁴

In an *obiter* statement the full court said that even if it was found that Goliath's object was in fact to recover calcite, it could not agree with the statements made by Heerey J to the effect that the exclusion of limestone includes an exclusion of limestone's constituents.³⁸⁵

An exclusion from beneficial legislation should not, in our view, be read widely unless it is clear that it was intended to incorporate more than is conveyed, namely the stated material. Calcite cannot, as a matter of language, be regarded as a derivative of the word limestone (as to which see Pearce, D. C., *Statutory Interpretation in Australia*, 4th ed. Sydney: Butterworths, 1996. [6.41]). The reference in the exclusion allowing for two constituents of clay should not be regarded as concluding the question whether the constituents of each of the materials there referred to were also to be taken as excluded, unless they were in turn excepted from it. At the most it creates an uncertainty. The extrinsic materials to which regard might then be had to resolve the question show that it was not intended to refuse rebate where a mineral within the stated minerals was sought to be recovered.³⁸⁶

³⁷⁹ Ibid.

³⁸⁰ *Goliath Portland Cement Co Ltd v Chief Executive Officer of Customs*, para 22.

³⁸¹ Ibid.

³⁸² Ibid., para 24.

³⁸³ Ibid., para 28.

³⁸⁴ Ibid.

³⁸⁵ Ibid., para 29.

³⁸⁶ Ibid.

After the full court's decision in the *Goliath* case, David Mitchell also appealed to the full court from Ryan J's judgement. The full court disagreed with the judgement of Ryan J that calcite was included in the exclusion of limestone and rather agreed with the *obiter* statement by the full court in *Goliath* holding that that it was open to the AAT to find that David Mitchell's operations were geared toward the extraction of calcite.³⁸⁷ However, the full court did agree with Ryan J that the beneficiation of calcite after recovery of the limestone was directed toward the recovery of lime (which is not a mineral) and therefore does not fall within the definition of "mining operations".³⁸⁸ Based on this the full court found that the diesel fuel used to extract calcite (a "mineral") would qualify for the DFR, but that the diesel fuel used to produce the subsequent product lime (which is not a "mineral") would not qualify for the DFR.³⁸⁹

In both the *Goliath* case and the *David Mitchell* case the full court applied a purposive test. The full court did not apply the informed general usage test, although limestone may constitute a mineral in terms of the informed general usage test, the test could not assist *Goliath* or *David Mitchell*. This is because limestone is specifically excluded from the definition of "minerals". The informed general usage test therefore becomes irrelevant for purposes of the Customs Act where the substance extracted is one of the excluded substances e.g. limestone or clay.

³⁸⁷ *David Mitchell Ltd v Chief Executive Officer of Customs*, para 29-32.

³⁸⁸ *Ibid.*, para 33-36.

³⁸⁹ *Ibid.*, 36; 46.

4.4.2 *The Adelaide Brighton case*

The AAT's findings of fact and decision

Adelaide Brighton Cement Ltd (“Adelaide”) extracts a substance, commonly known as limestone, to manufacture cement.³⁹⁰ Adelaide applied for the DFR for fuel used in prospecting, extraction and processing of limestone from 1995 to 2001.³⁹¹ The CEO refused the applications and Adelaide applied to the AAT for a review of the CEO’s decision.³⁹²

The main issue in the *Adelaide* case was whether Adelaide used the diesel fuel in “mining operations” as defined in section 164(7) of the Customs Act.³⁹³ This issue turns on whether Adelaide is “mining for minerals” as contemplated in paragraph (a) of the aforementioned definition, keeping in mind that limestone is specifically excluded from the definition of “minerals” in section 167(4) of the Customs Act.³⁹⁴

The AAT agreed with the full court in *State Rail Authority (NSW) v Collector of Customs*³⁹⁵ that, when determining whether an applicant is conducting “mining operations” “the concept of the recovery of minerals is...the central point of reference”.³⁹⁶ The following essential observations and findings were made by the AAT:

- The mere fact that the end product contains minerals is not enough for the extraction of that product to be said to be “mining for minerals”.³⁹⁷
- The end-use to which a product is put cannot determine whether the extraction of that product constitutes “mining operations”.³⁹⁸

³⁹⁰ *Re Adelaide Brighton Cement Ltd and Chief Executive Officer of Customs*, 71 Administrative Law Decisions 128, para 1 (2002).

³⁹¹ *Ibid.*

³⁹² *Ibid.*

³⁹³ *Ibid.*, para 3.

³⁹⁴ *Ibid.*

³⁹⁵ *State Rail Authority (NSW) v Collector of Customs*, 33 211 (1991).

³⁹⁶ *Ibid.*, 215. *Re Adelaide Brighton Cement Ltd and Chief Executive Officer of Customs*, para 25.

³⁹⁷ *Re Adelaide Brighton Cement Ltd and Chief Executive Officer of Customs*, para 26.

³⁹⁸ *Ibid.*, para 27.

- The definition of “minerals” encompasses substances which would not be regarded as minerals for geological purposes.³⁹⁹ This is evidenced by the inclusion of liquids and gasses in the definition of “minerals” which does not agree with the ordinary meaning of the word “minerals”.⁴⁰⁰
- Although Adelaide’s public relations material refer to “limestone”, it is clear that Adelaide only uses limestone with particular qualities.⁴⁰¹ For example, Adelaide places specific emphasis on the chemical content of the limestone it extracts.⁴⁰²
- Lime does not occur naturally in the deposits extracted by Adelaide but is formed after the release of carbon dioxide from the calcium carbonite.⁴⁰³
- The cement produced by Adelaide Brighton must contain the following materials in the following proportions: calcite (85%), silica (19,5%), alumina (1,5%) and haematite (1,2%).⁴⁰⁴
- Adelaide is extracting limestone.⁴⁰⁵ However, it is not doing it for the purpose of it being limestone, but rather for the four specific minerals inherent in limestone i.e. calcite, silica, alumina and haematite.⁴⁰⁶
- The fact that Adelaide does not separate the minerals before using them in the production of cement is irrelevant.⁴⁰⁷ The ultimate purpose is not for the extraction of these four minerals, but rather for the production of cement.⁴⁰⁸
- The *Adelaide* case can be distinguished from the *Goliath* case on the basis that in the last mentioned case what was extracted (i.e. limestone) is not the mineral which was

³⁹⁹ Ibid., para 28.

⁴⁰⁰ Ibid., para 30.

⁴⁰¹ Ibid., para 42.

⁴⁰² Ibid., para 43.

⁴⁰³ Ibid., para 44.

⁴⁰⁴ Ibid., para 10.

⁴⁰⁵ Ibid., para 54.

⁴⁰⁶ Ibid.

⁴⁰⁷ Ibid., para 48.

