

**UNIVERSITY OF CAPE TOWN
DEPARTMENT OF FINANCE AND TAX**

**THE CONTRIBUTION OF JUDGE OLIVER DENEYS
SCHREINER TO THE DEVELOPMENT OF
SOUTH AFRICAN TAX LAW
*“A MARK THAT CANNOT BE ERASED”***

A minor dissertation presented in partial fulfilment of the requirements
for the

Degree of

MASTERS IN TAXATION

by

**MARGIE MABUDAFHASI
(CHRMAR013)**

2013

SUPERVISOR: PROFESSOR PETER SURTEES

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

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

PLAGIARISM DECLARATION

I know that plagiarism is wrong. Plagiarism is to use another's work and pretend that it is one's own.

I have used the Harvard convention for citation and referencing. Each contribution to, and quotation in, this thesis from the work(s) of other people has been attributed, and has been cited and referenced.

This thesis is my own work.

I have not allowed, and will not allow, anyone to copy my work with the intention of passing it off as his or her own work.

I acknowledge that copying someone else's assignment, essay or paper or part of it is wrong, and declare that this is my own work.

Signature _____

Date _____

ACKNOWLEDGEMENTS

First and foremost to my husband Benedict, who has been supportive and understanding during this season of my life, thank you for believing in me and holding the fort. I am grateful to my 5 year old daughter Naledi who kept me at my desk by occasionally enquiring if 'we' had won the trophy. You both motivated me to work harder.

A big thank you goes to my parents, Davidson Chirombo, Rejoice Mabudafhasi and Marian Chirombo, for their encouragement.

My deep thanks go to Professor Peter Surtees whose advice was invaluable. Thank you for your inspiration and encouragement throughout this journey.

ABSTRACT

“It has been said of RA Butler that he was the greatest Prime Minister Britain did not have. So it may be said of Oliver Deneys Schreiner that he was the greatest Chief Justice South Africa did not have”. - Professor Ellison Kahn (Schreiner & Kahn 1983)

Oliver Deneys Schreiner made a remarkable contribution to the development of South African tax law during his career on the bench. Not only did he make a substantial contribution to the development of South African tax law, but in my view he also played a humble and selfless and indeed noteworthy role in the growth of our Nation’s democracy. He is an important part of South Africa’s judicial history.

This dissertation will be looking at the different facets of Judge Oliver Schreiner. The aspects will include his background, the political climate in which he lived and his philosophy and approach to his work on the bench. Oliver Deneys Schreiner delivered several judgments that are important and have played a role in the development of South African tax law.

This paper will be examining the significant judgments delivered by Judge Schreiner during his time in the Appellate Division. Cases such as: *CIR v Genn & Co (Pty) Ltd* 1955 (3) SA 293 (A); *CIR v Drakensberg Garden Hotel (Pty) Ltd* 1960 (2) SA and *CIR v Black* 1957 (3) SA 536(A).

The dissertation will be assessing the impact these cases have made where they are subsequently cited and accepted as precedent.

Judge Schreiner’s dissenting minority judgments in cases such as *CIR v Richmond Estates (Pty) Ltd* 1956 (1) SA 602 (A); *CIR v Lever Brothers and Unilever Ltd* 1946 AD 441, 14 and *CIR v Epstein* 1954 (3) SA689 (A) will be analysed. The thesis will also speculate in the theory of the potential impact Schreiner’s dissension in *CIR v Richmond Estates (Pty) Ltd* 1956 could have had on SA tax law if his minority judgment had been the majority.

