The approach of the Supreme Court of Appeal to the interpretation of fiscal legislation and the (unintentional) demise of the contra fiscum principle

PAULA GABRIEL (FRXPAU006)

SUBMITTED TO THE UNIVERSITY OF CAPE TOWN

In partial fulfilment of the requirements for the degree

LLM (TAX LAW)

(Word Count: 22 723)

Supervisor: Professor Johann Hattingh

Minor dissertation presented for the approval of Senate in fulfilment of part of the requirements for the Master of Laws (LLM) specialising in tax law in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of master's in law dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

Paula Gabriel

7 February 2024

ACKOWLEDGMENTS

I thank my supervisor, Professor Hattingh, for his expert guidance and encouragement. The wealth of Professor Hattingh's knowledge and the value of his insights cannot be overstated.

My thanks and appreciation also go to my husband and daughter for their infinite patience and support, and to my father, for tirelessly and willingly proof-reading multiple drafts of this document.

ABSTRACT

The decision of the Supreme Court of Appeal in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) ("*Endumeni*") enjoins the courts, when interpreting legislation, to consider the context of the document as a whole, in light of all the relevant circumstances. The *contra fiscum* principle provides that, in cases of ambiguity, legislation imposing a burden on a taxpayer should be construed in favour of the taxpayer (and against the fiscus).

This thesis examines the approach of the Supreme Court of Appeal to the interpretation of fiscal legislation since its decision in *Endumeni* and asks whether this approach is compatible with the continued survival of the *contra fiscum* principle in South African law.

LIST OF ABBREVIATIONS

Customs Act	-	Customs and Excise Act 91 of 1964
ITA	-	Income Tax Act 58 of 1962
Royalty Act	-	Mineral and Petroleum Resources Royalty Act 28 of 2008
SARS	-	South African Revenue Services
SCA	-	Supreme Court of Appeal
TAA	-	Tax Administration Act 28 of 2011
VAT Act	-	Value Added Tax Act 89 of 1991

LIST OF ABBREVIATIONS iv

CHAPTER 1 – INTRODUCTION AND PROBLEM STATEMENT 1

1.1. Introduction 1

1.2. Rationale for the study 2

1.3. Research question 3

1.4. Research method 3

1.5. Structure 6

CHAPTER 2 –THE CONTRA FISCUM PRINCIPLE 7

2.1. Introduction 7

2.2. What is the contra fiscum principle? 7

2.3. A rule or a presumption? 9

2.4. When does the contra fiscum principle apply? 12

2.5. Conclusion 13

CHAPTER 3 – THE INTERPRETATION OF FISCAL LEGISLATION 15

3.1. Introduction 15

3.2. The decision of Wallis JA in *Endumeni* 16

3.3. The interpretative approach to fiscal legislation prior to *Endumeni* 17

3.4. The interpretative approach to fiscal legislation after *Endumeni* 19

3.5. Conclusion 21

CHAPTER 4 – REFERENCES TO CONTRA FISCUM SINCE ENDUMENI (2019 TO 2023) 22

4.1. Introduction 22

4.2. Contra fiscum in Daikin 22

4.2.1. Introduction 22

4.2.2. Facts 23

4.2.3. Discussion 23

4.2.4. Conclusion 24

4.3. Contra fiscum in Marshall 24

4.3.1. Introduction 24

4.3.2. The legal question 25

4.3.3. Facts 25

4.3.4. Discussion 26

4.3.5. Appeal to the Constitutional Court 26

4.3.6. Conclusion 27

4.4. Contra fiscum in Telkom 27

4.4.1. Introduction 27

4.4.2. Facts 27

4.4.3. The legal question 28

4.4.4. Discussion 29

4.4.5. Conclusion 31

4.5. Contra fiscum in Glencore 31

4.5.1. Introduction 31

4.5.2. The facts 32

4.5.3. The legal question 32

4.5.4. Discussion 32

4.5.5. Conclusion 33

4.6. Conclusion 33

CHAPTER 5 – CASES NOT DEALING WITH CONTRA FISCUM (2019 TO 2023) 34

5.1. Introduction 34

5.2. CSARS v Big G Restaurants 35

5.2.1. Introduction 35

5.2.2. Facts 35

5.2.3. Decision of the Constitutional Court in Big G 37

5.2.4. Discussion 37

5.2.5. Conclusion 38

5.3. CSARS v Langholm Farms 38

5.3.1. Introduction 38

5.3.2. The facts 38

5.3.3. The decision 39

5.3.4. Discussion 41

5.3.5. Whether or not the approach is consistent with Endumeni 42

5.3.6. Conclusion 43

5.4. Milnerton Estates v CSARS 44

5.4.1. Introduction 44

5.4.2. Facts 44

5.4.3. Discussion 46

5.4.4. Conclusion 46

5.5. CSARS v United Manganese Of Kalahari (Pty) Ltd 46

5.5.1. Introduction 46

5.5.2. Legislative framework 48

5.5.3. Facts 48

5.5.4. Interpretative approach 49

5.5.5. Discussion 51

5.5.6. Conclusion 52

5.6. CSARS v The Thistle Trust 52

5.6.1. Introduction 52

5.6.2. The Facts 52

5.6.3. Discussion 53

5.6.4. Conclusion 54

5.7. Conclusion 54

CHAPTER 6 – HAS THE CONTRA FISCAL PRINCIPLE SURVIVED THE APPROACH IN ENDUMENI? 55

6.1. Introduction 55

6.2. Overview of the SCA's approach to interpretation in the period under review 55

6.3. The problem in *Telkom:* an "irresoluble" ambiguity 56

6.4. The unintentional demise of the *contra fiscum* principle 58

6.5. Conclusion 59

CONCLUSION 60

BIBLIOGRAPHY 62

THE APPROACH OF THE SUPREME COURT OF APPEAL TO THE INTERPRETATION OF FISCAL LEGISLATION AND THE (UNINTENTIONAL) DEMISE OF THE *CONTRA FISCUM* PRINCIPLE

CHAPTER 1 – INTRODUCTION AND PROBLEM STATEMENT

1.1. Introduction

In 1935 England it was held in *Duke of Westminster v IRC* that:

> *"[e]very man is entitled if he can order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioner for Inland Revenue or his fellow-taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax."*[1]

The idea that a taxpayer should be entitled to arrange his affairs to attract a lesser tax liability has long been supported by the principle that fiscal legislation that imposes a burden on a taxpayer should be interpreted *contra fiscum*.[2]

There has been a gradual shift, however, in the approach to the interpretation of fiscal legislation. The starting point was the "golden rule" of interpretation, which focused on the literal meaning of a statute, and which was based on the assumption that the language used can be clear. This approach was also based on the idea that, because tax legislation is onerous, it had to be interpreted strictly.[3]

The gradual change in the approach to statutory interpretation crystallised in the unanimous decision of the Supreme Court of Appeal ("the SCA") in *Natal Joint Municipal*

---

1 1935 All ER 259.

2 See for example *Estate Reynolds v CIR* 1937 AD 57 at 70. For present purposes the *contra fiscum* principle will be referred to as a "principle". The status of this principle, and whether or not it can legitimately be referred to as a rule of interpretation or a principle of law-making, is considered in chapter 2.

3 Hattingh, Nogueira, Roeleveld & West *Fundamentals of Taxation: An Introduction to Tax Policy, Tax Law and Tax Administration* (2019) ch 3.1.5, available at https://research-ibfd-org.ezproxy.uct.ac.za/#/doc?url=/collections/pt/html/pt_c03.html, accessed on 14 January 2024.

Pension Fund v Endumeni Municipality[4] ("*Endumeni*"), which has since been widely followed by the courts in South Africa ("the *Endumeni* approach"). The *Endumeni* approach focuses not on the literal construction of the language, but on the context and the purpose of the language used.[5]

A substantial body of authority dealing with the *contra fiscum* principle predates the decision in *Endumeni* and considers the *contra fiscum* principle in a context that focused on the literal meaning of the text and the "intention of the legislature". This thesis examines the *contra fiscum* principle in a post-*Endumeni* interpretative context.

1.2. Rationale for the study

In 1776 Adam Smith premised four maxims with regard to taxes in general, one of which is the concept that the tax which an individual is bound to pay ought to be certain and not arbitrary.[6] Over two centuries later the European Court of Justice held that the principle of fiscal legality may be considered as a general principle of EU law, requiring that the essential elements of the tax be defined in law, thereby enabling the taxpayer to determine his tax liability.[7]

In a South African context, the Constitutional Court has confirmed that arbitrary legislation will not be in line with constitutional principles.[8] Section 25 of the Constitution provides that no one may be deprived of property, except in terms of a law of general application, and no law may permit arbitrary deprivation of property. Since the courts assists in clarifying legislation that is otherwise neither clear nor certain, the manner in which legislation is interpreted is fundamental to the rights of taxpayers.[9]

---

4 2012 (4) SA 593 (SCA).

5 The *Endumeni* approach is discussed in chapter 3.

6 Smith, A *An Enquiry into the Nature and Causes of the Wealth of Nations* (1776) Book 5 ch 2 Part 1, available at *https://www.gutenberg.org/cache/epub/3300/pg3300-images.html#chap15*, accessed on 14 January 2024.

7 C-566/17 Związek Gmin Zagłębia Miedziowego w Polkowicach vSzef Krajowej Administracji Skarbowej.

8 *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (4) SA 768.

9 Goldswain, GK *The Winds of Change – An Analysis and Appraisal of Selected Constitutional Issues Affecting the Rights of Taxpayers* (unpublished Doctor of Accounting Science thesis, University of South Africa, 2012) 27.

Whether or not the *contra fiscum* principle still applies in our law, and how and when it is applied, is therefore not merely a matter of academic interest or the subject of abstract legal theory – it is a question that impacts the rights of taxpayer in a real and tangible manner. The *contra fiscum* principle, where applied, will relieve the taxpayers of a tax liability to which the fiscus may not be entitled. By contrast, the failure to apply the *contra fiscum* principle may result in a taxpayer being held liable for the payment of tax to which the fiscus is not entitled.[10]

1.3. Research question

In 1976 it was written by Dison that the *contra fiscum* principle is "*an important foundation of our jurisprudence and deserves to be examined afresh by everyone concerned with the interpretation of taxation laws, so that both the arguments presented to the courts and the decisions themselves may be enriched by a scholarly appreciation of its significance*".[11]

This thesis heeds the call and examines afresh the *contra fiscum* principle in light of the decision of the SCA in *Endumeni,*[12] and asks whether the *Endumeni* approach is compatible with the continued application of the *contra fiscum* principle in South African law.

1.4. Research method

This question is answered by analysing the approach adopted by the SCA to the interpretation of fiscal legislation[13] and establishing the extent, if any, to which the SCA has applied the *contra fiscum* principle in favour of the taxpayer since the decision in *Endumeni*, specifically in the period under review.

In matters where the courts are called upon to interpret fiscal legislation, the Commissioner of the South African Revenue Services is almost invariably cited as a party. This research therefore focuses on decisions of the SCA to which the Commissioner of the South African

---

10 Jooste, T *Tax Fairness: The Test Applicable to the Contra Fiscum Rule* (unpublished Master of Commerce thesis, University of Pretoria, 2020) 6.

11 Dison, Lewis R "The Contra Fiscum Rule in Theory and Practice" (1976) 2 *SALJ* 159 at 199.

12 Supra note 4.

13 Ibid.

Revenue Services ("the *Commissioner*") was a party in the period between 2019 and 2023, [14] in order to establish the extent to which the *contra fiscum* principle is still applied by the SCA. The decisions under review are tabulated below. Of these decisions, those that involved ambiguity in the interpretation of fiscal legislation are discussed in chapters 4 and 5.

CASE NAME	PROVISION INTERPRETED	OUTCOME	Contribution to research question
The Commissioner for the South African Revenue Services v Daikin Air Conditioning South Africa (Pty) Limited 2018 JDR 1072 (SCA)	Section 47(1) read with Schedule 1 of the Customs Act	SCA found against the taxpayer	*Contra fiscum* considered. Discussed in chapter 4.
CSARS v Big G Restaurants (Pty) Ltd 2019 (3) SA 90 (SCA)	Section 24(C) of the ITA	SCA found against the taxpayer	*Contra fiscum* not considered. Discussed in chapter 5.
CSARS v Langholm Farms (Pty) Ltd [2019] ZASCA 163	section 75(1C)(a)(iii) of the Customs Act	SCA found against the taxpayer	*Contra fiscum* not considered. Discussed in chapter 5.
CSARS v Volkswagen South Africa (Pty) Ltd 2019 (2) SA 362 (SCA)	section 22(1)(a) of the ITA	SCA found against the taxpayer	Language not ambiguous and *contra fiscum* would not have found application. This case is therefore not discussed in chapter 5.
The Milnerton Estates Limited v CSARS 2019 (2) 386 (SCA)	section 24(1) of the ITA	SCA found against the taxpayer	*Contra fiscum* not considered. Discussed in chapter 5.
CSARS v Clicks Retailers (Pty) Ltd 2020 (2) SA 72 (SCA); *Clicks Retailers v CSARS* 2021 (4) 390 (CC)	section 24C of the ITA	SCA and the Constitutional Court found against the taxpayer	This decision was decided shortly after *Big G* and involved the same provision. This decision is therefore not discussed in chapter 5.
CSARS v United Manganese of Kalahari (Pty) Ltd 2020	Section 6 of the Royalty Act	SCA found in favour of the	*Contra fiscum* not considered. Discussed in

[14] This is the period prior to the date of submission of this thesis. The last decision in the period under review was handed down on 3 March 2023. Due to the length restrictions of this work, it is not feasible to analyse decisions handed down by the SCA between 2012 (when *Endumeni* was decided) and 2019.

(4) SA 428 (SCA)		taxpayer without reference to the *contra fiscum* principle	chapter 5.
Telkom SA Soc Ltd v CSARS 2020 (4) SA 480 (SCA)	Section 24I of the ITA	The SCA found against the taxpayer with reference to the *contra fiscum* principle	*Contra fiscum* considered. Discussed in chapter 4.
CSARS v Glencore Operations SA (Pty) Ltd (Case no 462/2020) [2021] ZASCA 111 (10 August 2021)	section 75(1A) of the Customs Act	The SCA found against the taxpayer	*Contra fiscum* considered. Discussed in chapter 4.
CSARS v Spur Group (Pty) Ltd 2021 JDR 2530 (SCA)	Section 11(a) of the ITA	The SCA found against the taxpayer	The question was not one of interpretation to which *contra fiscum* would apply. This decision is therefore not discussed in chapter 5.
CSARS v The Thistle Trust (516/2021) [2022] ZASCA 153 (7 November 2022)	section 25B of the ITA	SCA found against the taxpayer	*Contra fiscum* not considered. Discussed in chapter 5.
Purveyors South Africa Mine Services (Pty) Ltd v CSARS 2022 (3) SA 139 (SCA)	section 227(a) of the TAA	SCA found against the taxpayer	The matter dealt with the interpretation of the Tax Administration Act, and provisions which are not onerous in the sense of depriving taxpayers of property. This case is therefore not discussed in chapter 5.
CSARS v Coronation Investment Management South Africa (Pty) Ltd 2023 (3) 404 (SCA)	section 9D of the ITA	SCA found against the taxpayer	The matter involved a question of application, rather than interpretation, and is therefore not discussed in chapter 5.
CSARS v Medtronic	39(7)(a) of the	SCA found in	The matter involved the

International Trading SARL 2023 (3) SA 423 (SCA)	VAT Act	favour of the taxpayer without reference to the *contra fiscum* principle	interpretation of provisions which are not onerous in the sense of depriving a taxpayer of property. This case is therefore not discussed in chapter 5.
Mobile Telephone Networks (Pty) Ltd v CSARS 2023 (1) SA 420 (SCA)	Circumstances in which declaratory relief is competent	The SCA found against the taxpayer	The decision dealt with circumstances in which declaratory relief is competent, and not with the interpretation of an ambiguous fiscal provision. This decision is therefore not discussed in chapter 5.