⁴⁰⁸ Ibid., para 47.

sought (i.e. lime).⁴⁰⁹ Lime is only present later after certain chemical reactions.⁴¹⁰ The *Adelaide* case is more similar to the *David Mitchell* case where it was found that David Mitchell is partially mining for calcite which is a mineral.⁴¹¹

An appeal by the CEO to a single judge of the FCA was dismissed. The CEO lodged a further appeal to the full court of the FCA where the CEO argued that the limestone exclusion will apply unless it is “agricultural use limestone” or the minerals constituting the limestone are separated at no later than stockpiling.⁴¹² Adelaide on the other hand submitted that the purpose of its operations was not to extract “limestone as such”, but rather to obtain the four minerals contained in the extracted limestone and therefore the limestone exclusion does not apply.⁴¹³

The majority’s decision – per Tamberlin, Sackville and Finn JJ

The majority noted that section 15AB(1) of the Acts Interpretation Act, No. 2 of 1901 provides that the explanatory memorandum or second reading speech to a bill may be considered where a provision in an Act is ambiguous or to confirm the ordinary meaning of a provision.⁴¹⁴ On this basis the Explanatory Memorandum to the Customs and Excise Amendment Bill and the secondary reading speech of the Minister suggest that the purpose of the amendment of the definition of “minerals” is to exclude limestone which is useful “as is” from the DFR (for example for use as a building material), but not to exclude limestone extracted for its “inherent mineral qualities”.⁴¹⁵ Based on this the majority confirmed the findings of the AAT and the single judge of the FCA and dismissed the appeal of the CEO.⁴¹⁶

⁴⁰⁹ Ibid., para 55.

⁴¹⁰ Ibid., para 56.

⁴¹¹ Ibid., para 57.

⁴¹² *Chief Executive Officer of Customs v Adelaide Brighton Cement Ltd*, paras 104; 10.

⁴¹³ Ibid., para 106.

⁴¹⁴ Ibid., para 121-24.

⁴¹⁵ Ibid., para 124.

⁴¹⁶ Ibid., para 128.

The majority did not view their decision as inconsistent with the decision in the *Goliath* case.⁴¹⁷ In that case the problem for Goliath was that the mineral lime, was not present when the material was extracted and therefore Goliath could not be said to be “mining for minerals”.⁴¹⁸ It was therefore unnecessary for the FCA in the *Goliath* case to decide whether the exclusion of limestone included an exclusion of limestone’s constituents.⁴¹⁹ The FCA did, however, state *obiter* that the exclusion only applied to “limestone as such” and a wide interpretation should only be given where it is clear that the exclusion intended to apply to more than is conveyed.⁴²⁰ This, according to the majority in the *Adelaide* case, is consistent with its interpretation of the exclusion.⁴²¹

There were two minority decisions per Black CJ and Selway J.

The minority decisions – per Black CJ

Black CJ considered the *Neumann Sands* case which he views as the AAT decision referred to in the second reading.⁴²² Black CJ noted that both *Neumann Sands* and *Adelaide* extracts material which is useful as extracted.⁴²³ The material (sand and limestone respectively) was extracted because its mineral content and physical attributes made it useful for its purpose and in each case, the material retained its physical nature.⁴²⁴ Black CJ inferred that the intention of the legislator was to exclude those materials which would inappropriately be included as minerals under the purposive test as applied in the *Boral Bricks* case and effectively reverse the result brought on by the *Neumann Sands* case.⁴²⁵

⁴¹⁷ Ibid., para 125.

⁴¹⁸ Ibid.

⁴¹⁹ Ibid.

⁴²⁰ Ibid., para 126.

⁴²¹ Ibid., para 127.

⁴²² Ibid., para 36.

⁴²³ Ibid., para 35.

⁴²⁴ Ibid., para 36.

⁴²⁵ Ibid., para 37.

Black CJ further considered the decisions in the *Goliath* case and *David Mitchell* case.⁴²⁶ He referred to the following *obiter* passage in the *Goliath* case where the full court disagreed with the court *a quo* that all constituents of limestone must also be excluded from the definition of minerals:⁴²⁷

...we are however respectfully unable to agree with His Honour the primary judge...that any more was intended by the exclusion than a reference to limestone as such.⁴²⁸

It is on the basis of this passage that Adelaide relies to argue that the intention of the legislature is to limit the limestone exclusion to “limestone as such”.⁴²⁹ Black CJ, however, is of the view that Adelaide’s interpretation of this passage is wrong.⁴³⁰ He argues that the expression “limestone as such” was used in the *Goliath* case to distinguish mining operations, where calcite is the substance present at the end of the extraction process, from mining operations where limestone is the substance present at the end, regardless of whether the limestone was extracted for its physical characteristics or its mineral content.⁴³¹ According to Black CJ, the full court in the *Goliath* case meant that where calcite is separated from limestone, it will not be caught by the limestone exclusion, and therefore the full court in the *Goliath* case could not agree with the court *a quo* in that case that all constituents of limestone must be excluded from the definition of “minerals” in all situations.⁴³²

Black CJ further considered the full court in David Mitchell’s application of the *obiter* passage in the *Goliath* case.⁴³³ He criticised the finding by the full court in the *David Mitchell* case that the AAT’s finding that David Mitchell mined for the mineral calcite was a finding

⁴²⁶ Ibid., para 49-69.

⁴²⁷ Ibid., para 51.

⁴²⁸ *Goliath Portland Cement Co Ltd v Chief Executive Officer of Customs*, para 18.

⁴²⁹ *Chief Executive Officer of Customs v Adelaide Brighton Cement Ltd*, para 61.

⁴³⁰ Ibid., para 62.

⁴³¹ Ibid.

⁴³² Ibid., para 63.

⁴³³ Ibid., para 64-69.

of fact.⁴³⁴ According to Black CJ, this was rather a question of law i.e. was section 164(7) of the Customs Act correctly applied?⁴³⁵ Black CJ is of the view that the full court in the *David Mitchell* case thought itself bound by the AAT's findings and that had it been pointed out to the full court that the AAT's finding was not a finding of fact, but a finding of law, the decision in the *David Mitchell* case might have been different.⁴³⁶

Black CJ held that Adelaide is not entitled to the DFR as it did not separate the minerals it mined for from limestone.⁴³⁷ This is so, he continued, because,

the exception to the definition of 'minerals' extends to all situations in which an excepted material is present at the conclusion of the mining operations, whether that material has been extracted for its physical, chemical or mineral properties.⁴³⁸

He acknowledged that the view he has taken leads to an inconsistency between the extraction of limestone compared to marble where both is used for the end-purpose of manufacturing cement.⁴³⁹ However, Black CJ is of the view that this is a matter for the legislature to resolve.⁴⁴⁰ In this regard, he expressed the view that an amendment to the legislation to the effect that certain activities are excluded from mining operations rather than materials would resolve this inconsistency and lead to greater certainty of the legislature's intended application of the DFR.⁴⁴¹

The minority decisions – per Selway J

Selway emphasised that the meaning of "mining operations" involves the application of a purposive test.⁴⁴² This test is subjective and involves a question of fact.⁴⁴³ He further

⁴³⁴ Ibid., para 67.