TABLE OF CONTENTS

PLAGIARISM DECLARATION	I
ACKNOWLEDGEMENTS	II
ABSTRACT	III
CHAPTER ONE: INTRODUCTION	1
1.1 BACKGROUND.....	1
1.2 RESEARCH QUESTION	1
1.3 RESEARCH METHOD	1
1.4 LIMITATIONS.....	1
1.5 STRUCTURE	1
CHAPTER TWO: THE LIFE OF OLIVER DENEYS SCHREINER (1890 - 1980).....	3
2.1 INTRODUCTION	3
2.2 FAMILY HISTORY	3
2.3 RELATIONSHIPS	4
2.3.1 <i>Father: WP Schreiner</i>	4
2.3.2 <i>Paternal Aunt: Olive Schreiner</i>	5
2.3.3 <i>Wife: Edna Schreiner</i>	5
2.4 EDUCATION (1890-1914)	6
2.4.1 <i>Rondebosch Boys & SACS 1890-1911</i>	6
2.4.2 <i>Cambridge (1911-1914)</i>	6
2.5 THE GREAT WAR – ARMY SERVICE (1914-1919).....	6
2.6 QUALIFICATION AND TIME AT THE BAR (1920-1937)	7
2.7 PERIOD ON THE BENCH (1937-1944)	7
2.8 THE APPELLATE DIVISION (1945-1960).....	7
2.9 GENERAL CAREER	8
CHAPTER THREE: POLITICS	10
3.1 INTRODUCTION	10
3.2 COLOURED VOTE CONSTITUTIONAL CRISIS	10
3.2.1 <i>The Senate Act 1955</i>	11
3.2.2 <i>Appellate Division Quorum Act, 1955</i>	12
3.2.3 <i>The South Africa Amendment Act</i>	13
3.3 SCHREINER PASSED OVER –	13
3.4 CONCLUSION	15
3.5 TRIBUTES TO OLIVER SCHREINER.....	16

CHAPTER FOUR: GROSS INCOME - RESIDENCE	17
4.1 INTRODUCTION	17
4.2 "ORDINARILY RESIDENT" AND THE COHEN PRINCIPLE	18
4.2.1 <i>Facts of the case</i>	18
4.2.2 <i>Schreiner's judgment and insight on "ordinarily resident"</i>	19
4.3 CONCLUSION	22
4.3.1 <i>Application of "ordinarily resident" in the Kuttel case</i>	22
CHAPTER FIVE: GROSS INCOME – "SOURCE"	24
5.1 INTRODUCTION	24
5.2 ORIGINATING CAUSE (LEVER BROTHERS CASE).....	24
5.2.1 <i>Introduction</i>	24
5.2.2 <i>Facts of the case: CIR v Lever Brothers and Unilever Ltd, 1946</i>	25
5.2.3 <i>Majority judgment – Watermeyer CJ</i>	26
5.2.4 <i>Schreiner's minority dissenting judgment</i>	26
5.2.5 <i>Conclusion</i>	28
5.3 DOMINANT CAUSE	28
5.3.1 <i>Introduction</i>	28
5.3.2 <i>Facts of the case:</i>	29
5.3.3 <i>Majority judgment delivered by Chief Justice Centlivres</i>	30
5.3.4 <i>Minority dissenting judgment – Schreiner</i>	30
5.3.5 <i>Conclusion</i>	32
5.4 DOMINANT CAUSE.....	32
5.4.1 <i>Introduction</i>	32
5.4.2 <i>Facts of the case</i>	33
5.4.3 <i>Schreiner's Judgment in the Black case</i>	34
5.5 APPLICATION OF THE 'BLACK' PRINCIPLE IN THE CASE OF ESSENTIAL STEROLIN PRODUCTS (PTY) LTD	35
5.5.1 <i>Introduction</i>	35
5.5.2 <i>Facts of the case – Essential Sterolin Products (Pty) Ltd v CIR [Essential Sterolin Products case], 1993</i>	36
5.5.3 <i>Chief Justice Corbett's application of Schreiner's principles to the Essential Sterolin Products case</i> ..	37
5.6 CONCLUSION	38
CHAPTER SIX: INTEREST ON MONIES BORROWED	39
6.1 INTRODUCTION	39
6.2 <i>CIR v GENN & CO (PTY) LTD [GENN CASE], 1955</i>	39
6.2.1 <i>Introduction</i>	39
6.2.2 <i>Facts of the case</i>	39