This paper uses a qualitative desktop study relying on primary and secondary sources. No field work or interviews were conducted during the course of researching this thesis. As a result, no ethics approval is required.

1.5. Structure

Chapter 2 considers the nature and the status of the *contra fiscum* principle and asks whether it is a rule of law or a principle of interpretation.

Chapter 3 discusses the interpretative approach applicable specifically to fiscal legislation in light of the decision in *Endumeni*.[15]

Chapter 4 considers those decisions under review in which reference is made to the *contra fiscum* principle.

Chapter 5 considers those decisions under review in which fiscal legislation was interpreted without reference to the *contra fiscum* principle.

Chapter 6 considers whether the *contra fiscum* principle can be said to have survived the decision in *Endumeni*.

[15] Supra note 4.

CHAPTER 2 –THE CONTRA FISCUM PRINCIPLE

2.1. Introduction

"[I]n a matter of doubt we are bound to invoke the rule of interpretation contra fiscum*."*[1]

This chapter examines the nature of the *contra fiscum* principle, when it finds application, and whether it has the status of a rule of law-making or a presumption.

2.2. What is the contra fiscum principle?

The *contra fiscum* principle has its origins in the Roman Law[2] presumption that legislation is not unjust, unreasonable or inequitable.[3] The principle (also referred to in other jurisdictions as the in *dubio pro tributario* principle) is referred to in Modestinus D.49.14.10, where it is stated: "*Non puto delinquere eum, qui in dubiis quaestionibus contra fiscum facile respondent*".[4] The principle was formally recognised in South Africa in *Elliot v Rex*[5] in which the Court referred to the Roman Law maxim "*in dubiis quaestionibus contra fiscum responditur*".[6]

In England the rule that the intention to impose a charge on a subject must be shown by clear and unambiguous language was referred to in *Oriental Bank Corp v Treasurer of the Province of Griqualand West*, in which Lord Blackburn stated that "*if the Legislature, from want of foresight or for any other reasons, has omitted to provide for such a case, it is the province of the Legislature itself, and not of the Courts, to supply the omission*."[7]

The role of taxation has changed over the centuries from the collection of revenue to support the head of state, to the raising of revenue to achieve social and economic objectives in a

---

1 *Estate Reynolds v CIR* 1937 AD 57 at 70.

2 Goldswain, GK *The Winds of Change – An Analysis and Appraisal of Selected Constitutional Issues Affecting the Rights of Taxpayers* (unpublished Doctor of Accounting Science thesis, University of South Africa, 2012); Morawski, Wojciech & Radim Bohac "In Dubio Pro Tributario In Dubio Mitius as a Rule of Reasoning in Tax Law Interpretation*"* 2023 (51) *Intertax* 506.

3 Du Plessis, LM "Statute Law and Interpretation: the presumptions" LAWSA vol 25(1) Second Reissue (2011) para 334.

4 Morawski & Bohac op cit note 2 at 508. English*: I do not think that he violates his duty who, in questions which are doubtful, readily answers against the treasury*.

5 *Elliot v Rex* 1911 EDL 514 at 517.

6 Goldswain op cit note 2 at 74. English: *In doubtful questions answered against the treasury*.

7 *Oriental Bank Corp v Treasurer of the Province of Griqualand West* (1880) 5 App. Cas. 842 (PC) at 856.

modern democracy.[8] Coupled with this is a shift in the approach to the interpretation of fiscal legislation away from the "golden rule" that gave words their literal and ordinary meaning, towards an approach that interprets the ordinary meaning of the words used in the context of the document as a whole. The strict approach to the interpretation of fiscal legislation was based on the understanding that tax legislation was onerous for the subjects of a state, and that there was no equity in tax.[9]

As stated by Hoexter JA in *Commissioner for Inland Revenue v Insolvent Estate JP Botha t/a Trio Culture,*[10] quoting the rule of construction in taxing statutes enunciated in 1869 by Lord Cairns in *Partington v The Attorney General:*[11]

> *"[T]he principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the law the case might otherwise appear to be. In other words, if there be an equitable construction, certainly such construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute."*[12]

In light of South Africa's historical ties to England, South Africa adopted the Westminster system of parliamentary supremacy, which remained in place until the advent of a constitutional era in South Africa.[13] The constitutional dispensation requires that, even where the language of a statutory provision is clear, it cannot be viewed in isolation, and the purpose of the legislation also needs to be looked at. It is no longer appropriate, in the current constitutional dispensation, to interpret fiscal legislation without reference to the spirit and object of the Constitution. This includes the need to uplift previously oppressed and disadvantaged persons, and the obligation on the government to uphold and advance the socio-economic rights guaranteed in the

---

8 Goldswain "The Purposes approach to interpretation of fiscal legislation - the winds of change" (2008) 16 (2) *Meditari Accountancy Research* 107-121.

9 Hattingh, Nogueira, Roeleveld & West *Fundamentals of Taxation: An Introduction to Tax Policy, Tax Law and Tax Administration* (2019) ch 3.1.5, available at https://research-ibfd-org.ezproxy.uct.ac.za/#/doc?url=/collections/pt/html/pt_c03.html, accessed on 14 January 2024.

10 *Commissioner for Inland Revenue v Insolvent Estate JP Botha t/a Trio Culture* 1990 (2) SA 548 (AD).

11 *Partington v The Attorney General* 21 LT 370 (HL).

12 Ibid at 375.

13 Goldswain (2008) op cit note 8 at 114.

Constitution. These rights include the right to access to social security, education, housing and healthcare, which requires revenue, not only for the benefit of the state, but for the benefit of society.

Goldswain argues that the *contra fiscum* principle in fact complements the principles underlying the Constitution by ensuring that there is equity in the interpretation of fiscal legislation.[14]

2.3. A rule or a presumption?

Dworkin writes that the difference between legal principles and legal rules lies in the nature of the direction that they give. Where a rule is found to be applicable, it has to be applied; if it is not applicable, it adds nothing to the decision. A rule therefore has an "all-or-nothing" character. A principle, by contrast, provides reasons to argue in a particular direction, but does not necessitate a particular decision, since there may be other principles or policies that argue in another direction.[15] Pavčnik writes that legal principles operate through legal rules, which are the basis upon which cases are decided.[16]

Alexy writes that rules are norms which are either fulfilled or not. If the rule finds application, it must be applied. Principles, on the other hand, are norms which must be realised to the greatest extent possible, given the legal and factual possibilities. Where two conflicting rules find application, the conflict can be resolved by reading an exception into one of the rules, or by declaring it invalid. By contrast, competing principles are applied by weighing these principles against each other. The fact that one principle outweighs another in a particular set of circumstances does not render it invalid.[17] Prinsloo, in a 1986 thesis entitled "Equity in Tax Law with Special Reference to the Interpretation of Tax Statutes",[18] considered whether canons of

---

14 Goldswain (2008) op cit note 8 at 116.

15 Dworkin, Ronald "The Model of Rules" (1976) 35 *U Chi L Rev* 25-26.

16 Pavčnik, Marijan "Interpretative Importance of Legal Principles for the Understanding of Legal Texts" *Archives for Philosophy of Law and Social Philosophy* (2015) 101 52-59 at 52.

17 Alexy, R *A Theory of Constitutional Rights* (2002) Oxford University Press, Oxford, ch 3.

18 Prinsloo, IC *Equity in Tax Law with Special Reference to the Interpretation of Tax Statutes* (LLM Thesis, University of the Witwatersrand, 1986).

construction are rules of law. Prinsloo agrees[19] with the view of Celliers[20] that a court, in interpreting legislation, has the following hierarchical resources at its disposal:

1. The clear, unambiguous words of the legislation;
2. Where the words are ambiguous, the canons of construction; and
3. If the canons of construction fail to indicate the intention of the legislature, only then can the presumptions be used.

Prinsloo concludes that neither the canons of construction, nor the presumptions, are rules of law, and that the *contra fiscum* principle has the status of a presumption.[21]

Morawski and Bohac state that in South Africa the *contra fiscum* principle takes the form of a general principle of law.[22] Goldswain refers to it as an equity-based rule of interpretation and a presumption.[23] Stratford ACJ in *Executors Testamentary, Estate Reynolds and Others Commissioner for Inland Revenue*[24] also referred to the *contra fiscum* principle as a rule of interpretation.[25]

Steyn describes the *contra fiscum* principle as a presumption, stating as follows:

> *"Bepalings wat laste oplê. Hier kom veral belastingwette in aanmerking. By die uitleg van sulke wette geld die reël dat die uitleg wat teen die fiscus gaan, gevolg moet word… of soos dit uitgedruk word in Hollandsche Consultatien, 3(2), b.685, n 12: hy wat by twyfel teen die fiscus uitspraak gee, gee nie 'n slegte uitspraak nie ('non male judicate, qui in dubio contra Fiscum judicat')…. As daar onsekerheid omtrent die bedoeling bestaan, moet die hier bedoelde vermoede ten gevolg hê dat die betrokke belasting nie gehef word nie".*[26]

Dison[27] appears to take the view that it is better described as a cannon of construction, rather than a rule of law, and that it is *"immaterial what one calls these rules; the important*

---

19 Ibid at 35.
20 Celliers, HS "Die Betekenis van Vermoedens by Wetsuitleg" (1962) 2 *SALJ* 189.
21 Prinsloo op cit note 18 at 44.
22 Morawski & Bohac op cit note 2 at 510.
23 Goldswain (2012) op cit note 2 at 74 and 75.
24 *Executors Testamentary, Estate Reynolds and Others Commissioner for Inland Revenue* 1937 AD 57.
25 Ibid at 70.
26 Steyn, DLC *Die Uitleg van Wette* 4th ed (1974) Juta, Cape Town 115-116.
27 Dison, Lewis R "The Contra Fiscum Rule in Theory and Practice" (1976) 2 *SALJ* 159 at 168.

thing is their effect." Dison also refers to Hahlo and Kahn,[28] who state that "*The basic attitudes that have been discussed cannot be called rules of law: they are rules of approach, canons of construction, 'axioms of experience'*."[29]

More recently, in the minority judgment in *The Commissioner for the South African Revenue Services v Daikin Air Conditioning South Africa (Pty) Limited*[30] ("*Daikin*"), Majiedt JA and Davis AJA refer to the *contra fiscum* principle in the context of the interpretation of legislation. The minority in *Daikin*, while using the word "rule", nevertheless refer to it as a principle of law-making.[31]

The Court in *Telkom SA Soc Ltd v CSARS*)[32] ("*Telkom")* specifically directed the parties to file supplementary heads of argument dealing with the minority judgment in *Daikin* and the application of the *contra fiscum* principle.[33] The following observations can be distilled from the judgment in *Telkom*:

1. The *contra fiscum* principle still applies in South African law and is consistent with the values underpinned in the Constitution.[34]

2. The *contra fiscum* principle may have a reduced application than was previously the case when the courts favoured a strict, literal approach to interpretation, which more easily led to ambiguity.[35]

3. To the extent that a purposive approach may ultimately yield two constructions which are equally plausible, the *contra fiscum* principle will find application and the court ought to find in favour of the taxpayer.[36]

---

28 Hahlo, HR & Ellison Kahn *The South African Legal System and its Background* (1986) Juta, Cape Town.
29 Ibid at 186.
30 *The Commissioner for the South African Revenue Services v Daikin Air Conditioning South Africa (Pty) Limited* 2018 JDR 1072 (SCA) para 32-33.
31 *Daikin* supra note 36 para 32-33.
32 *Telkom SA Soc Ltd v CSARS* 2020 (4) SA 480 (SCA).
33 Ibid para 9.
34 Ibid para 19.
35 Ibid.
36 Ibid.

It was submitted for Telkom that the *contra fiscum* presumption should be applied at the outset as part of the interpretative process. However, the SCA disagreed, holding that "*the rule should only be invoked after an interpretational analysis results in an irresoluble ambiguity as to the meaning of the particular provision in the fiscal statute*".[37] This dictum supports the conclusion that the *contra fiscum* principle is a principle of interpretation, rather than a rule of law-making.

2.4. When does the contra fiscum principle apply?

As stated above, the *contra fiscum* principle applies in cases of ambiguity, but the authorities dealing with interpretation and the *contra fiscum* principle do not appear to distinguish between ambiguity in interpretation and ambiguity in application. This section examines the distinction, if any, between ambiguity in the interpretation of legislation and ambiguity in the application of legislation.

The purpose of interpreting legislation is to attribute meaning to words[38] in order to apply a particular provision to a specific factual matrix. Once the meaning is clear, the question is whether the facts fall within the ambit of the legislation.

For example, if legislation were to provide that owners of blue houses will be taxed, a taxpayer might argue that he is not subject to tax because his house is light blue. Whether or not the term "blue houses" as used in the hypothetical legislation also applies to houses that are light blue, is a question of interpretation. The application of the legislative provision in this scenario is ambiguous because the language is ambiguous. The ambiguity can be resolved with reference to the *contra fiscum* principle, in which case it will be found that the provision does not apply to the owners of light blue houses.

In order to remove the ambiguity, the hypothetical legislation is consequently amended to provide that owners of all shades of blue houses will be taxed. A different taxpayer then argues that he is not subject to tax because his house is turquoise and not blue. The hypothetical legislation is no longer ambiguous insofar as all parties agree that it does not apply to turquoise

---

37 Ibid para 20.

38 *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

houses. Any ambiguity now relates to the true colour of the taxpayer's house, rather than the meaning of the legislation, and in order to determine whether the facts fall within the ambit of the legislation it is necessary to determine whether the taxpayer's house is turquoise or light blue. This is a question of fact to which the *contra fiscum* principle will not apply.

Where the language is ambiguous, it follows that the application is ambiguous. This view is supported by the approach described in *Endumeni*,[39] which endorses a unitary approach that considers the context of legislation, the results of a particular interpretation, and which prefers an interpretation that does not undermine the purpose of the legislation. In other words, when adopting the *Endumeni* approach a legislative provision will not be interpreted without reference to its application. If the ambiguity lies not in the interpretation of the legislation, but in how to properly apply the facts, the *contra fiscum* principle will not find application.