⁴³⁵ Ibid.

⁴³⁶ Ibid., para 68.

⁴³⁷ Ibid., para 70-72.

⁴³⁸ Ibid., para 71.

⁴³⁹ Ibid., para 75.

⁴⁴⁰ Ibid., para 76.

⁴⁴¹ Ibid.

⁴⁴² Ibid., para 144.

considered the decisions in the *Goliath* case and the *David Mitchell* case and expressed the view that there is an inconsistency between the two decisions.⁴⁴⁴ According to Selway, the full court in the *David Mitchell* case and the AAT in the *Adelaide* case wrongly viewed each mineral as mutually exclusive.⁴⁴⁵ According to Selway,

[t]he assumption involves an error in interpretation that because a thing has a particular name, it must be different from something with a different name. The identification of an appropriate name is thus viewed as a conclusion as to its nature and character.⁴⁴⁶

Selway was of the view that the *Adelaide* case should be remitted to the AAT for a consideration whether the material extracted by Adelaide was limestone or limestone and one or more minerals.⁴⁴⁷

4.4.3 The Midland case

Midland Brick Company (Pty) Ltd (“Midland”) extracts certain materials, colloquially known as “clay”, for the manufacture of bricks.⁴⁴⁸ Midland applied to the CEO for access to the DFR on the basis that its extraction operations constitutes “mining for minerals” as contemplated in the definition of “mining operations”.⁴⁴⁹ The CEO refused the DFR application as it was of the view that Midland is mining for clay, which is excluded from the definition of “minerals” and on that basis Midland’s operations do not constitute “mining operations”.⁴⁵⁰

⁴⁴³ Ibid.

⁴⁴⁴ Ibid., para 148.

⁴⁴⁵ Ibid.

⁴⁴⁶ Ibid.

⁴⁴⁷ Ibid., para 164.

⁴⁴⁸ *In Re Midland Brick Company (Pty) Ltd and Chief Executive Officer of Customs*, para 49.

⁴⁴⁹ Ibid., para 1; 119.

⁴⁵⁰ Ibid., para 2.

The AAT was called to review the above refusal by the CEO. The question before the AAT was whether Midland is “mining for minerals” as contemplated in the definition of “mining operations”.⁴⁵¹

According to the AAT the correct approach to be applied is that of the majority in the *Adelaide* case.⁴⁵² It therefore needs to be determined whether Midland is mining for “minerals” or mining for clay (which is excluded from the definition of “minerals”).⁴⁵³ This is an enquiry into the objective purpose of Midland in extracting the materials.⁴⁵⁴ The objective purpose is determined by weighing all the relevant factors.⁴⁵⁵

Midland asserted that the purpose of its operations is to extract the minerals kaolin, illite and silica i.e. minerals which are not excluded from the definition of “minerals”.⁴⁵⁶ According to the AAT the evidence does not support this alleged purpose.⁴⁵⁷ The AAT weighed the following factors:

- All customer material describes the material extracted by Midland as clay.⁴⁵⁸ No reference is made in any of the customer material to kaolin, illite or silica.⁴⁵⁹
- All Midland’s licenses are for clay.⁴⁶⁰ Midland does not own any license for kaolin, illite or silica.⁴⁶¹
- Midland has nine requirements for the raw material it extracts.⁴⁶² Although four of these requirements relate to the raw material’s chemical content, there are no

⁴⁵¹ Ibid., para 44.

⁴⁵² Ibid., para 43.

⁴⁵³ Ibid.

⁴⁵⁴ Ibid.

⁴⁵⁵ Ibid.

⁴⁵⁶ Ibid., para 4.

⁴⁵⁷ Ibid., para 47.

⁴⁵⁸ Ibid., para 49-50.

⁴⁵⁹ Ibid., para 50.

⁴⁶⁰ Ibid., para 52.

⁴⁶¹ Ibid.

⁴⁶² Ibid., para 53.

requirements with regard to mineral content.⁴⁶³ No specific limits or mix specifications are set with regard to kaolin, illite or silica.⁴⁶⁴

- More than once a day and 3000 times a year Midland tests the extracted raw material for physical properties.⁴⁶⁵ Midland only provided evidence of one mineral test conducted and the AAT was of the view that this was done with the litigation before the tribunal in mind.⁴⁶⁶
- No evidence is provided on the mineral content of the clay extracted for which Midland claimed the DFR.⁴⁶⁷

Based on this the AAT found that Midland was mining for clay and not mining for “minerals.”⁴⁶⁸ The AAT found the facts in the *Midland* case distinguishable from those in the *Adelaide* case.⁴⁶⁹ The AAT pointed out that Adelaide was mining for specific minerals in specific proportions.⁴⁷⁰ However, in the *Midland* case, the AAT could not find any evidence that Midland was mining for specific minerals in specific proportions.⁴⁷¹ In this regard, a broad relationship between mineralogy and the material extracted is not sufficient.⁴⁷² According to the AAT if this were the case, it would always be arguable that the use of clay depends on its mineral content and therefore, the exclusion of clay would have no practical effect.⁴⁷³ The AAT therefore confirmed the CEO’s decision denying Midland’s DFR application.

⁴⁶³ Ibid.

⁴⁶⁴ Ibid.

⁴⁶⁵ Ibid., para 54.

⁴⁶⁶ Ibid.

⁴⁶⁷ Ibid., para 55.

⁴⁶⁸ Ibid., para 67.

⁴⁶⁹ Ibid., para 68.

⁴⁷⁰ Ibid., para 72.72.

⁴⁷¹ Ibid.

⁴⁷² Ibid., para 73.

⁴⁷³ Ibid.

4.5 Conclusion

The meaning of “mining operations” and “mineral”, both in the context of the ITSSCAA and the Customs Act, have been considered extensively by the AAT and Australian courts. While the ITSSCAA is no longer in force, the decisions dealing with the meaning of “mining operations” and “mineral” still remain relevant for purposes of this study to the extent that they are applied to the same terms as used in the Customs Act.

Pre-1995, a wide approach was followed in interpreting the meaning of these terms and any substance which is a mineral in terms of the informed general usage test was considered to be a “mineral” for purposes of the Customs Act. Post-1995 the informed general usage test no longer provided the necessary relief for DFR applicants extracting substances which are colloquially known as limestone, clay or any of the excluded substances. This is because although limestone and clay may be minerals in terms of the informed general usage test, they are specifically excluded from the amended definition of “minerals”. Consequently, post-1995 the AAT and the FCA applies a purposive test post-1995 to determine whether a DFR applicant is conducting “mining operations”. In an oversimplification, in terms of the purposive test, a DFR applicant will be said to be conducting “mining operations” if the purpose of its operations is to extract a “mineral”.