6.2.3 Brief analysis of Schreiner’s judgment	40
6.2.4 Conclusion – Principles from Genn case.....	42
6.3 CIR V DRAKENSBERG GARDEN HOTEL (PTY) LTD [DRAKENSBERG CASE] (1960)	43
6.3.1 Introduction	43
6.3.2 Facts of the case.....	43
6.3.3 Conclusion - Schreiner’s judgment and robust principles.....	45
6.4 CONCLUSION	47
CHAPTER SEVEN: DISSENTING JUDGMENTS	48
7.1 INTRODUCTION	48
7.2 CIR V RICHMOND ESTATES (PTY) LTD [RICHMOND CASE] 1956 - (SCHREINER DISSENTING)	48
7.2.1 Introduction	48
7.2.2 Facts of the Richmond case.....	48
7.2.3 The Chief Justice Centlivres’ judgment.....	50
7.2.4 Judge Schreiner’s ratio decidendi.....	50
7.3 APPLICATION OF SCHREINER’S RATIO IN RICHMOND TO THE JOHN BELL CASE.....	53
7.3.1 Introduction	53
7.3.2 Brief summary of the John Bell case	53
7.3.3 Application to John Bell.....	54
7.4 APPLICATION OF SCHREINER’S RATIO DECIDENDI IN RICHMOND TO THE NATAL ESTATES APPEAL CASE.	57
7.4.1 Introduction	57
7.4.2 Brief summary of the Natal Estates case.	57
7.4.3 Schreiner’s ratio applied to the Natal Estates case.....	59
7.5 CONCLUSION	61
CHAPTER EIGHT: CONCLUSION	62
REFERENCES.....	63
SECONDARY SOURCES	63
CASES	64

CHAPTER ONE: INTRODUCTION

1.1 Background

Oliver Schreiner was one of the great judges in our judicial history. He came from a family of rich South African background and tradition. My research reflects that the most important influence and support in his distinguished and often painful career was his wife Edna.

His success in his studies gave promise of his future distinguished career. It is in my opinion one of the tragedies of our judicial history that Oliver Schreiner was denied the reward he clearly deserved, that of appointment as Chief Justice of South Africa. Nonetheless he left an indelible imprint on the development of tax legislation in South Africa.

1.2 Research question

Was the contribution of Oliver Schreiner significant in the development of tax legislation in South Africa?

Subsidiary to this question are two further questions.

1. Did his ill treatment by the Government of the day affect his performance as a judge?
2. Had his several minority judgments been in the majority, would our tax law have developed differently?

1.3 Research method

My method will be, after setting out his personal, educational and career background, to analyse the most prominent tax cases in which he was involved and evaluate the impact on the development of South African tax law. My research method will therefore consist of an analysis of the judgments of both him and his fellow judges in these landmark cases.

1.4 Limitations

This dissertation is limited to Oliver Schreiner's contribution to tax law as reflected in the law reports. It goes without saying that his contribution to South African law extended beyond tax but this falls outside the confines of this dissertation.

1.5 Structure

This dissertation will commence with a discussion of Oliver Schreiner's life and background in chapter two. Chapter three provides insight into the politics of the day during Oliver

Schreiner's judicial career. This chapter will focus mainly on the politics surrounding the coloured vote constitutional crisis that occurred in the 1950's. Chapters four and five outline important aspects of gross income. Chapter four will focus on the aspect of the "residence" of a taxpayer for tax purposes and chapter five will be focussing on the "source" of a taxpayer's gross income. In these chapters this dissertation will be analysing the precedent found in the landmark judgments delivered by Oliver Schreiner relating to the aforementioned aspects and their application in subsequent cases. The principles found in his dissenting judgments will also be discussed.

Chapter six explores the precedent found in Oliver Schreiner's judgment relating to deductions, more specifically the deductibility of interest expense on monies borrowed. In chapter seven this dissertation will discuss his dissenting judgments in landmark cases and analyse the impact (if any) on the development of our tax law if these minority judgments were the majority. Chapter eight, the final chapter of this dissertation presents a brief summary of and conclusions regarding Oliver Schreiner's contribution to the South African tax law.

CHAPTER TWO: THE LIFE OF OLIVER DENEYS SCHREINER (1890 - 1980)

2.1 Introduction

Dr Anthony Clare of the Institute of Psychology wrote an article in *The Listener* in which he said:

“Many public figures are never portrayed save one dimensionally. The athlete, the artist, the judge and the actress are rarely discussed in any other terms other than the particular profession or public ability which summarizes and labels them. Divorced from the impulses, motivations, values and emotions that fuel them, such individuals appear truncated and partial, half human rather than superhuman, and seeming to inhabit a world which is not bound by remorseless demands of a more mundane order involving the often competing claims of career, family, home, marriage and other personal relationships.”

In the spirit of Dr Anthony Clare’s comment, it would in my view be an injustice not to adopt this holistic approach when discussing Oliver Schreiner’s contribution to South African Tax Law.