In *Glen Anil Development Corporation Ltd v Secretary for Inland Revenue*[40] ("*Glen Anil Development Corporation*") the Court referred to the *contra fiscum* principle as a specific application of the general rule that all legislation imposing a burden on a subject should, in the case of ambiguity, be construed in favour of the subject.[41] Although the Court in *Glen Anil Development Corporation* distinguished between charging provisions and other sections of the ITA,[42] this distinction appears not to have been made in *Telkom*,[43] where it was held that the *contra fiscum* principle still applies in our law when interpreting fiscal legislation, anti-avoidance or otherwise.[44]

2.5. Conclusion

The *contra fiscum* principle finds application in instances where the interpretation of a taxing provision imposing a burden on the taxpayer is ambiguous. If it is accepted that the *contra fiscum* principle has the status of a presumption, as opposed to a legal rule, its application becomes a matter of discretion, and the failure to apply the *contra fiscum* principle will be justified where other principles prevail. On the other hand, if it were regarded as a rule, which

---

39 *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).
40 *Glen Anil Development Corporation Ltd v Secretary for Inland Revenue* 1975 (4) SA 715 (A).
41 Ibid at 727.
42 Ibid at 716.
43 Supra note 32.
44 *Telkom* supra note 32 para 19.

does not appear to be the case, the failure to apply the *contra fiscum* principle would amount to an error of law that renders the decision appealable.

CHAPTER 3 – THE INTERPRETATION OF FISCAL LEGISLATION

3.1. Introduction

The Honourable Mr Justice Adams, presiding in the Tax Court in 2023, held that "*[t]he so-called contra fiscum rule of interpretation remains part of our law, and is accommodated within the unitary Endumeni approach*." [1]

Adams goes on to refer to the decision of the Supreme Court of Appeal in *Telkom*[2] in which Swain JA referred, with approval, to the following passage from *NST Ferrochrome (Pty) Ltd v Commissioner for Inland Revenue* ("*Ferrochrome*"):

> '*... Where there is doubt as to the meaning of a statutory provision which imposes a burden, it is well established that the doubt is to be resolved by construing the provision in a way which is more favourable to the subject, provided of course the provision is reasonably capable of that construction ... ... But, where any uncertainty in a statutory provision can be resolved by an examination of the language used in its context, there is no rule of interpretation which requires that effect be given to a construction which is found not to be the correct one merely because that construction would be less onerous on the subject*.'[3]

The decision in *Ferrochrome*[4] pre-dates the 2012 decision of the SCA in *Endumeni*[5], the seminal case on statutory interpretation in South African jurisprudence.

Prior to the decision of the SCA in *Endumeni*,[6] the conventional approach to statutory interpretation sought to identify the "intention of the Legislature" by giving the language used its ordinary grammatical meaning. Even where other factors were considered, this was done in order to establish the intention of the Legislature.

However, the approach adopted in *Endumeni*,[7] which has since been widely followed by the Courts in South Africa, endorses a unitary, interpretive process which considers the language

---

1 *A v Commissioner for the South African Revenue Services* (46206) [2023] ZATC 1 para 38.
2 *Telkom SA Soc Ltd v CSARS* 2020 (4) SA 480 (SCA).
3 *NST Ferrochrome (Pty) Ltd v Commissioner for Inland Revenue* 2000 (3) SA 1040 (SCA) para 17.
4 Ibid.
5 *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).
6 Ibid.
7 Ibid.

within the context and purpose of the legislation. Seligson SC[8] argues that the "golden rule" of statutory interpretation has been "relegated to the dustbin of legal history", with the emphasis being placed instead on the contextual, purposive and sensible interpretation of statutes, rather than on the intention of the legislature.

3.2. The decision of Wallis JA in *Endumeni*

Wallis JA writes that the decision in *Endumeni* "is not an earthquake rearranging the tectonic plates of the interpretation of documents", but that it is rather an endeavour to "identify where the slowly shifting, grinding together of those tectonic plates has taken us".[9]

In the majority decision in *Endumeni*,[10] Wallis JA canvasses foreign and domestic case law and academic commentary, and concludes that the proper approach to statutory interpretation is to read the words used in the context of the document as a whole and in light of all the relevant circumstances. One of the most quoted paragraphs from this judgment reads as follows:

> *"Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own … The present state of the law can be expressed as follows: 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. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax, the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between*

---

8 Seligson SC, Milton "Judicial Forays in Statutory Construction" (2021) 2 *Business Tax & Company Law Quarterly* 8 at 10.

9 Wallis M "Interpretation Before and After Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 4 SA 593 (SCA)" *PER/ PELJ* (2019) 22 at 8

10 Supra note 5.

interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."[11] [own underlining]

This approach received the unqualified endorsement of the Constitutional Court in *Airports Company South Africa v Big Five Duty Free (Pty) Ltd and Others*.[12]

A closer reading of the underlined portions in the paragraph quoted above indicates that the *Endumeni* approach requires a consideration of the purpose of a provision, rather than the purpose of the document as a whole. This distinction is important, since the purpose of a particular section might not necessarily be the same as the purpose of the overall statute. For example, an exemption clause in a tax statute does not have the purpose of raising revenue. It appears, however, that the purpose of the document as a whole becomes relevant when favouring a sensible, businesslike approach.

With regard to what is regarded as sensible and businesslike, Wallis J cautions judges not to supplement what they think the legislation ought to have said. The enquiry, according to Wallis J, requires a broad assessment of what would be regarded by society as sensible and businesslike.[13]

3.3. The interpretative approach to fiscal legislation prior to *Endumeni*

Prior to the decision in *Endumeni*, Silke[14] analysed the canons of construction in the interpretation of fiscal legislation in a series of court cases.

In *CIR v Simpson*[15] Centileveres JA (quoting from *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 1 KB 64 at 71) held as follows:

---

11 Ibid para 18.
12 *Airports Company South Africa v Big Five Duty Free (Pty) Ltd and Others* 2019 (5) SA 1 (CC) at para 29.
13 Wallis op cit note 9 at 21.
14 Silke, Jonathan "The Interpretation of Fiscal Legislation – Canons of Construction, Recent Judicial Comments and New Approaches" (1995) *Acta Juridica* 123.
15 *CIR v Simpson* 1949 (4) SA 678 (A).

"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."[16]

Centilevres CJ, in *Savage v Commissioner for Inland Revenue*,[17] stated the position as follows (quoting from *Shenker v The Master* 1936 AD 136):

"[The] rule is that, where the language of a statute is unambiguous, and its meaning is clear, the court may only depart from such meaning "if it leads to an absurdity so glaring that it could never have been contemplated by the Legislature, or if it leads to a result contrary to the intention of Parliament as shown by the context or by such other considerations as the court is justified in taking into account …

Moreover, as has often been remarked by eminent Judges, 'it is dangerous to speculate as to the intention of the Legislature, and what seems an absurdity to one man does not seem absurd to another.' The absurdity must be utterly glaring and the intention of the Legislature must be clear, and not a mere matter of surmise or probability."[18]

Corbett JA (as he then was) appealed for a more equitable approach in *CIR v Nemojim* (Pty) Ltd 1983 (4) SA 935 (A), where he commented as follows on the strict approach to fiscal legislation:

"It has been said that 'there is no equity about a tax'. While this may in many instances be a relevant guiding principle in the interpretation of fiscal legislation, there is nevertheless a measure of satisfaction to be gained from a result which seems equitable, both from the point of view of the taxpayer and from the point of view of the fiscus. And it may be fairly inferred that such a result is in conformity with the intention of the legislature. An acceptance of the case put forward by Nemojim would in circumstances such as these have the effect of permitting a taxpayer who is carrying on a profitable business to accumulate enormous annual assessed losses, which from a financial and accounting point of view can only be described as fictitious .... This could not have been what Parliament intended. It is true that an amendment to the Act, which took effect on 2 October 1981 (s 8D), may render a scheme of dividend stripping, such as was embarked upon in this case, ineffective in that the taxpayer will be taxable on the dividends

---

16 Ibid at 695.
17 *Savage v Commissioner for Inland Revenue* 1951 (4) SA 400 (A).
18 Ibid at 408.

received, but I do not consider that this amendment in any way affects the interpretation to be placed on the Act as it was when the assessments under review were made."[19]

Silke[20] submitted, however, that Corbett JA's plea for a more equitable approach did not compromise the golden rule that, in the interpretation of fiscal legislation, the true intention of the legislature is of paramount importance. The intention of the legislature is arrived at first by having regard to the words used in the statute in question and giving them, unless they have been specifically defined, their ordinary grammatical meaning. It is only when giving them such a meaning would lead to absurdities or anomalies, which could not have been contemplated by the legislature, that one may depart from such meaning and rely on the other canons of interpretation to determine the legislature's intention.

Silke[21] went on to submit that further development of this approach, and the more equitable approach advocated for by Corbett JA, could only come from the future pronouncements by the Appellate Division. Unknown to Silke at the time, this pronouncement would come in the *Endumeni*[22] judgment.

3.4. The interpretative approach to fiscal legislation after *Endumeni*

In 1975 the Appellate Division in *Glen Anil Development Corporation Ltd v Secretary for Inland Revenue*,[23] (per Botha JA) held as follows:

"Apart from the rule that in the case of an ambiguity a fiscal provision should be construed contra fiscum … [citation omitted] which is but a specific application of the general rule that all legislation imposing a burden upon the subject should, in the case of an ambiguity, be construed in favour of the subject, there seems little reason why the interpretation of fiscal legislation should be subjected to special treatment which is not applicable in the interpretation of other legislation…"[24]

---

19 *CIR v Nemojim* (Pty) Ltd 1983 (4) SA 935 (A) at 958.
20 Silke Op cit note 14 at 128.
21 Ibid.
22 Supra note 5.
23 1975 (4) SA 715 (A).
24 Ibid at 727F – 728A.

However, this statement now has to be viewed in light of the *Endumeni*[25] judgment and the approach of the SCA in *Telkom*[26] and *CSARS v Glencore Operations SA (Pty) Ltd*[27] ("*Glencore*").

In *CSARS v Bosch and Another*[28] ("*Bosch*") Wallis JA restated the golden rule in order to align it with the approach in *Endumeni*. Wallis JA held that, in ascertaining the intention of the legislature, some weight must be accorded to the consistent interpretation for a substantial period of time by those responsible for the administration of the legislation. It was held:

> *"The conduct of those who administer the legislation provides clear evidence of how reasonable persons in their position would understand and construe the provision in question. As such it would be a valuable pointer to the correct interpretation."*[29]

However, this approach was questioned by the Constitutional Court in *Marshall NO and Others v CSARS,*[30] in which it was held as follows:

> *"Missing from this reformulation is any explicit mention of a further fundamental contextual change, that from legislative supremacy to constitutional democracy. Why should a unilateral practice of one part of the executive arm of government play a role in the determination of the reasonable meaning to be given to a statutory provision? It might conceivably be justified where the practice is evidence of an impartial application of a custom recognised by all concerned, but not where the practice is unilaterally established by one of the litigating parties. In those circumstances it is difficult to see what advantage evidence of the unilateral practice will have for the objective and independent interpretation by the courts of the meaning of legislation, in accordance with constitutionally compliant precepts. It is best avoided."*[31]

Wallis J in *Endumeni*[32] deliberately avoided using the conventional test of establishing the intention of the legislature, since legislation is often drafted by legal advisers in a ministry and

---

25 Supra note 5.
26 Supra note 2.
27 *CSARS v Glencore Operations SA (Pty) Ltd* (Case no 462/2020) [2021] ZASCA 111 (10 August 2021).
28 *CSARS v Bosch and Another* 2015 (2) SA 174 (SCA).
29 Ibid para 17.
30 *Marshall NO and Others v CSARS* 2019 (6) SA 246 (CC).
31 Ibid para 10.
32 Supra note 5.

subjected to public debate, and in those circumstances it is artificial to speak of the intention of the legislature.

The approach in *Endumeni*[33] applies to all documentary instruments, including contracts.[34] In *Bosch*[35] the SCA confirmed that this includes fiscal legislation.[36] More recently the application of the *Endumeni* approach to fiscal legislation was considered by the SCA in *CSARS v United Manganese of Kalahari (Pty) Ltd*[37] ("*United Manganese*") and in *Telkom.*[38]

In *United Manganese*[39] the SCA held that context is fundamental to the interpretation of all written instruments, including taxing statutes, even though their context may be different. In *Telkom*[40] the SCA endorsed the view that the *contra fiscum* principle still applies, but only where interpretational analysis results in an ambiguity as to the meaning of the provision in question. The SCA also held that the common-law presumption that the statute is not unjust, inequitable, or unreasonable may facilitate the process of interpreting fiscal legislation in a manner consistent with our constitutional values.

3.5. Conclusion

Wallis AJ himself, in an article that explores the background to the decision in *Endumeni,*[41] writes that a contextual approach does not mean that a construction favourable to the fiscus must be given because the purpose of a taxing statute is to raise revenue.[42] Unfortunately, however, this warning appears not to have been heeded by the SCA in *Glencore,*[43] which is discussed in the following chapter.

---

33 Supra note 5.
34 *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) paras 10–12.
35 Supra note 28.
36 Ibid para 9.
37 *CSARS v United Manganese of Kalahari (Pty) Ltd* 2020 (4) SA 428 (SCA).
38 Supra note 2.
39 Supra note 37.
40 Supra note 2.
41 Supra note 5.
42 Wallis op cit note 9 at 17.
43 Supra note 27.

CHAPTER 4 – REFERENCES TO CONTRA FISCUM SINCE ENDUMENI (2019 TO 2023)

4.1. Introduction

In the period under review, in decisions to which the Commissioner was a party, the *contra fiscum* principle has only been referred to by the SCA in three decisions. In another, although the *contra fiscum* principle was not considered by the SCA, it was referred to on appeal to the Constitutional Court.

The following decisions, in which reference is made to the *contra fiscum,* are discussed in this chapter:

1. *The Commissioner for the South African Revenue Services v Daikin Air Conditioning South Africa (Pty) Limited ("Daikin").*[1]
2. *Marshall NO and Others v Commissioner, South African Revenue Service* ("*Marshall*").[2]
3. *Telkom SA Soc Ltd v CSARS ("Telkom").*[3]
4. *CSARS v Glencore Operations SA (Pty) Ltd ("Glencore").*[4]

4.2. Contra fiscum in Daikin

4.2.1. Introduction

The Respondent in *Daikin*[5] was an importer of air conditioning machines and parts. Section 47(1) of the Customs Act provides that customs duty shall be paid on imported goods in accordance with Schedule 1 to the Customs Act. The appeal concerned the classification of air conditioning machines for purposes of determining the customs duties payable.

---

1 *The Commissioner for the South African Revenue Services v Daikin Air Conditioning South Africa (Pty) Limited* 2018 JDR 1072 (SCA).
2 *Marshall NO and Others v Commissioner, South African Revenue Service* 2019 (6) SA 246 (CC).
3 *Telkom SA Soc Ltd v CSARS* 2020 (4) SA 480 (SCA).
4 *CSARS v Glencore Operations SA (Pty) Ltd* (Case no 462/2020) [2021] ZASCA 111.
5 Supra note 1.

4.2.2. Facts

The relevant portion of the Schedule dealing with tariff headings read as follows: "*Windows or wall types, self-contained or 'split-system'*". In a self-contained system, the evaporator unit and the condenser unit are integrated into a single housing which is typically installed through a window of a building. Split-system air conditioners are specifically designed for mounting under ceilings inside buildings, and are not mounted through windows or on walls. The outdoor units of the split system are placed outside the building on the floor, ground or roof.