CHAPTER 5: A SAVIGNIAN’S ANALYSIS OF THE DEFINITION OF “MINING OPERATIONS”

5.1 Introduction

Against the background provided for in chapters 1-4, the purpose of chapter 5 is to interpret the definition of “mining operations” in terms of the Savignian interpretation model set out in chapter 2. In what follows, each technique of the Savignian interpretation model will be considered separately and applied to the definition of “mining operations”. In applying the first four techniques the definition of “mining operations” is interpreted in an SA context, after which a comparison is drawn between such an interpretation and the interpretation followed in Australia. Lastly, Chapter 5 answers the research question and concludes whether the extraction of clay for brickmaking and limestone for the manufacture of cement in principle constitute “mining operations” for purposes of the ITA.

5.2 Grammatical technique

The theory behind the grammatical technique is explained at 2.5.1. In chapter 3, the grammatical technique is applied to analyse the words used in the definition of “mining operations”, specifically the words “include”, “every” “any” and “mineral”. The ordinary meanings of the words “include”, “every” and “any” show that generally these words are used to extend the ordinary meaning of a defined term. It is further noted that the word “include” can also be used where a definition is meant to be exhaustive. In each case the context in which the word “include” is used will be decisive.

Chapter 3 analyses the meaning of “mineral”, a term central to the definition of “mining operations”. The dictionary meaning of the term “mineral” is framed widely to include any “substance obtained by mining”. It is thought that the ordinary meaning of the

term “mineral” is neither fixed nor certain and that depending on the context the term can be used in limitation or expansion.

In terms of the grammatical technique, courts should give effect to every word, unless the court is of the opinion that the words used are superfluous in light of the purpose of the legislation. In other words, in the absence of any indication to the contrary, it is assumed that the legislator had a specific intention with the words used. Applied to the definition of “mining operations”, the use of general words such as “include”, “every” and “any” coupled with the flexible “mineral” indicate that the legislature intended the definition of “mining operations” to be wider than its ordinary meaning.

5.3 Contextual technique

As mentioned above, the context in which words such as “include” and “mineral” is used will determine whether such terms are used in expansion or limitation of the ordinary meaning of “mining operations”. The theory behind the contextual technique is explained at 2.5.2. The application of the contextual technique to the definition of “mining operations” will consider both the intra-textual and extra-textual dimension.

5.3.1 *Extra-textual dimension*

The extra-textual dimension determines that the social, political and economic context in which the legislation is framed (and continues to be framed) is to be considered. The purpose of the 100% capital expenditure allowance is to compensate mining companies for the inherent and extrinsic risks they face, in acknowledgement of the role the mining industry played and continues to play in the social and economic development of SA. At the time of the introduction of the 100% capital expenditure allowance (early 1970s), the mining industry contributed double digits to SA’s gross domestic product (“GDP”), peaking at 19,4% during 1980. Currently, the mining industry contributes about 7% to SA’s GDP.

The 2016 Tax Statistics note that the collection of Corporate Income Tax was “severely impacted by the deterioration in commodity prices”.⁴⁷⁴ It is further noted that the “mining industry in particular was impacted by depressed markets, oversupply in the market, falling commodity prices, high mining costs, and Rand/Dollar fluctuations”.⁴⁷⁵ The table below shows the severe decline in tax revenue collected by SARS (especially from 2014 to 2015) from the “mining and quarrying” sector:⁴⁷⁶

	2012	2013	2014	2015
Number of taxpayers	2235	2290	2063	1300
Taxable income (R million)	19685	15904	-4436	-26544
Assessed tax (R million)	14096	15142	11582	3183

Even though the mining industry has suffered severely under the realisation of inherent and external risks, which has led to a decrease in the industry’s contribution to SA’s GDP and SARS tax revenue, as will be noted at 5.4 and 5.5, the mining industry still makes a valuable and irreplaceable contribution to SA, both socially and economically.

5.3.2 *Intra-textual dimension*

The long title of the ITA reads as follows:

To consolidate the law relating to the taxation of incomes and donations, to provide for the recovery of taxes on persons, to provide for the deduction by employers of amounts from the remuneration of employees in respect of certain tax liabilities of employees, and to provide for the making of provisional tax payments and for the payment into the National Revenue Fund of portions of the normal tax and interest and other charges in respect of such taxes, and to provide for related matters.

⁴⁷⁴ National Treasury and SARS, “2016 Tax Statistics,” ed. Department of National Treasury (2016), 129.

⁴⁷⁵ Ibid., 235.

⁴⁷⁶ Ibid., 147-49.

It is submitted that the long title does not assist in interpreting the meaning of “mining operations” in the context of the 100% capital expenditure allowance. This is because the 100% capital expenditure allowance is a specific concession to the normal taxing regime.

The definition of “mining operations” is contained in section 1. The heading and opening words of section 1 reads as follows:

1. Interpretation.—(1) In this Act, unless the context otherwise indicates.

In this regard, the *Nyasaland Quarries* case provides authority that the definition of “mining operations” is wider than the ordinary meaning of the term. Therefore, the definition of “mining operations” (and not the ordinary meaning) should therefore be applied where “mining operations” is used in the ITA, unless the context indicates otherwise.

The 100% capital expenditure allowance is provided for in section 15(a) read with section 36. The headings of the relevant sections read as follows:

15. Deductions from income derived from mining operations.

36. Calculation of redemption allowance and unredeemed balance of capital expenditure in connection with mining operations.

These sections do not give any indication that the definition of “mining operations” in section 1(1) of the ITA should be deviated from. However, apart from this observation, no further assistance is derived from an intra-textual analysis of the definition of “mining operations”.

5.4 Value technique

The theoretical background to the value technique is set out in 2.5.3. When interpreting the meaning of “mining operations” an interpretation which promotes the spirit, purport and objects of the Bill of Rights should be followed.⁴⁷⁷ In this regard, the government

⁴⁷⁷ "Constitution of the Republic of South Africa," section 39(2).

has an obligation to *inter alia* progressively make available and ensure access to everyone to basic and further education and adequate housing.⁴⁷⁸

According to the Chamber of Mines of South Africa, the mining industry spent roughly R2 billion in local mining and labour sending communities during 2016.⁴⁷⁹ This expenditure was used for direct and indirect job creation, the provision of learnerships and bursaries, improving access to clean water, sanitation, roads and access to healthcare, etc.⁴⁸⁰ In this regard, providing tax incentives to mining companies can assist the Government in fulfilling their constitutional obligations.⁴⁸¹ Therefore, it is submitted that a wider interpretation (as opposed to SARS' narrow interpretation) should find constitutional favour.

5.5 Historical Technique

The theory behind the historical technique is set out at 2.5.4. As mentioned there, when applying the historical technique the emphasis should not lie on the historical facts which led to the provision of the 100% capital expenditure allowance, but rather the “mischief” to which the legislation is aimed.