Based on my research, a very significant aspect in Oliver’s life is his relationships. Among the relationships that need mentioning are: the strong bond he shared with his wife Edna Schreiner, his close relationship with father WP Schreiner and his beloved aunt Olive Schreiner.

A central aspect during Oliver’s time on the bench and in the Appellate division is the part that politics played in his career. The political climate of Apartheid in South Africa at the time had an unavoidable impact on his job and in turn influenced the development of law in its entirety. To avoid discussing the politics would indeed be an injustice.

2.2 Family history

Oliver Deneys Schreiner was born on the 29th of December 1890. He was the last born in a family of three children. His parents were William Philip Schreiner and Fanny Schreiner, born Reitz. His father WP Schreiner was of German descent and his mother Fanny Reitz came from a prominent Afrikaner Cape family.

Francis William Reitz, Oliver’s maternal grandfather, was a prominent politician and a well-known judge. FW Reitz was the fifth President of the Orange Free State (1889-1895). He was noted to have been a big campaigner for the advancement of the Afrikaans language

and by inference was a firm supporter of apartheid policies. Oliver's paternal grandfather, Gottlob Schreiner, was of German ancestry. He trained as a missionary in England. Rebecca Schreiner who was his paternal grandmother was the daughter of a congregational minister.

His father WP Schreiner obtained an LLB qualification at the University of London after studying at Cambridge. Subsequently he was called to practise at the Cape Bar from 1882. In 1885, WP Schreiner became the Attorney General of the Cape in the Rhodes administration.

In October 1898 WP Schreiner became Prime Minister of the Cape. He held this office for two years. As Prime Minister, WP Schreiner travelled around in the Cape. His travels took him in and around the Ciskei and Transkei regions that in later generations were known as Bantustans during the peak period of institutional Apartheid. These were territories that existed and were specifically set aside for Xhosa-speaking black inhabitants of South Africa as part of the policy of apartheid racial segregation and are now known as the Eastern Cape Province. His experiences during the time he spent in these Bantustans changed his belief that people of colour were a minority group not deserving of any recognition or equal rights with the ruling white elite such as himself. WP Schreiner instead became a champion of the rights of black people (Schreiner & Kahn, 1983).

2.3 Relationships

2.3.1 Father: WP Schreiner

Oliver had a very close relationship with his parents and a particularly tight bond with his father. WP Schreiner was an affectionate family man who devoted his attention to his wife and children. He was highly respected for his integrity and dedication to duty. Oliver admired his father's courage and lack of racist feeling. It has been said that Oliver resembled his father 'in build and spirit' (Schreiner & Kahn, 1983).

WP Schreiner's close personal relationship with Oliver can be seen in the following excerpts from a letter that he wrote to 21 year old Oliver in October 1911 after he had returned to England. The letter said:

"I know that nothing that concerns you will be trivial to me. You and I have a tie between us that is very exceptional: we have been so much about together, and we have so much in common by temperament and proclivities. Let me be your eldest brother rather than only the old father. You may think you know, but you don't, how it strains my very heart strings to part from you" (Schreiner & Kahn 1983).

2.3.2 Paternal Aunt: Olive Schreiner

Oliver had a special connection with his aunt Olive Schreiner and had a deep regard for her. After the unfortunate death of her only child at a very young age, she focused her maternal energy on Oliver and his cousins. Olive took on a mentoring role in Oliver's life during his youth and early adult-hood. Olive was a famous feminist, writer and activist. Oliver and his aunt Olive corresponded frequently by letter, which was not surprising, as she was noted to be a voluminous letter writer, a political essayist, storywriter and social commentator.

In one of their many letters Olive wrote to Oliver: "...-what does matter is going on living where the power to work has gone from one. Death is nothing – to go on living with a broken wing you are always trying to raise for flight & can't is everything [sic]" (Schreiner & Kahn 1983: 7).

This letter to Oliver would ring true in the later years of his life when he served in the Appellate Division. Oliver was not a supporter of apartheid policies, and especially made known that he did not condone the Nationalist Government's manoeuvring and circumventing entrenched laws to achieve their objectives. Oliver was passionate about the obligation of judges to defend the law and protect the autonomous functioning of the bench. This attitude and conviction arguably "broke" the wing of his career and, instead of "death" and giving up, it was everything to Oliver to continue trying to rise for flight.