The answer therefore lay in the interpretation of the words "window or wall types, self-contained or 'split-system'". The question was whether the words "self-contained or split-system" qualified the preceding words ("window or wall types"), or whether the words "window or wall types" were only qualified by the word "self-contained". The taxpayer argued that the subheading ("window or wall types, self-contained or 'split-system'") referred to window or wall types of air conditioning machines, which may be self-contained or split-system. The Commissioner, on the other hand, argued that it referred to window or wall types that were self-contained, as well as to all split-system air conditioners.

4.2.3. Discussion

The majority considered the Brussels Notes as a guide to interpretation and favoured the interpretation advanced by the Commissioner. The majority held that it would be unbusinesslike to differentiate, for customs duty purposes, between split-system air conditioning machines, of which the indoor units do exactly the same work as the outdoor units, simply because the indoor units are placed on ceilings and not on walls or through windows.[6]

The minority held that, when seeking to ascertain the meaning of legislation, what is required is to apply the principles and standards appropriate to the exercise of interpretation and law-making. In the case of fiscal legislation, the appropriate standard is the *contra fiscum* principle (the word "rule" is used in the judgment"), which is based on the idea that no tax can be imposed upon a subject without words in legislation clearly evincing an intention to lay such a burden on the taxpayer. The minority took the position that, absent unambiguous

6 Ibid para 11-14.

language and in cases of doubt, the *contra fiscum* principle will be decisive in favour of the taxpayer.[7]

The minority were of the view that the meaning of the words in the provision were clear, and that the comma between "window or wall types" and "self-contained or split-system" indicates that the latter phrase qualifies or describes the nature of the two types of air conditioners as being either window types or wall types. The minority illustrated this construction with reference to a hypothetical example: *Car or SUV's; blue or black*, which would not plausibly extend to trucks or tractors.[8] The minority was also of the view that the interpretation favoured by the Commissioner, namely that all self-contained and split system air conditioners fall within the tariff heading, would render the words "window or wall type" superfluous.[9]

Importantly, the minority acknowledged that, in the case of fiscal legislation, the *contra fiscum* rule is applied from the outset where there is ambiguity, and not only where the *Endumeni* approach has failed to resolve the ambiguity.

The minority found in favour of the taxpayer.

4.2.4. Conclusion

The minority decision in *Daikin*[10] is the closest the SCA has come in the period under review to applying the *contra fiscum* principle. While the minority decision does not benefit the taxpayer, it does perhaps serve to confirm that the *contra fiscum* principle, although gathering dust on the jurisprudential shelf, has not yet been formally relegated to the dustbin of legal history.

4.3. Contra fiscum in Marshall

4.3.1. Introduction

The Constitutional Court in *Marshall*[11] considered the extent to which the Courts may consider or defer to an administrative body's interpretation of legislation, such as SARS's

7 Ibid para 32-33.
8 Ibid para 28.
9 Ibid para 33-37.
10 Supra note 1.
11 Supra note 2.

Interpretation Notes, when interpreting ambiguous legislation. The Court, in dismissing the appeal, held that reference to a unilateral practice of an executive arm of government cannot be justified where the practice was unilaterally established by one of the litigating parties.

4.3.2. The legal question

The appeal involved the interpretation of certain provisions of the Value Added Tax Act 89 of 1991 ("the Vat Act"), and whether the aero-medical services supplied to the provincial health department were "deemed services" in terms of section 8(5) of the VAT Act that qualified to be zero-rated in terms of section 11(2)(n).

Section 8(5) of the VAT Act provides that a designated entity shall be deemed to supply services to any public authority or municipality to the extent of any payment made in the course or furtherance of an enterprise carried on by that designated entity. Section 11(2)(n) provides for zero-rating of VAT payable in respect of certain payments received for the deemed supply of services provided for in section 8(5). Section 8(5) is therefore a gateway to zero rating under section 11(2)(n).

4.3.3. Facts

As consideration for the areo-medical services provided, the provincial government paid the appellants, who were the trustees of the South African Red Cross Air Mercy Service Trust ("the Trust"), a monthly fee for the availability of three aircraft. The Trust, a non-profit organisation, was of the view that these payments qualified to be zero-rated because it was a welfare organisation as defined in section 1 of the VAT Act.

The Commissioner argued that the services rendered by the Trust were actual services, rather than "deemed" services, which fell outside the ambit of section 8(5) of the VAT Act, and that the provisions of section 8(5) applied only to instances where designated entities received payments which were not made in consideration for the actual supply of goods and services.

It was argued for the Trust that to limit the application of section 8(5) to gratuitous payments, as argued for by the Commissioner, militated against the clear wording of section 8(5), which provided for "any payment". The Trust argued that the purpose of section 8(5) was to enable public authorities to claim input tax, and if the legislature had intended to limit

the application of section 8(5) to grants and subsidies, it would have expressed itself accordingly.

4.3.4. Discussion

The SCA confirmed that the process of ascertaining the meaning of legislative provisions entails a consideration of the language used, the context in which the provision is set, including the material known to the drafters, and the purpose of the provision.[12]

The SCA then held that the contention by the Trust that the words "any payment" must be given a literal meaning, to the exclusion of the remaining words in section 8(5), ignores the distinction between the actual supply of goods and services catered for by section 7(1)(a) of the VAT Act, and the deemed supply of services, as provided for in section 8(5). The Court confirmed that the word "deemed" was appropriate to imbue a person with qualities they did not have, and was not appropriate when the person actually had those qualities.[13]

In reaching this decision the SCA had regard to a SARS Interpretation Note which set out the VAT treatment of public authorities. The SCA held that the Interpretation Note, though not binding authority, constitutes a persuasive explanation in relation to the interpretation of the provision in question.[14]

4.3.5. Appeal to the Constitutional Court

On appeal to the Constitutional Court the Trust argued that to consider the Interpretation Note as relevant to the interpretation of legislation would offend the *contra fiscum* principle. The Constitutional Court, with reference to the decision in *Bosch*,[15] held that evidence of an interpretative practice need not necessarily conflict with the *contra fiscum* principle.[16]

Although the Constitutional Court was not inclined to rely on a unilateral practice of one of the litigating parties, the Court nevertheless dismissed the appeal on the basis that an objective, independent interpretation of the relevant sections of the VAT Act leads to the same conclusion reached by the SCA.

---

12 *Marshall* supra note 2 para 24.
13 Ibid para 25.
14 Ibid para 33.
15 *CSARS v Bosch and Another* 2015 (2) SA 174 (SCA).
16 Supra note 2 para 7.

4.3.6. Conclusion

The SCA no doubt followed the approach in *Endumeni*,[17] considering not only the Interpretation Note, but also the general scheme of the VAT Act and the purpose of the provision in question. The SCA took the view that there is no reason, where public benefit organisations engage in commercial activities, that they should be treated differently from other commercial entities.[18] In so doing the SCA appears to have resolved the ambiguity by adopting an approach that is not unbusinesslike or oppressive, and that does not subvert the apparent purpose of the document. The application of the *contra fiscum* principle was therefore not triggered.

4.4. Contra fiscum in Telkom

4.4.1. Introduction

In 2020 the SCA in *Telkom*[19] concluded that the *contra fiscum* principle still applies in South Africa. However, the SCA emphasised that this principle should only be invoked after the interpretational analysis results in an irresoluble ambiguity, and that where a purposive approach yields two constructions that are both equally plausible, the *contra fiscum* principle should apply and the Court should favour the taxpayer.[20]

4.4.2. Facts

Telkom International (Pty) Ltd ("Telkom International") acquired the full share capital in MultiLinks International (Pty) Ltd ("MultiLinks"), a company registered in Nigeria. The appellant, Telkom SA Soc Ltd ("Telkom SA"), a wholly-owned subsidiary of Telkom International, advanced a loan to MultiLinks in the amount of USD 877 million, denominated in USD, as capital to make MultiLinks viable. Of this amount, USD 346 million was converted into preference share equity, and the balance remained outstanding on the loan account.

The MultiLinks business was not successful, however, and in 2012 both Telkom SA and Telkom International disposed of their equity interests in MultiLinks to an unrelated third

17 *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).
18 Ibid para 34.
19 Supra note 3.
20 Ibid para 19-20.

party. Telkom SA also disposed of its rights in respect of its loan account to MultiLinks, which it sold for USD 100.

Section 24I(3) of the ITA, as it read at the relevant time, provided for foreign exchange gains and losses arising from "exchange items" to be included in determining taxable income, subject to section 24(I)(10), which stipulated when such deductions may not be made.

Telkom then claimed a deduction in the amount of almost R 4 billion as a foreign exchange loss in terms of section 24I(3). The Commissioner disallowed the deduction and instead assessed Telkom for tax in the amount of R 425 million as a foreign exchange gain.

The Tax Court rejected Telkom's appeal against this additional assessment and concluded that section 24I was not a self-standing deduction provision. The Tax Court concluded that Telkom had impermissibly invoked the provision involving exchange rate gains and losses in order to deduct a commercial loss, which was unrelated to foreign exchange currency differences.[21]

The taxpayer in this matter relied on *Endumeni* and submitted that the interpretation of section 24I advanced by the Commissioner produced a result that was not business-like and that was removed from the commercial reality, that it undermined the purpose of the provision, and that it was not just or reasonable.

4.4.3. The legal question

The dispute turned on the definition of the "ruling exchange rate" on the realisation date of the loan. Telkom submitted that the consideration of USD 100 was determined by applying a "rate". Telkom applied the disposal rate in lieu of the spot rate, arguing that the disposal rate was another rate used to determine the consideration payable for the loan.

The Court considered the role of the *contra fiscum* principle in the interpretation of fiscal legislation and whether, apart from the *contra fiscum* principle, a general distinction should be drawn between the interpretation of fiscal and other statutes.

---

21 Ibid para 30.

4.4.4. Discussion

The unanimous judgment, penned by Swain JA, considered the minority judgment in *Daikin*,[22] the *contra fiscum* principle, and whether there is a general distinction between the interpretation of fiscal and other statutes. In so doing the SCA concurred with the analysis of *Daikin* by Wallis JA in *United Manganese*[23] and reiterated the approach adopted in *Endumeni*.[24] The Court held that, while the majority in *Daikin*[25] had correctly asserted that the process of drafting a contract is very different from the process of legislative enactment, the same fundamental interpretative technique is applied.

The Court applied the *Endumeni* approach to section 24I and found in favour of SARS.[26]

It was held that *Endumeni* did not suggest that it was irrelevant whether particular words were to be construed as part of a contract, statute or other document. Rather, *Endumeni* emphasises that the context is important, regardless of the nature of the document. While the process which culminates in the conclusion of a contract is different from the legislative process leading to the enactment of legislation, the same fundamental interpretative technique is applied, bearing in mind the context.[27]

The Commissioner submitted that Telkom's argument that "rate" can mean an absolute price to sell the Multi-Links loan, based on its perceived value, cannot on any sensible interpretation be described as a "determination of the consideration by applying a rate". On such an approach, "consideration" and "rate" are the same thing, and there is nothing to "determine".

The Court rejected Telkom's interpretation for the following reasons:

First, the Tax Court correctly concluded that the purpose of section 24I(10) was to solve the problem that arises where amounts to be included or deducted for tax purposes, are denominated in a currency other than South African Rand. It was designed to ensure that these amounts were converted into Rands at a defined exchange rate, thus avoiding disputes as to the Rand value of what was received or expended for purposes of calculating taxable

22 Supra note 1.
23 *CSARS v United Manganese of Kalahari (Pty) Ltd* 2020 (4) SA 428 (SCA).
24 Supra note 17.
25 Supra note 1.
26 *Telkom* supra note 3. In respect of section 23H the Court held that the Tax Court had erred in the application of section 23H and allowed the taxpayer's appeal on that issue.
27 Ibid para 16-17.

income. The section dealt with losses or gains caused by foreign exchange fluctuation and was not applicable to a "business" loss.[28]

Second, the Court held that Telkom's argument that the USD 100 received by it constituted a "rate" within the definition of "disposal rate", failed to satisfy the requirement in the proviso that the consideration must be "determined" by "applying" the rate as a result of a process of calculation which utilises the "rate" as a factor to produce the result. The only type of rate that was able to achieve this was one which compared two items against one another, such as the currency exchange rate. Clearly the consideration for the loan, being 100 USD, was agreed by reference only to the perceived value of the loan, and currency exchange rates played no role in the determination of the price.[29]

The SCA in *Telkom*[30] referred with approval to a dissertation by Miller[31] in which it was submitted that, where a purposive approach would yield two constructions which were *both equally plausible*, the *contra fiscum* principle should apply and the court should ultimately conclude in favour of the taxpayer.[32] Miller states that in a constitutional dispensation, where the Constitution is supreme, where all legislation must be interpreted to promote the spirit, purport and objectives of the Bill of Rights, and where the common law must be interpreted to be consistent with the Constitution, the literal approach becomes unworkable and a purposive approach to interpretation is the only viable option. This can only be achieved, according to Miller, if the courts make certain value judgments during the interpretative process.[33]

The Court in *Telkom*[34] also refers, with approval, to the judgment in *Ferrochrome*[35] in which the principle was described as follows:

> *"Where there is doubt as to the meaning of a statutory provision which imposes a burden, it is well established that the doubt is to be resolved by construing the provision in a way which is*

---

28 Ibid para 34.
29 Ibid.
30 Supra note 3.
31 Miller, Craig Ian *The Application of a New Approach to Interpreting Fiscal Statutes in South Africa* (unpublished LLM thesis, University of Johannesburg, 2016).
32 Ibid at 78.
33 Ibid at 30-31.
34 Supra note 3.
35 *NST Ferrochrome (Pty) Ltd v Commissioner for Inland Revenue* 2000 (3) SA 1040 (SCA).

more favourable to the subject, provided of course the provision is reasonably capable of that construction."[36]

4.4.5. Conclusion

This decision appears to follow the *Endumeni*[37] approach to the extent that it considers the ordinary and dictionary meaning of the words used in the context of the legislation as a whole, taking into account the purpose of the legislation.

It is submitted that the problem with the judgment in *Telkom*[38] is that, immediately after quoting from the Miller dissertation (that the *contra fiscum* principle finds application where two possible constructions are equally plausible),[39] and from the *Ferrocrhome* decision (that the *contra fiscum* principle applies where there is doubt as to the meaning of a statutory provision),[40] the SCA goes on to state that the principle should only be invoked after an interpretational analysis result in an *irresoluble ambiguity* as to the meaning of the particular provision of the fiscal statute.[41] The impact of this subtle distinction is discussed in chapter 6.

4.5. Contra fiscum in Glencore

4.5.1. Introduction

The question in *Glencore*[42] was whether Glencore was entitled to a rebate of the fuel levy pursuant to the Provisions of section 75(1A) of the Customs and Excise Act 91 of 1964 ("the Customs Act"). The Commissioner disallowed Glencore's application for a refund of the fuel levy on the grounds that the fuel in respect of which the refund was claimed by Glencore was not used in "own primary production activities in mining", as contemplated in Note 6(f)(iii) to the schedule, and that it was instead used in secondary production activities. The High Court upheld an appeal by Glencore and the Commissioner appealed to the SCA against the decision of the High Court.