The 100% capital expenditure allowance is granted in lieu of certain other less favourable allowances.⁴⁸² Therefore, in order to prevent the abuse of the 100% capital expenditure allowance, certain restrictions on claiming the allowance were put in place. Firstly, the allowance is only available to producing mines.⁴⁸³ Secondly, it can only be deducted from “mining income”.⁴⁸⁴ Thirdly, the allowance is ring fenced to a specific mine i.e. the capital expenditure in respect of a mine can only be deducted against the mining

⁴⁷⁸ Ibid., sections 26; 29.

⁴⁷⁹ Chamber of Mines of South Africa, “Mine SA,” (<http://www.chamberofmines.org.za/industry-news/publications/facts-and-figures>) (accessed 12 July, 2017) 2016), 29.

⁴⁸⁰ Ibid.

⁴⁸¹ Ibid.

⁴⁸² *Income Tax Act*, section 15(a).

⁴⁸³ Ibid., section 36(7C).

⁴⁸⁴ Ibid., section 15(a).

income of that same mine.⁴⁸⁵ Partial relaxation of the third restriction is available where mining operations commenced after 14 March 1990. In this regard, the “old mine” can deduct capital expenditure incurred in respect of the “new mine”, limited to 25% of the taxable income of the “old mine” after deduction of the “old mine’s” own capital expenditure.⁴⁸⁶

Historically, the 100% capital expenditure allowance was only available to new gold mines (i.e. mining leases granted after 28 February 1946).⁴⁸⁷ Only in 1973 did the legislator extend the capital expenditure allowance to all mines. In 1987 the Margo Commission recommended the abolishment of the 100% capital allowances and its replacement with a 50/30/20 accelerated allowances.⁴⁸⁸ The Margo Commission acknowledged that such a change might have an adverse impact on investment in the mining industry.⁴⁸⁹ However, the purpose of this was to ensure consistency among the mining and manufacturing industries which found favour with the Government.⁴⁹⁰ The acceptance of this recommendation was made dependent on the findings of a Technical Working Group.⁴⁹¹ The Technical Working Group led to the Report of the Technical Committee on Mining Taxation chaired by Dr G Marais.⁴⁹²

The Marais Committee acknowledged that both the 100% capital expenditure allowance and the recommended 50/30/20 capital expenditure allowance are acceptable under a neutral tax regime.⁴⁹³ However, the Marais Committee recommended that the 100% capital expenditure allowance be retained as the 50/30/20 allowance would potentially have an adverse effect on investment in the mining industry.⁴⁹⁴ Furthermore, the Marais Committee favoured the simplicity of the 100% capital expenditure allowance above the 50/30/20

⁴⁸⁵ Ibid., section 36(7F).

⁴⁸⁶ Ibid., section 36(7G).

⁴⁸⁷ Van Blerk, C-7.

⁴⁸⁸ C.S. Margo, "White Paper on The Report of the Commission of Inquiry Into the Tax Structure of the Republic of South Africa," (Pretoria: The Government Printer, 1987), 17.

⁴⁸⁹ Ibid., 17.

⁴⁹⁰ Ibid., 17.

⁴⁹¹ Ibid., 16.

⁴⁹² G. Marais, "Report of the Technical Committee on Mining Taxation," (1988).

⁴⁹³ Ibid., 36.

⁴⁹⁴ Ibid., 68.

allowance, as the nature of mining operations make it difficult to distinguish between capital expenditure and revenue expenditure.⁴⁹⁵ Such distinction would become relevant under a 50/30/20 regime where only revenue expenditure (and no longer revenue expenditure) would qualify for a 100% deduction during the year it was incurred.⁴⁹⁶ It was further recommended that the ring fencing provisions be amended to provide a discretion to the Minister of Finance to relax or waive the ring fencing provisions if and when it considered it necessary.⁴⁹⁷ During the 1989 tax amendments the Government retained the 100% capital expenditure allowance and the ring fencing of tax provisions, rejecting the relaxation thereof.

In 2015 the Davis Tax Committee (“DTC”) recommended that the 100% capital expenditure allowance be abolished in favour of an allowance spread over a period of four years (40/20/20/20), similar to allowances available to the manufacturing allowances.⁴⁹⁸ This recommendation is in line with the DTC’s general view that the incentives should be provided for in the market and that the tax system should be neutral. In its first interim report, the DTC rejected the Marais Committee’s view that it is difficult to distinguish between capital and revenue expenditure in the mining industry.⁴⁹⁹ According to the DTC this distinction is made in any event by taxpayers as they “maintain this information for accounting and record keeping purposes”.⁵⁰⁰ It is clear that this view propounded by the DTC is flawed. It is a well-established principle that what is capital expenditure for accounting purposes is not necessarily capital expenditure for tax purposes.⁵⁰¹

The DTC further recommends the removal of the ring fencing provisions.⁵⁰²

According to the DTC, this would further parity between the mining industry and the

⁴⁹⁵ Ibid., 69.

⁴⁹⁶ Ibid.

⁴⁹⁷ Ibid., 84.

⁴⁹⁸ Davis Tax Committee, 62.

⁴⁹⁹ Ibid.

⁵⁰⁰ Ibid., 59.

⁵⁰¹ See *Sub-Nigal Ltd v Commissioner for Inland Revenue* 15 South African Tax Cases 381, 389 (1984).

⁵⁰² 61.

manufacturing industry.⁵⁰³ However, the DTC also recommends that, unlike for manufacturing assets, the mining asset be depreciated from the date the capital expenditure is incurred (and not the date the asset is brought into use).⁵⁰⁴

It is noted that the DTC's recommendations have not resulted in amendments to the ITA as of yet and that the 100% capital expenditure allowance (and accompanying ring fencing provisions) remain intact.

5.6 Comparative technique

The theory behind the comparative technique is set out at 2.5.5 Although SA courts are not bound by foreign law, they have constitutional permission to derive assistance from it. This study identified Australia as a comparative jurisdiction for the following reasons:

- Australia, like SA, is abundant with mineral resources;
- Unlike SA, the meaning of “mining operations” and “mineral” have been considered extensively in Australia, both in the context of the ITSSCAA and the Customs Act; and
- SARS, SA courts and SA academic writers refer to Australian case law in interpreting the meaning of “mining operations” and “mineral”.

With regard to the ITSSCA, a narrow view of the meaning of “mining operations” was expressed by the court in the *NSW* case, limiting the “mining operations” to those operations which are extracted through underground workings unless it would not be an unnatural stretch of language to hold that the extraction of a substance through open cast workings constitutes “mining operations”. On the application of this case to the definition of “mining operations” in the FITA the court in the *Nyasaland Quarries* case held as follows:

Counsel for the appellant placed great reliance upon the Australian case of *New South Wales Associated Blue Metals Quarries, Ltd. v The Federal*

⁵⁰³ Ibid., 62.

⁵⁰⁴ Ibid.