2.3.3 Wife: Edna Schreiner

It would appear from their correspondence that the most important and significant relationship in Oliver's life is the relationship he had with his wife Edna Lambert Schreiner, born Fincham. They met whilst studying at the South African College. Edna was studying for her BA at the time. They both served on the Students' Representative Council (SRC). Edna and Oliver had been corresponding during his time at University in 1913. In 1918 Edna and Oliver got engaged in Cape Town shortly before he returned to war. When he returned in 1919 they got married. Their marriage lasted 43 years until Edna passed on in 1962.

Throughout their relationship Edna and Oliver communicated extensively through letters. It is important to emphasise that it is only because of their correspondence through these informative letters that we are privileged to get intimate insight into Schreiner's character, his thoughts, motivations and convictions. Their friendship and deep love for each other is overwhelmingly evident in their letters. Edna was very supportive and a phenomenal source of strength for Oliver.

During what was dubbed the Constitutional crisis in the 1950s, Edna wrote a letter to Oliver on 20 September 1956 where she assured him of her unconditional support and willingness to sacrifice anything because she believed in him. It is the support from Edna that I believe encouraged Oliver to be true to himself, his oath of office, his personal convictions and morals regardless of all the external persuasions. Referring to a judgment Oliver was preparing on the famous Senate case, Edna stated in her letter:

“What your views as to the ultimate position are of course I don’t know. But I just want to say that if such a position arises that you feel a drastic step on your part is the right course, please remember that your family is solidly behind you. I can live as a poor man’s wife very easily”(Edna cited in Schreiner & Kahn 1983: 44).

2.4 Education (1890-1914)

2.4.1 Rondebosch Boys & SACS 1890-1911

Oliver went to Rondebosch Boys High School. After he matriculated he went on to do his pre-tertiary education at the South African College School (SACS).

2.4.2 Cambridge (1911-1914)

Oliver proceeded to Oxford and later to Cambridge. By all accounts, he was a distinguished student and clearly very intelligent. He was a very hard worker and aimed to make his father proud as well as maintain the reputation that his father had gained at the university. A friend of WP Schreiner - Henry Hollond, a Lecturer in Law & Fellow of the Trinity, wrote to WP Schreiner that: “Oliver’s...academic success is but a prelude to a most valuable career. His qualities are obviously not those of a mere examinee, his sound common sense & his indefatigability obviously fit him for a brilliant position in the world of affairs..” (Schreiner & Kahn 1983: 11)

2.5 The Great War – army service (1914-1919)

As would have been expected of him at the time, he was called up to an officers’ training course in order to join the Great War of 1914 to 1919. He survived serious wounds sustained during combat in France (Trones Wood) in 1916. While he was recuperating in hospital in England he received news that he had been elected to a fellowship at Trinity in recognition of his outstanding intellectual ability. On his return from war he married his fiancée Edna. Shortly thereafter he acquired his bar qualifications, both in the Cape and in England. This paved the way for his practice at the Johannesburg Bar from 1920 to 1937.

2.6 Qualification and time at the Bar (1920-1937)

Oliver decided to practise at the Johannesburg Bar. In 1920, he was admitted as an advocate of the Transvaal Provincial Division. In this early part of his practice, he lectured part time law classes at the University College Johannesburg, now the University of the Witwatersrand. He lectured Roman Law, Law of Evidence and Criminal Law among other courses. During those days, teaching law subjects was what many newcomers to the bar did to supplement their income. Oliver's practice at the bar grew quite significantly so that he eventually had to give up the teaching that he was passionate about.

In 1920 his first child Jean Frances Fincham was born and they later had two more children. Oliver was known to be a hard worker but not a workaholic. He maintained a balanced life and spent time with his family which eased the burden on Edna who was taking care of their daughter Jean who suffered from epilepsy. In spite of her epilepsy, Jean was a determined and intelligent girl who went on to obtain a first class pass in her matriculation exam in 1937 and a BA degree thereafter.

During his time at the bar, Oliver was described with great admiration by Justice HC Nicholas during his practice for having a phenomenal knowledge of case law, and an ability, which was legendary, to rise from his desk during a consultation, take down a law report and open it at a case in point (Moseneke 2008: 5). Schreiner took silk in 1935 and two years later he was appointed to the Transvaal Provincial Division of the Supreme Court as an acting judge.