---

36 Ibid para 17.
37 Supra note 17.
38 Supra note 3.
39 Ibid para 19.
40 Ibid para 18.
41 Ibid para 20.
42 Supra note 4.

4.5.2. The facts

In order to promote international competitiveness, the government introduced a diesel fuel concession for own primary production in various sectors, including mining.

Glencore conducted business in the mining of coal, which involved the use of a variety of vehicles and equipment using diesel. Glencore submitted claims for a refund of the fuel levy for the period between August 2011 and December 2013. The Commissioner disallowed certain claims on the basis that the diesel in respect of those refunds was not used in Glencore's primary production activities in mining.

4.5.3. The legal question

The primary issue on appeal was therefore whether the mining operations, in relation to which diesel refunds were claimed by Glencore, had been carried on for "own primary production in mining" as contemplated in Note 6, and therefore qualified for a refund of levies. The subsidiary question was whether the list of activities set out in Note 6(f)(iii) of the Customs Act, which qualify as own primary production activities, was exhaustive.

4.5.4. Discussion

The SCA reiterated the fundamental tenets of statutory interpretation, holding that words in a statute must be given their ordinary grammatical meaning, unless doing so would result in an absurdity. The Court found that there were three provisos to this principle, namely that statutory provisions should always be interpreted purposively, contextually, and with reference to the Constitution.[43]

Having referred to the *contra fiscum* principle, the Court went on to state that where a provision is ambiguous, its possible meanings must be weighed against one another, having regard to the aforesaid principles of interpretation.[44] In so doing the SCA invoked the text, context and purpose of the statute to sidestep the need to apply the *contra fiscum* principle. Indeed, the Court held as follows:

---

43 Ibid para 20.
44 Ibid para 21.

"By way of example, a meaning that undermines the manifest purpose of the statute or leads to insensible or unbusinesslike results is not to be preferred."[45]

Despite Wallis J's caution, the SCA held, in interpreting the word "include" in Note 6(f)(iii), that a non-exhaustive list would lead to unbusinesslike or insensible results, because an interpretation that favours a non-exhaustive list has the potential to frustrate the principal purpose of the Act, which was the imposition of fuel levies in order to broaden the government's revenue base.[46]

4.5.5. Conclusion

The SCA in *Glencore*[47] resolved the ambiguity in the legislative provision with reference to the legislative context and history, which included the fact that the Minister's budget speech made it clear that the purpose of imposing fuel levies was to augment the government's revenue base.[48]

4.6. Conclusion

There are only three cases in the period under review in which the *contra fiscum* principle was considered by the SCA, and a fourth where it was not considered by the SCA, but by the Constitutional Court on appeal. In none of these cases was the contra *fiscum* principle applied in favour of the taxpayer. These cases are discussed in chapter 4.

The cases in the period under review in which the *contra fiscum* principle may have found application, but was not considered, are discussed in chapter 5.

---

45 Ibid.
46 Ibid para 51 and 53.
47 Supra note 4.
48 Ibid para 37.

CHAPTER 5 – CASES NOT DEALING WITH CONTRA FISCUM (2019 TO 2023)

5.1. Introduction

The decisions under review are tabulated in chapter 1. Of these, the decisions in which *contra fiscum* is referenced are discussed in chapter 4 above. What follows is a discussion of the remainder of those cases in which fiscal legislation was interpreted, without reference to the *contra fiscum* principle, in which the *contra fiscum* principle might have found application.

Cases in which the *contra fiscum* principle would not find application, either because of the absence of an ambiguity, or because the provision being interpreted did not levy a tax, are distinguished. The following cases to which the Commissioner was a party, although decided in the period under review, do not contribute to the research question and are therefore not discussed in this chapter:

1. *CSARS v Volkswagen South Africa (Pty) Ltd* 2019 (2) SA 362 (SCA), in which the language was open-ended and discretionary and therefore did not result in an ambiguity.

2. *CSARS v Clicks Retailers (Pty) Ltd* 2020 (2) SA 72 (SCA) ("*Clicks*"), which was decided shortly after the decision in *Big G* and which also involved the interpretation of section 24(C) of the ITA. Both cases went on appeal to the Constitutional Court, and the Constitutional Court in *Clicks* applied the test articulated in *Big G*.

3. *CSARS v Spur Group (Pty) Ltd* 2021 JDR 2530 (SCA), in which the question before the Court was not one of interpretation, but rather whether or not there was a sufficient link between the expenditure incurred and the production of income, as required by section 11(a) of the ITA.

4. *Purveyors South Africa Mine Services (Pty) Ltd v CSARS* 2022 (3) SA 139 (SCA), which involved the interpretation of provisions of the Tax Administration Act 28 of 2011 ("TAA") which do not deprive taxpayers of property, and to which the *contra fiscum* principle would therefore not apply.

5. *CSARS v Coronation Investment Management South Africa (Pty) Ltd* 2023 (3) 404 (SCA), in which the question whether or not the taxpayer was entitled to an exemption was one of fact, rather than an interpretation of the provision in question.

6. *CSARS v Medtronic International Trading SARL* 2023 (3) SA 423 (SCA) concerned a provision of the VAT Act relating to voluntary disclosure agreements. The Court was called upon to decide whether SARS was precluded from considering a remission of interest levied on late payment of VAT, as provided for in section 39(7)(a) of the VAT Act, subsequent to the conclusion of a voluntary disclosure agreement in terms of section 229 of the TAA. The issue was therefore one of administrative law, and the provision in question was not onerous in the sense of depriving a taxpayer of property.

7. *Mobile Telephone Networks (Pty) Ltd v CSARS* 2023 (1) SA 420 (SCA) in which the SCA held that the nature of the dispute lent itself more properly to resolution in terms of the TAA, and that it had not been appropriate for the taxpayer to seek declaratory relief in the High Court. The decision therefore dealt with circumstances in which declaratory relief is competent, and not with the interpretation of an ambiguous fiscal provision. The *contra fiscum* principle therefore found no application.

5.2. CSARS v Big G Restaurants

5.2.1. Introduction

The decision in *CSARS v Big G Restaurants (Pty) Ltd*[1] ("*Big G Restaurants*") turned on the interpretation of the words 'in terms of' as used in section 24(C) of the ITA, which provides that:

> *"[i]f the income of any taxpayer in any year of assessment includes or consists of an amount received by or accrued to him in terms of any contract and the Commissioner is satisfied that such amount will be utilized in whole or in part to finance future expenditure which will be incurred by the taxpayer in the performance of his obligations under such contract, there shall be deducted in the determination of the taxpayer's taxable income for such year such allowance (not exceeding the said amount) as the Commissioner may determine, in respect of so much of such future expenditure as in his opinion relates to the said amount."*

5.2.2. Facts

The taxpayer, Big G Restaurants (Pty) Ltd, was a franchisee that operated a Spur Restaurant in terms of a franchise agreement with Spur Group (Pty) Ltd. The taxpayer was obliged, in

[1] *CSARS v Big G Restaurants (Pty) Ltd* 2019 (3) SA 90 (SCA).

terms of the franchise agreement, to pay the franchisor a monthly franchise and service fee of 5% of its gross sales, less VAT. The taxpayer was also required to upgrade and/or refurbish its restaurants at reasonable intervals, as determined by the franchisor.

In respect of its 2011 – 2014 years of assessment, the taxpayer claimed certain amounts in terms of section 24(C) of the ITA in relation to future expenditure to be incurred by virtue of the obligation imposed by the franchise agreements to upgrade and refurbish its restaurants.

The Court was called upon to decide two questions of law. The first question was whether the income received by the taxpayer from operating the franchise business were amounts received or accrued in terms of the franchise agreement, as envisaged in section 24(C) of the ITA. The second question was whether, for purposes of section 24(C), the expenditure required to refurbish or upgrade the restaurants was incurred in the performance of the taxpayer's obligations under the franchise agreement.

It was argued for the Commissioner that the taxpayer did not earn an income from the franchise agreement, but from individual, *ad hoc* contracts with the patrons who bought meals, and that the franchise agreement was merely the agreement that enabled the taxpayer to earn an income. On the other hand, it was argued for the taxpayer that it was obliged to sell meals to the patrons in terms of the franchise agreement, which spelled out how it was obliged to operate its restaurant, and that the taxpayer's income was earned "pursuant to" or "in accordance with" the franchise agreement. It was argued for the taxpayer that the phrase "in terms of" ought to be given a wide meaning.

Ultimately the SCA applied the narrow meaning of the phrase "in terms of" and held that the fact that a franchise agreement is useful, or even necessary, to enable a taxpayer to earn income, does not mean that the income is earned 'in terms of' such contract. The Court held that the taxpayer did not receive income under the franchise agreement.

Since the first question was dispositive of the appeal, the SCA did not consider the second question, whether the expenditure required to refurbish or upgrade the restaurants was incurred under the same contract. This question was given further consideration in the decision in *SARS v Clicks Retailers* (Pty) Ltd 2020 (2) SA 72 (SCA).

5.2.3. Decision of the Constitutional Court in Big G

On appeal to the Constitutional Court the Court[2] held that it was a requirement of the section that the contract in terms of which the income that is to finance future expenditure accrues, must be the same contract under which the expenditure is incurred. However, the Court held that the requirement of sameness does not connote that there must be one piece of paper stipulating the earning of income and the imposition of future expenditure. Two or more contracts may be inextricably linked so that they satisfy this requirement.

However, the Court also held that it would be absurd to allow the taxpayer in question to benefit from the allowance under section 24(C) whilst at the same time denying it to unattached restauranteurs (who are not franchisees), and that an interpretation that gives rise to differential treatment of such restauranteurs would be unjust. The appeal was accordingly dismissed.

5.2.4. Discussion

It can scarcely be disputed that in this case there was an ambiguity as to whether the phrase "in terms of" should be given a wide meaning of "pursuant to" or "in accordance with", or whether it should be given a narrow meaning which asks whether the taxpayer received income "under" the franchise agreement.

Davis, Emslie, Dachs *et al*[3] take the view that the Court's approach of first identifying the narrow (ordinary) or wide meaning of the phrase 'in terms of', based on the 1988 decision of *Slims (Pty) Ltd and Another v Morris NO*[4], and then choosing between them for purposes of section 24(C), was not a unitary exercise as required by Wallis J in *Endumeni*.[5] Rather, this approach first recognises two possible meanings of the phrase, being a wide and a narrow meaning, before taking into account the factual and legislative context.

The 1988 decision in *Slims*[6] on which the SCA relied, involved the interpretation of the Insolvency Act 24 of 1936, and not the interpretation of fiscal legislation. Similarly, the

---

2 *Big G Restaurants (Pty) Limited v Commissioner for the South African Revenue Service* 2020 (6) SA 1 (CC)

3 Davis, Emslie, Dachs *et al* "Income Tax – section 24C Allowance for Future Expenditure on Refurbishing Restaurants in Terms of an Obligation Imposed by a Franchise Contract*" The Taxpayer* (2018) 67(8) at 153.

4 *Slims (Pty) Ltd and Another v Morris NO* 1988 (1) SA 715 (A).

5 *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

6 Supra note 4.

decision in *Oosthuizen and Another v Standard Credit Corporation Ltd,*[7] on which the SCA relied and which also considered the meaning of the words "in terms of", involved the interpretation of a credit agreement, as opposed to fiscal legislation.

5.2.5. Conclusion

It is therefore submitted that the legislative context, and the reference by the SCA to other decisions dealing with similar phrases, did not resolve the ambiguity as to the meaning of the words "in terms of", and it would have been appropriate to apply the *contra fiscum* principle.

5.3. CSARS v Langholm Farms

5.3.1. Introduction

Davis, Emslie, Dachs *et al*,[8] in an editorial note to the judgment in *CSARS v Langholm Farms (Pty) Ltd*[9] ("*Langholm Farms")*, pose the question whether the approach of the SCA to interpretation in *Langholm Farms* differs in any significant measure from the approach in *Endumeni*.[10]

5.3.2. The facts

Langholm Farms (Pty) Ltd ("Langholm") operated a pineapple growing enterprise located outside of Grahamstown (as it was then known) in the Eastern Cape. It sold its pineapples to Summerpride Foods (Pty) Ltd ("Summerpride") to be processed and exported. Summerpride's factory was situated about 147 km from Langholm in East London.

Langholm delivered its pineapples to Summerpride, mainly using its own trucks, in bins specifically designed to facilitate the loading and offloading of such produce. When the trucks delivered the pineapples to Summerpride, they filled up with diesel fuel at a depot located at the Summerpride factory, before returning to Langholm with the empty bins. The trucks that were used for the transportation to Summerpride were not refuelled on

---

7 *Oosthuizen and Another v Standard Credit Corporation Ltd* 1993 (3) SA 891 (A).

8 Davis, Emslie, Dachs *et al* "Diesel Fuel Rebate – Interpretation of Customs and Excise Act – High Court's Discretion to Grant a Declaratory Order – Whether the High Court had Appropriately Exercised its discretion in circumstances where SARS had not yet Issued an Assessment" *The Taxpayer* (2020) 69(1) at 36.

9 *CSARS v Langholm Farms (Pty) Ltd* [2019] ZASCA 163. The majority judgment in this matter was penned by Saldulker JA with Cachalia and Wallis JJA concurring.

10 Supra note 5.

Langholm's farm. Langholm claimed a fuel rebate for the period between October 2015 and August 2016.

SARS issued a Notice of Intention to Assess in which it stated that the diesel used in transporting the pineapples and obtained at Summerpride's factory, was not eligible for the rebate because, in terms of section 75(1C)(a)(iii) of the Customs Act, a rebate could only be claimed in respect of diesel delivered, stored and dispensed from storage tanks situated on Langholm's premises. SARS was also of the view that the carting of the storage bins on the return journey from Summerpride's premises was not a "primary production activity" as defined in the Customs Act.

Langholm approached the High Court for a declaratory order confirming its understanding of section 75(1C)(a)(iii) of the Customs Act, which application was opposed by SARS. The High Court, per Smith J, found in favour of Langholm and granted a declaratory order that Langholm was entitled to a rebate when its trucks were refuelled at Summerpride's premises. SARS appealed to the SCA with leave of the High Court.

An important feature of this case was the SCA's finding that it is perfectly permissible for a taxpayer to launch an application for a declaratory order prior to the issue of an assessment by SARS, notwithstanding the fact that SARS had communicated its intention to issue an assessment by way of Notice of Intention to Assess. This aspect of the judgment falls outside the scope of this work, however, and the discussion that follows therefore focuses only on the SCA's decision on the merits and its interpretation of the Customs Act.

5.3.3. The decision

The part of the judgment that deals with the interpretation of statutory provisions starts with a concise exposition of the law with reference to the dicta in *Endumeni*[11] and in the *Bosch*[12] Judgment:

> "*A statute must be interpreted in line with ordinary rules of grammar and syntax taking cognisance of the context and purpose thereof. That approach is equally applicable to a taxing statute*."[13] [footnotes omitted]

11 Supra note 5.
12 *CSARS v Bosch and Another* 2015 (2) SA 174 (SCA).
13 *Langholm Farms* supra note 9 para 11.

It is submitted that, despite the reference to the decision in *Endumeni*, the Court in *Langholm Farms*[14] did not in fact follow the approach in *Endumeni*. It is also submitted, with respect, that this was a scenario in which the *contra fiscum* rule ought to have been applied.