Commissioner of Taxes. That case, however, as I read it, was decided upon the ordinary everyday meaning of the terms ‘mining’ and ‘mining operations’, and I must confess that my impression upon reading the various passages, upon which counsel relied, is that if the legislature in defining ‘mining’ and ‘mining operations’, as it did in section 2 of the Act, had intended to make it clear that the decision in that case was to have no application in the Federation they could hardly have found words more suitable for this purpose.⁵⁰⁵

In this regard it is again emphasised that the definition of FITA is substantially the same as the definition in the ITA. On this basis it is submitted that the narrow interpretation of “mining operations” in the *NSW* case has no application to interpreting the same phrase as defined in the ITA. Although the *North Australian Cement* case was also decided under the ITSSCA, it is applied in the context of the Customs Act and the case’s formulation of the informed general usage test is also referred to by SARS in the draft IN and by Van Blerk. To that extent, the *North Australian Cement* case remains relevant in interpreting the meaning of “mining operations” in the context of the Customs Act.

Unlike the ITSSCA, the Customs Act pre-1995 contained definitions of “mining operations” and “minerals”. Central to the definition of “mining operations” is the phrase “mining for minerals”. “Minerals” is defined very widely and the definition is similar to the terms ordinary dictionary meaning. The ITA, on the other hand, only defines “mining operations”. This definition is arguably wider than the Customs Act’s definition as it uses phrases of expansion such as “includes”, “any” and “every”. In comparison, the Customs Act’s definition uses the phrase “means” and further excludes certain quarrying operations from the definition of “mining operations”. However, the most important similarity between the two definitions is the central position held by the term “mineral”. The *Bell* case, established the informed general usage test in the context of the Customs Act. The *Neumann Sands* case applied the informed general usage test and found that in extracting sand for its silica content and by use of methods which could properly be described as “mining”,

⁵⁰⁵ *Commissioner of Taxes v Nyasaland Quarries and Mining Co Ltd*, 582.

Neumann Sands was “mining for minerals”. In this regard, it should be noted that the Customs Act requires that an applicant be “mining for minerals”, while the ITA includes “every method” by which a mineral is extracted. This further supports the contention that the definition of “mining operations” in the ITA is wider than that same definition in the Customs Act and certainly includes the extraction of minerals through open cast workings. The *Water Authority* case, decided after Neumann Sands, applied the characterisation test holding that the question is whether an applicant’s purpose in conducting its operations were to extract a mineral. This, according to the AAT is the conclusive test.

As mentioned in Chapter 4, it is believed that the *Neumann Sands* and *Water Authority* cases led to the amendment of the definition of “minerals” to exclude certain substances from that definition, notably “clay” and “limestone”. In the *David Mitchell* and *Goliath* cases, post-1995, the court applied a purposive test (similar to the test applied in the *Water Authority* case), and not the informed general usage test. The full FCA in these cases was precluded from applying the informed general usage test, because limestone is specifically excluded from the definition of “minerals”. In this regard, it should be noted that the ITA does not contain a definition of “minerals” and therefore does not exclude any substance from the meaning of “minerals”.

The purposive test was applied by the majority of the FCA in the *Adelaide Brighton* case and afterwards, by the AAT in the *Midland Brick* case. The two cases highlight the factual circumstances a court will take into account to determine whether an applicant is “mining for minerals”. These factual circumstances include whether:

- public relation and customer material refer to the mineral content or mineral characteristics of the substance extracted;
- the mining licences are in the name of the mineral extracted;

- internal documentation set out specific mineral composition requirements for the substance which is extracted; and
- extensive mineral composition tests are conducted on a regular basis.

In this regard, this study submits that the purposive test should be applied in the context of the ITA to determine whether a taxpayer is conducting “mining operations”. In such a case, even if a court should decide that clay and limestone are not minerals in the context of the definition of “mining operations”, the extraction of clay and limestone would still qualify as “mining operations” provided it can be proved that it is extracted for its mineral content. Furthermore, the factual circumstances set out above provide useful guidelines to determine whether a taxpayer’s purpose is to extract a mineral.

If the purposive test is applied to clay and limestone in South Africa, the extraction of clay for brickmaking and limestone for cement manufacture would constitute “mining operations” provided the purpose of the extraction is to recover the clay and limestone for their mineral content.

5.7 Conclusion

The Savignian interpretation model provides a useful and systematic method of interpreting the meaning of “mining operations” for income tax purposes. In terms of the grammatical analysis of the definition of “mining operations” it is concluded that a wider interpretation of that definition should be followed. This is supported by the application of the contextual technique which highlights that the original purpose behind the provision of the 100% capital expenditure allowance favours such a wider interpretation.

The value technique recognises the important role the mining industry can play in fulfilling the Government’s constitutional obligations and therefore, further supports a wider interpretation of the meaning of “mining operations”. The application of the technique shows that despite the potential for abuse of the 100% capital expenditure allowance through a wide

interpretation of “mining operations”, the ring fencing provisions provide internal checks and balances to sufficiently guard against such an abuse.

Finally, in comparing the interpretation of “mining operations” in Australia with South Africa, it is recommended that the purposive test applied in Australia should be adopted in SA. In this regard useful guidelines in applying the purposive test was also identified and set out at 5.6. In applying the purposive test, it is concluded that provided clay and limestone are extracted for their mineral content, the extraction operations will, in principle, constitute “mining operations”. Although this will ultimately depend on the specific facts before a court, it is thought that the purposive test provides sufficient guidelines and certainly to extractors of clay and limestone regarding their entitlement to the 100% capital expenditure allowance.

BIBLIOGRAPHY

Books

- Bekker, J.C., C. Rautenbach, and N.M.I Goolam. *Politics, Socio-Economic Issues and Culture in Constitutional Adjudication* Potchefstroom: Platinum Press, 2004.
- Botha, C.J. . *Statutory Interpretation: An Introduction for Students*. Juta, 2005.
. 2 vols. Durban: Butterworth & Co, 1976.
- Devenish, G.E. *The Interpretation of Statutes*. Juta, Limited, 1992.
- Dickerson, F.R. *The Interpretation and Application of Statutes*. Little, Brown, 1975.
- Du Plessis, L.M. *Re-Interpretation of Statutes*. Butterworths, 2002.
- Emslie, T., D. Davis, and S.J. Hutton. *Income Tax Cases and Materials*. Taxpayer CC, 1994.
- Kellaway, E.A. *Principles of Legal Interpretation of Statutes, Contracts and Wills*.
Butterworths, 1995.
- Meyerowitz, D., and E. Spiro. *The Taxpayer's Permanent Volume on Income Tax in South Africa*. The Taxpayer, 1969.
2nd (revised) ed. 1 vols. Oxford: Oxford University Press, 2005.
- Pryor, E.J. *Dictionary of Mineral Technology* London: Mining Publications, 1963.
- Sands, C.D., and N.J. Singer. *Sutherland Statutory Construction*. Vol. 2A: Callaghan & Company, 1972.
- Sullivan, R., and E.A. Driedger. *Driedger on the Construction of Statutes*. Butterworths, 1994.
- Tiley, J., J.A. Jones, P. Harris, and J.D.B. Oliver. *Comparative Perspectives on Revenue Law: Essays in Honour of John Tiley*. Cambridge University Press, 2008.
- Von Savigny, F.C. *System Des Heutigen Romischen Rechts*. Gale, Making Of Modern Law, 2013.
- Wills, B.A. *Wills' Mineral Processing Technology: An Introduction to the Practical Aspects of Ore Treatment and Mineral Recovery*. Elsevier Science, 2011.