Section 75(1C)(a)(iii) reads as follows:

> *"Notwithstanding the provision of subsection (1A), the Commissioner may investigate any application for a refund of such levies on distillate fuel to establish whether the fuel has been… delivered to the premises of the user and is being stored and used or has been used in accordance with the purpose declared on the application for registration and the said item of Schedule No 6."*

Langholm argued that it would be absurd to hold that the taxpayer could not claim for diesel fuel that is stored offsite. Langholm placed greater emphasis on the word "or" in the section, and held that the phrase "stored and used or has been used" referred to two different usages – the one usage on the premises and the other usage off the premises. Langholm argued that the purpose of the section was to grant a rebate, whether or not the fuel was procured elsewhere.

The Court disagreed with this interpretation and held as follows:

> *"But that is not how the section plainly reads. The section reads: 'is being stored and used or has been used'. The word 'used' is used twice. One usage is present use ('is being stored and used') and the other is historic use ('has been used'), but both refer to the use of diesel on the taxpayers' premises. That is what the plain language of the section says. What the respondent misconstrues is that the word 'used' is both in the present tense, ie, current use and in the past tense, historic use. This is the ordinary grammatical meaning. It is clear from the ordinary language of the section 'used' and 'has been used' relate to the premises of the taxpayer, whether it is in the past or the present, and not to any other premises.*[15]
>
> *…The issue is put beyond doubt when one considers the effect of Langholm's interpretation on the broader language of the section…Langholm's approach would result in the enquiry being:*
>
> *'whether the fuel has been:*
>
> *delivered to the premises of the user and is being stored and used;*

14 Supra note 9.
15 Ibid para 15.

or

has been used.'

The repetition of the language involved in asking whether the 'fuel has been…has been used' makes it plain that this cannot be the correct construction."[16]

The Court concluded that Langholm's complaint of absurdity must fail, since a plain reading of the statute does not allow for the interpretation that Langholm sought, and since the language of the section is clear and unequivocal.

5.3.4. Discussion

It is respectfully submitted, however, that the language of the section was neither clear nor unequivocal, and that the interpretation by Langholm could conceivably have been a correct construction.

A Court in the United States in the case of *O'Connor v Oakhurst Dairy*[17] began its judgment with the words: "*For want of a comma, we have this case.*"

In that matter, truck drivers had sued their employer for millions of dollars because a missing comma, under the law in the state of Maine, failed to include their delivery duties in a list of jobs that were exempt from overtime. Maine's overtime law states that anything beyond 40 working hours must be compensated at 1.5 times the normal rate, with the following exceptions: "The canning, processing, preserving, freezing, drying, marketing, storing, packing for shipment or distribution" of perishables and two other specific categories of food. The case turned on the absence of an Oxford comma before the words "or distribution". The court concluded that because the truck drivers do not "pack for distribution" they were owed the years of overtime pay for which they were not exempt.

The words "for want of a comma we have this case" might also have been appropriate in the SCA's judgment in *Langholm Farms*.

It is respectfully submitted that the interpretation adopted in *Langholm Farms*[18] could reasonably be supported by the simple employment of an Oxford comma, in which case the section would read as follows:

---

16 Ibid para 16.

17 No. 16-1901 (1st Cir. March 13, 2017).

"…whether the fuel has been delivered to the premises of the user and is being stored and used, or has been used in accordance with the purpose declared on the application for registration and the said item of Schedule No 6."

The addition of a comma before the word "or" contemplates two usages: one where the fuel has been delivered to the premises of the user and is being stored and used, and the other where the fuel has been used in accordance with the purpose declared on the application for registration irrespective of where it is stored and used.

It is also respectfully submitted that the language is not as clear as the SCA deemed it to be. The SCA notes that the word "used" is used twice. One usage is present use ("is being stored and used") and the other is historic use ("has been used"). The Court held that Langholm misconstrued the fact that the word "used" is both in the present tense (current use) and in the past tense (historic use).

The question the SCA did not ask, however, is why the words "is being stored" are not also repeated in the past tense. Arguably, if the section was intended to denote past and present usage on the premises only, it would have read:

"whether the fuel has been delivered to the premises of the user and is being stored and used or has been stored and used in accordance with the purpose…"

5.3.5. Whether or not the approach is consistent with Endumeni

Although the SCA in *Langholm Farms*[19] acknowledged that a statute must be interpreted in line with the ordinary rules of grammar and syntax, taking cognisance of the context and purpose thereof, there is no indication in the judgment of the manner and extent to which the Court took cognisance of the context and purpose of the provision. The SCA, in determining that section 75(1C)(a)(iii) only had one meaning, apparently did not deem it necessary to consider the context of the provision, the apparent purpose to which it is directed, or the material known to those responsible for its production.

---

18 Supra note 9.
19 Ibid.

Davis, Emslie, Dachs *et al*[20] ask whether the SCA's reliance[21] in *Langholm Farms* on *City of Johannesburg v Cantina Tequila and Another*[22] is at odds with the *locus classicus* on interpretation, being the decision in *Endumeni*.[23]

The passage from the *Cantina Tequila* judgment (which was handed down in September 2012) reads as follows:

> *"A court is entitled to find that an interpretation is absurd if an omission is so glaring or out of kilter with the overall purpose of the scheme that the result could simply not have been contemplated. But a court may not, under the guise of a concern to avoid absurdity, ignore the clear language of a provision simply because of any perceived harshness or lack of wisdom. Nor may it construe the provision in a manner that the language does not permit, for in so doing it is improperly substituting its will for that of the lawmaker."*[24]

5.3.6. Conclusion

It is respectfully submitted that in its determination to honour the plain language of the provision, the SCA adopted the less sensible and less business-like approach. As opined by Davis, Emslie, Dachs *et al*:

> *"[I]n order to be able to claim to have climbed Everest, one must not only have reached the summit but also descended therefrom successfully. Similarly, it strikes one as somewhat absurd for diesel used to transport pineapples from Grahamstown to East London to qualify for the rebate because it was stored and used on the taxpayer's own premises, but for diesel purchased at the Bathurst Co-op for the return journey not to qualify. After all, it is necessary to get there and back in order to deliver one's pineapples*."[25]

The SCA appears to have considered the language of the text in isolation, rather than as part of a unitary process, which would have included considerations of what was sensible and businesslike. Davis, Emslie, Dachs *et al* appear to be of the view that considerations of what would have been sensible and businesslike would have been sufficient to tip the scales in favour of the taxpayer.

---

20 Davis, Emslie, Dachs *et al* op cit note 8 at 36.
21 *Langholm Farms* supra note 9 para 17.
22 *City of Johannesburg v Cantina Tequila and Another* [2012] ZASCA 121.
23 The decision in *Cantina Tequila* (in which Wallis J was not on the Bench) does not reference the decision in *Endumeni*. The extent to which the *Cantina Tequila* may be inconsistent with *Endumeni* is beyond the scope of this work.
24 Supra note 22 para 8.
25 Davis, Emslie, Dachs *et al* op cit note 8 at 35.

5.4. Milnerton Estates v CSARS

5.4.1. Introduction

The Milnerton Estates Limited v CSARS[26] ("*Milnerton Estates*") concerned the interpretation of section 24(1) of the ITA and whether it applies only to credit agreements, or whether it applies to all sale agreements where ownership passes from seller to purchaser "upon or after receipt by the taxpayer of the whole or a certain portion of the purchase price".

Section 24(1) reads as follows:

> *"Subject to the provisions of section 24J, if any taxpayer has entered into any agreement with any other person in respect of any property the effect of which is that, in the case of movable property, the ownership shall pass or, in the case of immovable property, transfer shall be passed from the taxpayer to that other person, upon or after receipt by the taxpayer of the whole or a certain portion of the amount payable to the taxpayer under the agreement, the whole of that amount shall for the purposes of this Act be deemed to have accrued to the taxpayer on the day on which the agreement was entered into."*

The definition of 'gross income' in section 1 of the ITA includes "*the total amount, in cash or otherwise, received by or accrued to or in favour of the taxpayer in relation to a tax year*". Section 24(1) deems the whole of the purchase price of the property sold by a taxpayer, where ownership passes to the purchaser upon or after full or partial payment of the purchase price, to accrue to a taxpayer upon the date of signature of the agreement.

5.4.2. Facts

The taxpayer was a property developer who sold stands in a development in the 2013 tax year and received payment of the balance of the purchase price in the 2014 tax year. The taxpayer omitted the purchase prices of these stands from its gross income for the 2013 tax year on the basis that its entitlement to the purchase price remained conditional on its performance of the remaining tasks necessary to effect transfer. SARS, however, argued that the proceeds had accrued, as per the definition of gross income, during the 2013 tax year, alternatively that it was deemed to have accrued in 2013 by virtue of section 24(1).

---

[26] *The Milnerton Estates Limited v CSARS* 2019 (2) 386 (SCA).

The Tax Court dismissed the taxpayer's appeal on the basis that it was bound by the decision of the Appeal Court in *SIR v Silverglen Investments (Pty) Ltd*[27] ("*Silverglen*"). In that case the Appellate Division confirmed that section 24(1) applied, not only when the purchase price of immovable property was payable before or simultaneously with transfer, but also where no amount was payable until transfer, and that it did not only apply to credit agreements.

On appeal to the SCA the taxpayer argued that section 24(1) was not concerned with cash sale agreements, but only with agreements for the sale of immovable property on credit where transfer was only given once the full purchase price had been paid, and further that *Silverglen*[28] had been wrongly decided.

The SCA held that the guarantees provided by the purchasers of erven from the taxpayer constituted payment of the purchase price, such payment being concurrent with transfer of ownership by registration in the Deeds Office. The agreements accordingly provided for the taxpayer to pass ownership to the purchasers upon or after receipt of the whole of the purchase price in terms of section 24(1). The purchase price was therefore deemed to have been received in its entirety in the 2013 tax year, and not in 2014 when the payments were in fact made. The SCA further held that criticism against *Silverglen* was not sufficient to justify a departure from that decision.

In *Silverglen*[29] certain erven were sold by the taxpayer in circumstances which entitled the Group Areas Development Board to exercise a pre-emptive right to purchase the properties. The taxpayer and the Board agreed the terms of the purchase in May 1963 and transfer passed in August 1963. The taxpayer's tax year ended on 30 June of each year and the taxpayer wished to include the accrual of the selling price in the year of assessment ending in June 1963, whereas the Secretary for Inland Revenue contended that the profit fell to be included in the 1964 tax year. The Appellate Division, however, found that the arrangement between the taxpayer and the Board fell under section 24 of the ITA, and that there had thus been a deemed accrual of the purchase price in the 1963 year of assessment.

---

27 *SIR v Silverglen Investments (Pty) Ltd* 1969 (1) SA 365 (A).
28 Ibid.
29 Ibid.

5.4.3. Discussion

The difference between the facts in *Silverglen*[30] and those in *Milnerton Estates*[31] are, with respect, material and obvious. The taxpayer in *Silverglen* argued that section 24 should apply, so that the purchase price could be deemed to have accrued in the 1963 tax year. In contrast, the taxpayer in *Milnerton Estates* argued against the application of section 24 and for the purchase price not to be deemed to have accrued in the earlier tax year. This distinction is relevant for purposes of the application of the *contra fiscum* principle in favour of the taxpayer.

To the extent that there may have been a discrepancy in *Silverglen*,[32] the court in *Silverglen* found *contra fiscum* and in favour of the taxpayer. The SCA in *Milnerton Estates*, however, in considering itself bound by the decision in *Silverglen*, applied the decision in *Silverglen pro fiscus* and against the taxpayer.

5.4.4. Conclusion

The SCA relied on *Silverglen*[33] without acknowledging the fact that, while the judgment in *Silverglen* does not make reference to the *contra fiscum* principle, it appears from the case information that it was argued on behalf of the taxpayer that there was nothing in section 24 which supported the construction which the Secretary sought to place on it, and that to give it that interpretation would be contrary to the *contra fiscum* principle of construction and the considerations of fairness on which that rule is based.[34]

It would have been insightful to know whether or not the application of the *contra fiscum* principle in *Silverglen* was at all considered by the SCA.

5.5. CSARS v United Manganese Of Kalahari (Pty) Ltd

5.5.1. Introduction

Like the *Endumeni* judgment, the judgment in *CSARS v United Manganese of Kalahari (Pty) Ltd*[35] ("*United Manganese*") was also penned by Wallis JA. The decision involved a

30 Ibid.
31 Supra note 26.
32 Supra note 27.
33 Ibid.
34 Ibid at 370.
35 *CSARS v United Manganese of Kalahari (Pty) Ltd* 2020 (4) SA 428 (SCA).

provision of the Royalty Act which required that, in determining gross sales for the purpose of calculating the royalty payable by a miner extracting the mineral resource, expenditure incurred in respect of transport, insurance and handling should be disregarded.

SARS took the view that the exclusion of such expenditure was limited to those cases where customers were invoiced separately for those amounts as part of the purchase price. The taxpayer took the view that, once those costs had been incurred, they fell to be deducted from the amount of the gross sales for determining royalties. The ambiguity therefore lay in whether the provision could be applied to the facts.

The taxpayer was successful in the court *a quo*, and SARS appealed the decision.

The SCA held, in a unanimous judgment, that having regard to the context of the Royalty Act and its provisions, the statutory provision said nothing other than that the expenditure incurred in respect of the three items should be disregarded. The Court could therefore not support the construction advanced by SARS. The Court took into account that the drafters of the legislation would have been aware that, under common trading patterns, many contracts for the sale of minerals would be concluded at fixed prices, without the costs of transport, insurance and handling being separately specified. The SCA held that there was nothing to indicate why, in providing that such expenditure should be disregarded in determining the amount of gross sales, the legislature would have had in mind only those contracts in which these expenses were itemised.

In dismissing SARS's appeal, the Court also had regard to the legislative history of the provision and an explanatory memorandum that accompanied a subsequent amendment.

The SCA emphatically rejected the notion that context is applicable only when interpreting contracts and other documents, but not in the interpretation of statutes. The Court held as follows:

> *"Context is fundamental in approaching the interpretation of all written instruments, but there are differences in context with different documents, including the nature of the document itself. Legislation is different in character from contracts, and a contract formulated carefully by*

lawyers after lengthy negotiations will differ from one scribbled by lay people on a page torn from a notebook."[36]

5.5.2. Legislative framework

In exchange for the right to extract mineral wealth from South African soil, mining companies pay royalties in terms of the Royalty Act. The royalty payable is determined in accordance with the formula contained in section 4(2) of the Royalty Act, and one of the elements in calculating the royalty payable is the mining company's gross sales, which are determined in accordance with section 6 of the Royalty Act.

At the time in question, the relevant part of section 6 read as follows:

"(2) Gross sales in respect of an unrefined mineral resource transferred –

(a) as mentioned in paragraph (a) of the definition of 'transfer' in section 1 in the condition specified in Schedule 2 for that mineral resource is the amount received or accrued during the year of assessment in respect of the transfer of that mineral resource;

…

(3)(b) For purposes of subsection (2), gross sales are determined without regard to any expenditure incurred in respect of transport, insurance and handling of an unrefined mineral resource after that mineral resource was brought to the condition specified in Schedule 2 for that mineral resource or any expenditure incurred in respect of transport, insurance and handling to effect the disposal of that mineral resource."

5.5.3. Facts

United Manganese of Kalahari ("UMK") conducted its mining operations in the Northern Cape and sold manganese as an unrefined mineral resource both locally and abroad. In respect of local sales, purchasers would take delivery of the manganese at the mine. This did not present a problem. It was the sale to foreign purchasers that gave rise to the dispute between SARS and UMK.

In 2012 SARS commenced an audit of tax returns rendered by UKM for the 2010 and 2011 tax years, from which it appeared that UMK and SARS had different approaches to the

[36] Ibid para 16.

determination of the amount of UMK's gross sales for purposes of calculating the royalties due by it. UMK approached the High Court in Pretoria for a declaratory order as to the proper method of determining the amount of its gross sales.

The parties both accepted that the expression "received or accrued" in section 6(2)(a) of the ITA bore the same meaning as the corresponding expression in the definition of gross income in section 1. Accordingly gross sales included every amount actually received by UMK, or to which it became entitled, in the relevant tax years.

The dispute turned on the expression "without regard to any expenditure incurred in respect of transport, insurance and handling" after the manganese ore was brought to the specified condition, and on the determination of UMK's gross sales for royalty purposes.

SARS contended that, where the price charged by UMK to its customers specified separate amounts for transport, insurance and handling of the ore as a component of the global price to be paid, the amounts so specified should be deducted in determining the amount of gross sales on which royalties should be paid. UMK, on the other hand, argued that any costs incurred in the circumstances prescribed in section 6(3)(b) had to be deducted in calculating gross sales for royalty purposes, regardless of whether or not the costs were specified as a line-item component of the price charged to customers.

5.5.4. Interpretative approach

The Court in *United Manganese* summarised the "factors" to be considered when interpreting a legislative provision: ordinary rules of grammar and syntax, the context in which the provision appears, the apparent purpose to which the provision is directed, and the material known to those responsible for its production.[37]

In considering the language of section 6(3)(c) of the ITA, the Court noted that the use of "any expenditure" in the section did not speak to the manner in which UMK should determine the prices to be paid by its customers, much less did it require that those prices should specify the separately amounts to be charged for transport. It was held that SARS's approach to the section did not amount to a sensible construction thereof.[38]

---

37 Supra note 35 para 8.
38 Ibid para 15.

In considering the context, the Court confirmed that the difference in the genesis of statutes and contracts provides a different context for their interpretation; statutes undoubtedly have a context that may be highly relevant, and the legislative history may provide useful background. The Court also considered that, in the case of statutes dealing with specific areas of public life or the economy, the nature of these specific areas provides the context for the legislation.[39] The Court found that the context also did not support the construction advanced by SARS.[40]

With regard to the background to the Royalty Act, the Court considered that South Africa is a country with vast mineral wealth which is exploited primarily by private enterprises in a heavily regulated environment. The mining industry has always formed a major part of the South African economy, and royalties are payable in return for the right to exploit these mineral rights.

In considering the material available to those responsible for drafting the legislation, the Court held as follows:

> *"The annual South African Mineral Industry reports issued by the Department of Mineral Affairs demonstrate that the Department is thoroughly familiar with all mining activities and the basis upon which trade in minerals occurs. It is proper then to approach the interpretation of section 6 on the basis that those responsible for drafting the legislation did so in the light of their knowledge of common, if not invariable, trading patterns. It can be accepted that they were aware that many contracts for the sale of minerals would be concluded at fixed prices on FOB or CIF terms, without the cost of transport, insurance and handling being separately specified. There is nothing to indicate why then, in providing the expenditure on TIH [transport, insurance and handling] costs should be disregarded in determining the number of gross sales, they would have in mind only those contracts – potentially very few in number – in which the price was divided into an amount for the mineral in question and separate amounts for transport, insurance and handling. No sensible reason existed, and none has been advanced in the affidavits or argument, for distinguishing between the two situations."*[41]

Lastly, the Court considered the purpose of the Royalty Act, being to secure the payment of royalties on the value of the minerals extracted, as well as its statutory history. In so doing the Court considered that the section had been amended in 2019 by the deletion of

---

39 Ibid para 17.
40 Ibid para 15.
41 Ibid para 19.

the words 'without regard to the expenditure incurred' and their replacement by 'after deducting any expenditure actually incurred'. In considering the explanatory memorandum to this change, the Court held that, "*Parliament has clearly shown by later amending legislation what was meant by the earlier legislation under amendment and the amending legislation is passed explicitly for the purpose of clarifying that meaning,"*[42] and that in these circumstances it was permissible, as an aid to interpretation, to have regard to the meaning ascribed by the later legislation to its predecessor.[43]

5.5.5. Discussion

The SCA was able to find, in two short paragraphs as early into the judgment as paragraphs 14 and 15 thereof, that it was "impossible" to find any basis for the interpretation advanced by SARS, and that once it was accepted, as SARS did, that disregarding expenditure involved deducting it from the receipts and accruals, any difficult arising from the wording "evaporated".

Certain phrases in the judgment betray the fact that the Court, albeit inadvertently, attempted to establish the intention of the legislature, which approach was rejected in *Endumeni*. For example:

> "*Parliament has clearly shown by later amending legislation <u>what was meant</u> by the earlier legislation under amendment and the amending legislation is passed explicitly for the purpose of clarifying that meaning…"*[44] [own emphasis]

The SCA considered the circumstances in which the legislation was conceived, in line with the *Endumeni* approach, but in doing so appears to have relied on the assumption that those responsible for drafting the legislation "*did so in the light of their knowledge of common, if not invariable, trading patterns. It can be accepted that they were aware that many contracts for the sale of minerals would be concluded at fixed prices on FOB or CIF terms, without the cost of transport, insurance and handling being separately specified."*[45]

The Court went on to state that no sensible reason existed, and none had been advanced, for distinguishing between contracts in which the cost of transport, insurance and

---

42 Ibid para 24.
43 Ibid para 20-24.
44 Ibid para 24.
45 Ibid para 19

handling were itemised separately, and those contracts in which it was included in the price.[46] This appears to be a consideration of what would be a "sensible, businesslike" approach.

5.5.6. Conclusion

The SCA considered the apparent knowledge of those responsible for drafting the legislation, coupled with considerations of what would be "sensible", to resolve the ambiguity as to the meaning of the provision. Although the SCA did not resolve the ambiguity with express reference to the *contra fiscum* principle, it was nevertheless resolved in favour of the taxpayer.

5.6. CSARS v The Thistle Trust

5.6.1. Introduction

CSARS v The Thistle Trust[47] ("*Thistle Trust*") was first heard in the Tax Court in March/April 2021 and dealt with the interpretation of section 25B of the ITA, which was amended with effect from January 2021 to exclude amounts of a capital nature.

SARS's view was that the capital gains had to be taxed in the hands of Thistle Trust, whereas the Thistle Trust argued that it was taxable in the hands of the beneficiaries, and that the conduit pipe principle and section 25B(1) (prior to amendment) applied.

5.6.2. The Facts

The Thistle Trust was a discretionary trust and the beneficiary of a vesting trust. The vesting trust sold properties and the Thistle Trust became entitled to a share of the proceeds. The trustees of the Thistle Trust awarded those same amounts to its beneficiaries which were natural persons resident in South Africa.

The Court *a quo* held that the fact that section 25B had expressly been amended to exclude amounts of a capital nature, suggested that amounts of a capital nature were covered by section 25B previously. The Court held that the word "any" in "any amount" was a word of wide and unqualified generality and that there was no warrant for applying the new wording of section 25B of the ITA retrospectively. The court held that it was appropriate to

---

46 Ibid para 19.

47 *CSARS v The Thistle Trust* (516/2021) [2022] ZASCA 153 (7 November 2022).

characterise a capital gain in question as an amount, and that the capital gain was taxable in the hands of the natural persons who were beneficiaries of the Thistle Trust.

The SCA, by contrast, deviated from this approach quite substantially.

5.6.3. Discussion

While embarking on an interpretation and application of section 25B, the SCA referred[48] to the decision in *United Manganese*,[49] referring to the objective, unitary process where consideration must be given to the language used in the light of the ordinary rules of grammar and syntax, the context in which the provision appears, the apparent purpose to which it is directed and the material known to those responsible for its production.

The SCA then considered the fact that the legislation was introduced in 1991, at a time when capital gains tax did not yet exist in South Africa, and concluded that "if capital gains did not exist, section 25B could not have been intended to apply to capital gains".[50] The SCA appears to have considered the context in which the provision appears, the apparent purpose to which it is directed and the material known to those responsible for its production, as prescribed in *Endumeni*.

Notably, however, the SCA[51] quotes the text of section 25B after its amendment in 2021, and not as it would have read at the time relevant to the application. The amendment, which qualifies the words "any amount" to exclude an amount of a capital nature, was introduced in 2021, some 20 years after the introduction of a capital gains tax. The logic that, *"if capital gains did not exist, section 25B could not have been intended to apply to capital gains*",[52] overlooks the fact that the legislature left section 25B untouched for 20 years while capital gains did exist. By parity of reasoning it may be argued that the legislature allowed "any amount" to include a reference to capital gains for a period of 20 years until the amendment of section 25B served to exclude amounts of a capital nature that were previously covered by section 25B, in recognition of the fact that "any" was a word of wide and unqualified generality, and that there was no warrant for applying the new wording of section 25B retrospectively.

---

48 Ibid para 18.
49 Supra note 35.
50 Supra note 47 para 20.
51 Ibid para 9.
52 Ibid para 20.

The SCA, by contrast, viewed the amendment of section 25B as serving to clarify, rather than to amend, and in so doing allowed itself effectively to apply the amendment retrospectively, not *contra* fiscus, but *contra* taxpayer.

5.6.4. Conclusion

On the one hand, the 2021 amendment could be considered to clarify what was already the position – that section 25B did not, and still does not, apply to income of a capital nature. This was the position taken by the SCA. On the other hand, however, the 2021 amendment could be viewed as expressly *amending* section 25B to indicate that, while it previously *did* apply to income of a capital nature, that is no longer the case.

Arguably this was an instance where the *Endumeni* approach, and a reliance on the context and circumstances surrounding the enactment of the legislation, did not resolve the ambiguity, thereby rendering the ambiguity "irresoluble", in which case the *contra fiscum* principle could properly have found application.

5.7. Conclusion

Of the decisions considered in chapter 5, *United Manganese*[53] is the only decision in which the SCA found in favour of the taxpayer, albeit without reference to the *contra fiscum* principle. The impact of the SCA's approach to the interpretation of fiscal legislation in the period under review on the survival of the *contra fiscum* principle is discussed in the following chapter.

[53] Supra note 35.

CHAPTER 6 – HAS THE CONTRA FISCAL PRINCIPLE SURVIVED THE APPROACH IN ENDUMENI?

6.1. Introduction

In 1995, before the decision in *Endumeni*, Meyerowitz SC[1] examined the use of the *contra fiscum* principle by the courts and asked whether the *contra fiscum* principle had vanished. In 2008 Meyerowitz, Emslie and Davis similarly expressed concern that the purposive approach will consign the *contra fiscum* principle to the scrapheap, because the purpose of fiscal legislation is generally to collect revenue from the taxpayer.[2] This chapter revisits the question in light of the decision in *Endumeni*[3] and with reference to the decisions discussed in chapters 4 and 5.

6.2. Overview of the SCA's approach to interpretation in the period under review

What is clear from the analysis conducted in chapter 5 is that the *Endumeni* approach has not been applied consistently.

For example, in *Big G Restaurants*[4] and *Milnerton Estates*[5] the SCA does not appear to have applied the unitary approach to interpretation endorsed in *Endumeni*.[6] In *Big G Restaurants* the Court's approach of first identifying both the narrow and wide meanings of the phrase 'in terms of', based on the 1988 decision of *Slims (Pty) Ltd and Another v Morris NO*[7], and then choosing between the two meanings, thus obviating the need to consider any of the other factors that for part of the unitary approach endorsed by the same Court in *Endumeni*. Similarly, the Court in *Milnerton Estates* considered itself bound by the 1969 decision in *Silverglen*,[8] while in *Langholm Farms*[9] the SCA appears to have focused on the text of the provision, without considering the other factors espoused in *Endumeni* as part of a unitary process.

---

1 Meyerowitz, David "Has the Contra Fiscum Rule Vanished" (1995) *Acta Juridica* 79-88 at 79.
2 Meyerowitz, Emslie & Davis "The evolution in the interpretation of tax statutes" (2008) 9 *The Taxpayer* 161-163.
3 *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).
4 *CSARS v Big G Restaurants (Pty) Ltd* 2019 (3) SA 90 (SCA). Discussed above in chapter 5.2.
5 *The Milnerton Estates Limited v CSARS* 2019 (2) 386 (SCA). Discussed above in chapter 5.4.
6 Supra note 3.
7 *Slims (Pty) Ltd and Another v Morris NO* 1988 (1) SA 715 (A).
8 *SIR v Silverglen Investments (Pty) Ltd* 1969 (1) SA 365 (A).
9 *CSARS v Langholm Farms (Pty) Ltd* [2019] ZASCA 163. Discussed above in chapter 5.3.

Despite the call for a unitary approach, it does not appear that equal weight is always given to the language, context or purpose of a provision, nor is a sensible, businesslike result always favoured.

It is only in *United Manganese*[10] that the Court considered what would be a "sensible, businesslike" approach, and in *Thistle Trust*[11] the SCA relied on the context and circumstances surrounding the enactment of section 25B of the ITA to resolve any ambiguity in the interpretation of the provision.

6.3. The problem in *Telkom:* an "irresoluble" ambiguity

The SCA in *Telkom*[12] held that the *contra fiscum* principle will find application where a purposive approach yields two constructions which are equally plausible[13] and stated that "*the rule should only be invoked after an interpretational analysis results in an irresoluble ambiguity as to the meaning of the particular provision in the fiscal statute*."[14] [emphasis added]

The SCA in *Telkom* appears to have equated the existence of two equally plausible constructions to an "irresoluble ambiguity" that triggers the application of the *contra fiscum* principle. This must be contrasted with the dictum in *Ferrochrome,*[15] which referred only to provisions that were reasonably capable of two different constructions and which create doubt (as distinct from an irresoluble ambiguity).

The Court in *Ferrochrome*[16] (quoted in the *Telkom* judgment) stated as follows:

> *"…Where there is doubt as to the meaning of a statutory provision which imposes a burden, it is well established that the doubt is to be resolved by construing the provision in a way which is more favourable to the subject, provided of course the provision is reasonably capable of that construction."*[17]

---

10 *CSARS v United Manganese of Kalahari (Pty) Ltd* 2020 (4) SA 428 (SCA). Discussed above in 5.5.
11 *CSARS v The Thistle Trust* (516/2021) [2022] ZASCA 153 (7 November 2022). Discussed above in chapter 5.6.
12 *Telkom SA Soc Ltd v CSARS* 2020 (4) SA 480 (SCA). Discussed above in chapter 4.4.
13 Para 19.
14 Ibid para 19-20.
15 *NST Ferrochrome (Pty) Ltd v Commissioner for Inland Revenue* 2000 (3) SA 1040 (SCA).
16 Ibid.
17 Ibid para [17].

Arguably a distinction can be drawn between two reasonably possible constructions (although not equally plausible) which create "doubt", and two equally plausible constructions which give rise to "an irresoluble ambiguity".