Journals

- Badenhorst, P.J. . "Mineral and Petroleum Resources Development Act 28 of 2002 : A Geologist as Devil's Advocate for a Change? ." *Obiter* 29, no. 1 (2008): 33-52.
- Cowen, D.V. "Prolegomenon to a Restatement of the Principles of Statutory Interpretation ". *TSAR* (1976).
- De Ville, J. "Meaning and Statutory Interpretation ". *THRHR* 62 (1999): 373-89.
- Devenish, G.E. "Teleological Evaluation: A Theory and Modus Operandi of Statutory Interpretation in South Africa." *SAPL* 62 (1991).
- Du Plessis, L.M. "The (Re-)Systemization of the Canons of and Aids to Statutory Interpretation." *SALJ* 122 (2005).
- King, H. "Limestone."
- McKerchar, M. "Philosophical Paradigms, Inquiry Strategies and Knowledge Claims: Applying the Principles of Research Design and Conduct to Taxation." *eJournal of Tax Research* 6 (1) (2008).
- Mureinik, E. . "Administrative Law in South Africa ". *SALJ* 103 (1986).
- Silke, J. "The Interpretation of Fiscal Legislation- Canons of Construction, Recent Judicial Comments and New Approaches." *AJ* (1995).

Case Law

- Abbott Point Bulk Coal Pty Ltd V Collector of Customs*, 35 Federal Court Reporter 371 (1992).

- Association of Amusement and Novelty Machine Operators V Minister of Justice and Another* 2 South African Law Reports 636 (1980).
- Bato Star Fishing (Pty) Ltd V Minister of Environmental Affairs and Tourism*, 4 South African Law Reports 490 (2004).
- Boral Bricks (Qld) Ltd V Australian Customs Service* 18 Administrative Law Decisions 456 (1988).
- Cape Brandy Syndicate V Inland Revenue Commissioner*, Law Reports, King's Bench 64 (1921).
- Chief Executive Officer of Customs V Adelaide Brighton Cement Ltd*, 139 Federal Court Reporter 147 (2004).
- Chief Executive Officer of Customs V David Mitchell Ltd*, 1611 (1999).
- Chief Executive Officer of Customs V Goliath Portland Cement Co Ltd*, 666 (1999).
- Coetzee V Government of the Republic of South Africa; Matiso V Commanding Officer, Port Elizabeth Prison*, 4 South African Law Reports 631 (1995).
- Collector of Customs V Neumann Sands (Victoria) (Pty) Ltd* 136 Australian Law Reports 584 (1996).
- Commissioner for the South African Revenue Services V Foskor (Pty) Ltd*, 72 South African Tax Cases 172 (2010).
- The Commissioner of Taxation of the Commonwealth of Australia V. I.C.I. Australia Limited*, 127 Commonwealth Law Reports 529 (1972).
- Commissioner of Taxes V Nyasaland Quarries and Mining Co Ltd*, 24 South African Tax Cases 579 (1961).
- Commissioner of the South African Revenue Service V Marula Platinum Mines Ltd*, 2 South African Law Reports 398 (2016).
- Daniels V Campbell*, 7 Butterworths Constitutional Law Reports 735 (2004).
- David Mitchell Ltd V Chief Executive Officer of Customs*, 46 Australasian Tax Reports 433 (1999).
- David Mitchell Ltd; Loongana Lime Pty Ltd and Ceo of Customs*, 69 (1998).
- De Reuck V Director of Public Prosecutions, Witwatersrand Local Division and Others*, 1 South African Law Reports 406 (2004).
- De Villiers V Cape Divisional Council*, Buchanan's Reports 50 (1875).
- Department of Land Affairs V Goedgelegen Tropical Fuirts (Pty) Ltd*, 6 South African Law Reports (2007).
- Ex Parte Slater, Walker Securities (Sa) Ltd*, 4 South African Law Reports (1974).
- Falcon Investments Ltd V Cd of Birnam (Suburban) (Pty) Ltd and Others* 4SA 384 (1973).
- Federal Commissioner of Taxation V Reynolds Australia Alumina Limited* (1987) 77 Alr 543 at P, 77 Australian Law Reports 543 (1987).
- Finbro Furnishers (Pty) Ltd V Registrar of Deeds, Bloemfontein*, 4 South African Law Reports 773 (1985).
- Fourie and Another V Minister of Home Affairs and Another* 1 All South African Law Reports 273 (2005).
- Glen Anil Development Corporation Ltd V Secretary for Inland Revenue* 4 South African Law Reports 715 (1975).
- Golden China Tv Game Centre V Nintendo Co Ltd*, 1 South African Law Reports 405 (1997).
- Goliath Portland Cement Co Ltd V Chief Executive Officer of Customs*, 45 Australasian Tax Reports 96 (2000).
- Goliath Portland Cement Co Ltd; Shaw Contracting Pty Ltd and Ceo of Customs*, 766 (1998).
- Harris V Law Society of Cape of Good Hope*, 449 (1917).
- Hayne & Co V Kaffrarian Steam Mill Co Ltd*, 371 (1914).