The SCA in *Glencore*[18], in considering the interpretation of "own primary production activities in mining", referred to the *contra fiscum* principle, without applying it, and held as follows:

> *"Counsel were further agreed that insofar as the proper interpretation of the relevant note is concerned, the ordinary rules of statutory interpretation apply. The effect of this is that the fact that we are here dealing with a fiscal provision matters not except to the limited extent that there may be ambiguity in which event the contra fiscum rule would be triggered."*[19]

The SCA then referred to both the decision in *Telkom*[20] and the decision in *Ferrochrome*,[21] and held that:

> "*Resort can be had to the contra fiscum rule to resolve an 'irresoluble ambiguity' only if all other conventional methods of contextual and purposive construction still yield two equally plausible interpretations. Differently put, one only invokes the rule when, despite all other ordinary approach to interpretation, one is still left with 'irresoluble ambiguity*".[22]

What the SCA in *Glencore*[23] does not acknowledge is the apparent change in the threshold for the application of the *contra fiscum* principle from cases of "doubt" (as applied in *Ferrochrome*) to cases involving an "irresoluble ambiguity" (as applied in *Telkom*).

It will be argued that this almost imperceptible change of the threshold from "ambiguity" (up to and including *Daikin*[24]), to an "irresoluble ambiguity" (in *Telkom*[25]), is significant. According to the *Endumeni* approach, where more than one meaning is possible, the starting point is the language of the text. Regard is had to the context of the document as a whole, the circumstances attendant upon its coming into existence, and the material available to those responsible for its production. Where more than one meaning remains possible (in

---

18 *CSARS v Glencore Operations SA (Pty) Ltd* (Case no 462/2020) [2021] ZASCA 111 (10 August 2021). Discussed above in chapter 4.5.

19 Ibid para 17.

20 Supra note 12.

21 Supra note 15.

22 *Glencore* supra note 18 para 18.

23 Supra note 18.

24 *The Commissioner for the South African Revenue Services v Daikin Air Conditioning South Africa (Pty) Limited*.

25 Supra note 12.

other words, where there continues to be doubt) an approach is adopted that avoids an unbusinesslike or oppressive outcome, or that subverts the apparent purpose of the document.

6.4. The unintentional demise of the *contra fiscum* principle

The unitary approach endorsed in *Endumeni*[26] allows for all the elements of interpretation to be considered together as part of the interpretative process, rather than in a hierarchical fashion. In other words, *Endumeni* does not propose an approach that considers first one principle or element of the interpretative process, and only if that fails does the court move on to the next. Ironically, by not considering the *contra fiscum* principle from the outset (as expressly rejected in *Telkom*), and by apparently only resorting to the *contra fiscum* principle where all other interpretative techniques have failed to resolve the ambiguity, the *contra fiscum* principle is excluded from the unitary process.

Although the SCA does not expressly state why the threshold for the application of the *contra fiscum* principle has been elevated from an ambiguity (in circumstances where there are two possible meanings) to an irresoluble ambiguity, it appears that the *contra fiscum* principle will now only apply when – and if – the *Endumeni* approach is unable to resolve the ambiguity.

Arguably the *Endumeni* approach to interpretation is never likely to result in an ambiguity remaining unresolved, thereby triggering the application of the *contra fiscum* principle. Indeed, the SCA has not found it necessary to apply the *contra fiscum* principle in the period under review.

It is submitted that the injunction to consider businesslike, sensible outcomes, which terms remain suitably vague and undefined, necessarily means that an ambiguity can be resolved by applying these standards, without recourse to the *contra fiscum* principle. It is difficult to conceive of a judge, when faced with an ambiguous legislative provision, being constrained to admit that they cannot conceive of a businesslike or sensible outcome that will resolve the ambiguity.

---

[26] Supra note 3.

6.5. Conclusion

From the analysis in chapters 4 and 5 it appears that the *contra fiscum* principle does not form part of the unitary approach to interpretation, but is only adopted as a last resort once the ambiguity is rendered "irresoluble". The SCA has not indicated, however, at what point the ambiguity becomes sufficiently "irresoluble" to trigger a consideration of the *contra fiscum* principle, and it appears that the *Endumeni* approach could conceivably be applied to resolve any doubt in a legislative provision, thus avoiding an "irresoluble" ambiguity altogether, so that the threshold for the application of *contra fiscum* is never met.

CONCLUSION

Lord Clyde, in *Ayrshire Pullman Motor Services and D M Ritchie v Commissioners of Inland Revenue*,[1] stated that:

> "*No man in the country is under the smallest obligation, moral or other, so to arrange his legal relations to his business or property as to enable the Inland Revenue to put the largest possible shovel in his stores. The Inland Revenue is not slow, and quite rightly, to take every advantage which is open to it under the Taxing Statutes for the purposes of depleting the taxpayer's pocket. And the taxpayer is in like manner entitled to be astute to prevent, so far as he honestly can, the depletion of his means by the Inland Revenue.*"

The *contra fiscum* principle remains important as a means of protecting the taxpayer's right to prevent, so far as he honestly can, the depletion of his means by SARS. For this reason it is argued that, given the recent approach of the SCA to statutory interpretation, particularly the interpretation of fiscal legislation, the *contra fiscum* principle is no longer afforded the significance it deserves, and it cannot be overlooked that, in the period under review, the SCA did not apply the *contra fiscum* principle in favour of the taxpayer and found against SARS on only two occasions.

In none of the cases discussed in chapters 4 and 5 did the *Endumeni* approach fail to resolve an ambiguity, thereby necessitating recourse to the *contra fiscum* principle, and it is submitted that, to the extent that the *contra fiscum* principle continues to be excluded from the unitary approach endorsed by the SCA in *Endumeni*, the *contra fiscum* principle is at risk of being abrogated by disuse.

It is submitted that the *contra fiscum* principle can be saved from the dustbin of legal history (in the words of Seligson SC[2]) in one of two ways:

1. By resorting to the pre-*Telkom* threshold of "ambiguity", as opposed to an "irresoluble ambiguity", in which case the *contra fiscum* principle may be applied as a part of a unitary process alongside the other principles and aids to interpretation.

---

1 [1929] 14 TC 754 at 763–764.

2 Seligson SC, Milton "Judicial Forays in Statutory Construction" (2021) 2 *Business Tax & Company Law Quarterly* 8 at 10.

2. Alternatively, when interpreting a provision in fiscal legislation, the fiscal nature of the legislation may be said to form part of its context.

Wallis J states that the context of legislation requires a reasoned assessment of the broad purpose underlying its enactment, but he is quick to clarify that this does not mean that in a taxing statute a construction favourable to the fiscus must be given because the purpose of a statute is to raise revenue.[3] Nevertheless, the broad purpose of fiscal legislation (albeit not necessarily the only purpose) is to raise revenue. In that way the *contra fiscum* principle can be imported *via* a consideration of the context and purpose of the legislation, thus allowing it to form part of the unitary exercise.

In so doing the *contra fiscum* principle may continue to act in favour of the taxpayer, and the taxpayer may continue to order his affairs, so far as he honestly can, to limit his tax liability.

[3] Wallis, M "Interpretation Before and After Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 4 SA 593 (SCA)" (2019) 22 *PER/ PELJ* 8 at 17.

BIBLIOGRAPHY

Primary Sources

Legislation

Constitution of South Africa, 1996

Customs and Excise Act 91 of 1964

Income Tax Act 58 of 1962

Mineral and Petroleum Resources Royalty Act 28 of 2008

Tax Administration Act 28 of 2011

Value Added Tax Act 89 of 1991

Case law

South African

A v Commissioner For The South African Revenue Services (46206) [2023] ZATC 1

Airports Company South Africa v Big Five Duty Free (Pty) Ltd and Others 2019 (5) SA 1 (CC)

Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk 2014 (2) SA 494 (SCA)

CIR v Nemojim (Pty) Ltd 1983 (4) SA 935 (A)

CIR v Simpson 1949 (4) SA 678 (A)

City of Johannesburg v Cantina Tequila and Another [2012] ZASCA 121

Commissioner for Inland Revenue v Insolvent Estate JP Botha t/a Trio Culture 1990 (2) SA 548 (AD)

CSARS v Big G Restaurants (Pty) Ltd 2019 (3) SA 90 (SCA)

CSARS v Bosch and Another 2015 (2) SA 174 (SCA)

CSARS v Clicks Retailers (Pty) Ltd 2020 (2) SA 72 (SCA); *Clicks Retailers v CSARS* 2021 (4) 390 (CC)

CSARS v Coronation Investment Management South Africa (Pty) Ltd 2023 (3) 404 (SCA)

CSARS v Glencore Operations SA (Pty) Ltd (Case no 462/2020) [2021] ZASCA 111 (10 August 2021)

CSARS v Langholm Farms (Pty) Ltd [2019] ZASCA 163

CSARS v Medtronic International Trading SARL 2023 (3) SA 423 (SCA)

CSARS v Spur Group (Pty) Ltd 2021 JDR 2530 (SCA)

CSARS v The Thistle Trust (516/2021) [2022] ZASCA 153 (7 November 2022)

CSARS v United Manganese of Kalahari (Pty) Ltd 2020 (4) SA 428 (SCA)

CSARS v Volkswagen South Africa (Pty) Ltd 2019 (2) SA 362 (SCA)

Executors Testamentary, Estate Reynolds v CIR 1937 AD 57

First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance 2002 (4) SA 768

Glen Anil Development Corporation Ltd v Secretary for Inland Revenue 1975 (4) SA 715 (A)

Marshall NO and Others v CSARS 2019 (6) SA 246 (CC)

Mobile Telephone Networks (Pty) Ltd v CSARS 2023 (1) SA 420 (SCA)

Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)

NST Ferrochrome (Pty) Ltd v Commissioner for Inland Revenue Revenue 2000 (3) SA 1040 (SCA)

Oosthuizen and Another v Standard Credit Corporation Ltd 1993 (3) SA 891 (A)

Purveyors South Africa Mine Services (Pty) Ltd v CSARS 2022 (3) SA 139 (SCA)

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

Shenker v The Master 1936 AD 136

SIR v Silverglen Investments (Pty) Ltd 1969 (1) SA 365 (A)

Slims (Pty) Ltd and Another v Morris NO 1988 (1) SA 715 (A)

Telkom SA Soc Ltd v CSARS 2020 (4) SA 480 (SCA)

The Commissioner for the South African Revenue Services v Daikin Air Conditioning South Africa (Pty) Limited 2018 JDR 1072 (SCA)

The Milnerton Estates Limited v CSARS 2019 (2) 386 (SCA)

Foreign

Ayrshire Pullman Motor Services and D M Ritchie v Commissioners of Inland Revenue [1929] 14 TC 754

Cape Brandy Syndicate v Inland Revenue Commissioners [1921] 1 KB 64

Duke of Westminster v IRC 1935 All ER 259

Elliot v Rex 1911 EDL 514

O'Connor v Oakhurst Dairy No. 16-1901 (1st Cir. March 13, 2017)

Oriental Bank Corp v Treasurer of the Province of Griqualand West (1880) 5 App. Cas. 842 (PC)

Partington v The Attorney General 21 LT 370 (HL)

C-566/17 Związek Gmin Zagłębia Miedziowego w Polkowicach vSzef Krajowej Administracji Skarbowej

Secondary Sources

Books

Alexy, R *A Theory of Constitutional Rights* (2002) Oxford University Press, Oxford.

Du Plessis, LM "Statute Law and Interpretation: the presumptions" LAWSA vol 25(1) Second Reissue (2011) para 334.

Hahlo, HR & Ellison Kahn *The South African Legal System and its Background* (1986) Juta, Cape Town.

Hattingh, Nogueira, Roeleveld & West *Fundamentals of Taxation: An Introduction to Tax Policy, Tax Law and Tax Administration* (2019) chap 3.1.5, available at https://research-ibfd-org.ezproxy.uct.ac.za/#/doc?url=/collections/pt/html/pt_c03.html, accessed on 14 January 2024.

Smith, A *An Enquiry into the Nature and Causes of the Wealth of Nations* (1776) Book 5 ch 2 Part 1, available at *https://www.gutenberg.org/cache/epub/3300/pg3300-images.html#chap15,* accessed on 14 January 2024.

Steyn, DLC *Die Uitleg van Wette* 4th ed (1974) Juta, Cape Town.

Journal articles

Celliers, HS "Die Betekenis van Vermoedens by Wetsuitleg" (1962) 2 *SALJ* 189.

Davis, Emslie, Dachs *et al* "Income Tax – section 24C Allowance for Future Expenditure on Refurbishing Restaurants in Terms of an Obligation Imposed by a Franchise Contract*" The Taxpayer* (2018) 67(8) 149.

Davis, Emslie, Dachs et al "Diesel Fuel Rebate – Interpretation of Customs and Excise Act – High Court's Discretion to Grant a Declaratory Order – Whether the High Court had Appropriate Exercised its discretion in circumstances where SARS had not yet Issued an Assessment" *The Taxpayer* (2020) 69(1) 33-40.

Dison, Lewis R "The Contra Fiscum Rule in Theory and Practice" (1976) 2 *SALJ* 159.

Dworkin, Ronald "The Model of Rules" (1976) 35 *U Chi L Rev* 25-26.

Goldswain “The Purposes approach to interpretation of fiscal legislation - the winds of change” (2008) 16 *Meditari Accountancy Research* 107-121.

Meyerowitz, David “Has the Contra Fiscum Rule Vanished” (1995) *Acta Juridica* 79-88

Meyerowitz, Emslie & Davis “The evolution in the interpretation of tax statutes” (2008) 9 *The Taxpayer* 161-163

Morawski, Wojciech & Radim Bohac “In Dubio Pro Tributario In Dubio Mitius as a Rule of Reasoning in Tax Law Interpretation*”* (2023) 51 *Intertax* 506Meyerowitz, Emslie & Davis “The evolution in the interpretation of tax statutes” (2008) 9 *The Taxpayer* 161-163.

Pavčnik, Marijan “Interpretative Importance of Legal Principles for the Understanding of Legal Texts” *Archives for Philosophy of Law and Social Philosophy* (2015) 101 52-59.

Seligson SC, Milton “Judicial Forays in Statutory Construction” (2021) 2 *Business Tax & Company Law Quarterly* 8.

Silke, Jonathan “The Interpretation of Fiscal Legislation – Canons of Construction, Recent Judicial Comments and New approaches” (1995) *Acta Juridica* 123.

Wallis, M “Interpretation Before and After Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 4 SA 593 (SCA)” (2019) 22 *PER/ PELJ* 8.

Theses

Goldswain, GK *The Winds of Change – An Analysis and Appraisal of Selected Constitutional Issues Affecting the Rights of Taxpayers* (unpublished Doctor of Accounting Science thesis, University of South Africa, 2012).

Jooste, T *Tax Fairness: The Test Applicable to the Contra Fiscum Rule* (unpublished Master of Commerce thesis, University of Pretoria, 2020).

Miller, Craig Ian *The Application of a New Approach to Interpreting Fiscal Statutes in South Africa* (unpublished LLM thesis, University of Johannesburg, 2016).

Prinsloo, IC *Equity in Tax Law with Special Reference to the Interpretation of Tax Statutes* (LLM thesis, University of the Witwatersrand, 1986).