- Heydon's Case*, J36 Exchequer Reports (1584).
- In Re Midland Brick Company (Pty) Ltd and Chief Executive Officer of Customs*, 178 Commonwealth Law Reports (2001).
- Income Tax Case No. 909*, 24 South African Tax Cases 97 (1960).
- Income Tax Case, No. 1836* 71 South African Tax Cases 115 (2008).
- Income Tax Case, No. 1875*, 77 South African Tax Cases 161 (2014).
- Jones & Co V Cir*, 1 (1926).
- Keyter V Minister of Agriculture* Natal Law Reports 522 (1908).
- Kommissaris Van Doeane En Aksyns V Mincer Motors* 1 South African Law Reports 114 (1959).
- Minister for Immigration and Multicultural and Indigenous Affairs V Al-Miahi* 65 Administrative Law Decisions 744 (2001).
- Minister of Land Affairs V Rand Mines Ltd*, 4 South African Law Reports 303 (1998).
- Minister of Water Affairs and Forestry V Swissborough Diamond Mines (Pty) Ltd*, 2 South African Law Reports 345 (1999).
- Nasionale Vervoerkommissie Van Suid-Afrika V Salz Gassow Transport (Edms) Bpk* 4 South African Law Reports (1983).
- Natal Joint Municipal Pension Fund V Endumeni Municipality*, 4 South African Law Reports 593 (2012).
- Neumann Sands Victoria Pty Ltd and Australian Customs Service*, Austlii (1995).
- New South Wales Associated Blue-Metal Quarries Ltd V Federal Commissioner of Taxation*, 94 Commonwealth Law Reports 509 (1956).
- North Australian Cement Limited V Federal Commissioner of Taxation*, 119 Commonwealth Law Reports 353 (1969).
- North Australian Cement Ltd V Federal Commissioner of Taxation*, 20 Australian Tax Reports 1058 (1989).
- Price Street Professional Centre Pty Ltd V Commissioner of Taxation* 243 Administrative Law Reports 728 (2008).
- Principal Immigration Officer V Hawabu*, 26 (1936).
- R V Debele*, 4 South African Law Reports 570 (1956).
- R V Hugo* 271 (1926).
- R V Kirk*, 564 (1914).
- Re Adelaide Brighton Cement Ltd and Chief Executive Officer of Customs*, 71 Administrative Law Decisions 128 (2002).
- Re Collector of Customs V Bell Basic Industries Ltd* 20 Federal Court Reports 146 (1988).
- Re Water Authority of Western Australia and Collector of Customs* 37 Administrative Law Decisions 600 (1995).
- Richards Bay Iron & Titanium (Pty) Ltd & Another V Commissioner for Inland Revenue* 58 South African Tax Cases 55 (1996).
- S V Makwaynyane*, 6 South African Criminal Law Reports 1 (1995).
- Savage V Commissioner for Inland Revenue*, 4 South African Law Reports 400 (1951).
- Secretary for Inland Revenue V Somers* 2 South African Law Reports 138 (1968).
- Shenker V the Master*, 136 (1946).
- South African Association of Personal Injury Lawyers V Heath*, 1 Butterworths Constitutional Law Reports 77 (2001).
- Standard General Insurance Co Ltd V Commissioner for Customs and Excise* 2 South African Law Reports 166 (2005).
- State Rail Authority (Nsw) V Collector of Customs*, 33 211 (1991).
- Stellenbosch Farmers' Wineries V Distillers Corporation (Sa) Ltd*, South African Law Reports 458 (1962).

Sub-Nigal Ltd V Commissioner for Inland Revenue 15 South African Tax Cases 381 (1984).
Thompson V Kama; Stilwell V Kama, 217 (1917).
Venter V R, 910 (1907).
Volschenck V Volschenk, 486 (1946).
Western Platinum Limited V Commissioner for the South African Revenue Service 67 SATC 1 (2005).

Legislation

"Constitution of the Republic of South Africa." (1996).
Income Tax Act.
Income Tax Act.
Intepretation Act.

Websites

Afsar, J. "Cement Manufacturing Process."
<http://www.engineeringintro.com/uncategorized/cement-manufacturing-process/>
 (accessed, 21 June 2017).
 Company, The Detering. "General Overview of Brick Manufacturing."
<http://www.detering.com/re-li/Brick-&-Stone/TDC-Additional-Brick-Information.pdf>
 (accessed 21 June, 2017).
 King, H. "Shale." <http://geology.com/rocks/shale.shtml> (accessed 21 June, 2017).
 Ltd, Lafarge South Africa Holdings (Pty). "Manufacturing Process."
http://www.lafarge.co.za/wps/portal/za/2_2_1-Manufacturing_process (accessed 21 June, 2017).
 Mathloma, S. "Csars V Marula Platinum Mines - More Than a Miner Problem."
<https://www.bdo.co.za/en-za/insights/2017/tax/csars-v-marula-platinum-mines-more-than-a-miner-problem> (accessed 12 July, 2017).
 Meiring, G., L. Le Roux, and J. Pousson. "Sa Court Decision on Application of Section 23f(2) to Mining Company." PwC, <https://www.pwc.co.za/en/assets/pdf/tax-alert-csars-v-marula-platinum-mines.pdf> (accessed 12 July, 2017).
 Myburgh, A. "The Taxation of South African Mining and Prospecting Companies: Certain and Predictable?" ENS, <https://www.ensafrica.com/news/The-Taxation-of-South-African-Mining-and-Prospecting-Companies-Certain-and-Pred?Id=1241&STitle=tax%20ENSight> (accessed 7 July, 2017).
 SARS. "Draft Documents for Public Comment." <http://www.sars.gov.za/Legal/Preparation-of-Legislation/Pages/Draft-Documents-for-Public-Comment.aspx> (accessed 21 June, 2017).
 Smit, C. "The Role of Mining in the South African Economy."
<https://www.sablog.kpmg.co.za/2013/12/role-mining-south-african-economy/>
 (accessed 21 June, 2017).
 Wienerberger. "The World of Brick Production." <http://clay-wienerberger.com/expertise/the-world-of-brick-production-> (accessed 21 June, 2017).

Theses

Cloete, L. "A Critical Analysis of the Distinction between Mining and Manufacturing for South African Income Tax Purposes." Nelson Mandela Metropolitan University, 2010.
 Swanepoel, P.A. "An Analysis of the Purposive Approach to the Interpretation of South African Fiscal Legislation." University of Pretoria, 2012.

Book Section

- Kraukamp, F., F. Croft, F. Dickinson, H. Harris, and A. Coetzee. "Clay Brick Manufacture." Chap. Clay Brick Manufacture In *Clay Brick Technical Guide*, edited by The Clay Brick Association of South Africa, 2015.
- Van Blerk, M. "Mining Tax in South Africa." Chap. History of Mining Tax Rivonia: Taxfax CC, 1992.

Other

- Africa, Chamber of Mines of South. "Mine Sa." <http://www.chamberofmines.org.za/industry-news/publications/facts-and-figures> (accessed 12 July, 2017), 2016.
- Davis Tax Committee. "First Interim Report on Mining for the Minister of Finance." 1-167, 2014.
- De Jager, A. "Findings of the Sca in the Marula Case – What Does This Mean for the Mining Industry?", edited by KPMG: KPMG, 2016.
- "Explanatory Memorandum to the Customs and Excise Amendment Bill." 1995.
- "House of Representatives Official Hansard." edited by House of Representatives, 1995.
- Ltd, Era Stene (Pty). "Mining Work Programme."
- Marais, G. "Report of the Technical Committee on Mining Taxation." 1988.
- Margo, C.S. "White Paper on the Report of the Commission of Inquiry into the Tax Structure of the Republic of South Africa." Pretoria: The Government Printer, 1987.
- Office, International Labour. "Small-Scale Brickmaking." edited by International Labour Organisation, 1984.
- PwC. "Mine 2017, Stop. Think... Act." 2017.
- SARS. "Draft Interpretation Note on Whether Certain Quarrying Operations Consitute Mining Operations." edited by SARS, 2015.
- Treasury, National, and SARS. "2016 Tax Statistics." edited by Department of National Treasury, 2016.