2.7 Period on the Bench (1937-1944)

At the age of forty-six years he was given a permanent appointment to the bench and became the youngest member of the judiciary at the time. As a trial judge Oliver was described as hardworking, conscientious, reliable and courteous. He served for eight years as a puisne judge before he was appointed to the Appellate Division.

2.8 The Appellate Division (1945-1960)

The last 15 years of Oliver's career in the judicial world were spent in the Appellate Division. Ellison Khan wrote of Oliver:

“A reading of Schreiner's decisions as a judge of appeal leaves a strong impression of three convictions of his: first, that the Appellate Division has its own ethos – “this court”, he would frequently say, with the stress on “this”, as being a court distinct from, and on a higher plane than provincial and local divisions; secondly, that the Appellate Division has a duty to be loyal to the characteristic spirit it has evolved for

itself; and thirdly, associated with the first two convictions, that, in general, it is the function of a judge of appeal to look at matters afresh, untrammelled by decisions of courts lower in the hierarchy – Schreiner did not often expressly consider or cite the decisions of those courts” (Schreiner & Kahn 1983: 80).

These convictions and attitude noted by Alison Khan underlie in principle Schreiner’s position on the constitutional crisis of the 1950s. His career lasted a total of 25 years on the bench.

2.9 General career

A powerful quality of Oliver Schreiner was his faithful observance of his solemn oath of office. It appears from my research that he observed his judicial obligations carefully and sincerely. On his retirement from the bench in 1960, a commentator noted:

“Oliver Schreiner will take his place as one of South Africa’s greatest judges, of the company of men like Henry de Villiers, James Rose Innes and William Solomon. His decisions have not only cleansed many dusty corners of our legal system, clarified what for so long had been opaque, simplified what for many had been complex: but have actively promoted that orderly and equitable advancement of the common law through judicial decision that is the hall-mark of a progressive society. His judgments are distinguished by their lucidity, their carefully marshalled, cogent and incisive reasons and their compelling persuasiveness”(Rumpff, cited in Kahn 1983 Zimmermann, 1996).

Oliver made remarkable judicial contributions in virtually every aspect of the law. Below are a few brief examples of how he is remembered in the different areas of law he was involved in. In respect of Indigenous law, Oliver was said to be persistently championing for customary law to be included within the bigger framework of the law of the land. “Time without count he refused to hold that African people should be kept out of courts only because a different system of courts had been devised to adjudicate on customary law” (Moseneke 2008: 9). In South Africa today we are privileged that customary law is recognised within the bigger framework of our law.

In criminal law Oliver is remembered for his search for the reformation of criminal law. In family law, Schreiner’s dicta in *Harris v Harris* 1949 is said to make it clear that courts must search for a different principle which appears to provide “juster results or be more suited to the times” (Moseneke 2008: 9).

Schreiner was very experienced in the field of complex mining tax laws. When on the Transvaal Bench, he gave a judgment in *Transvaal Property and Investment Co Ltd & Reinhold & Co v SA Townships Mining* 1938. This judgment, although subsequently affected by legislation, is said to remain the starting point for anyone wishing to investigate the difficult questions that arise when there is conflict between surface rights and mineral or mining rights (Schreiner & Kahn 1983).

CHAPTER THREE: POLITICS

3.1 Introduction

My research indicates that his father WP Schreiner and his aunt Olive Schreiner did not believe in apartheid and were against the notion. Olive was quoted saying: “I believe that an attempt to base our national life on distinctions of race and colour ... will ... prove fatal to us” (Olive Schreiner, cited in Butler, 1999: 18). It comes as no surprise that he would share a similar sentiment. However unlike his father, Oliver had no interest in participating in active politics.

Before Oliver’s rise to the Bench in 1937 he held a few portfolios that were uncommon amongst the white elite in that they were largely opposed to anti-apartheid policies. He held the office of Vice-Chairman of the South African Institute of Race Relations (SAIRR). The South African Institute of Race Relations was founded 1929 and it spoke out noticeably against apartheid policies. The SAIRR was the first multiracial organisation to work on conducting research that would promote interracial understanding and practical co-operation between the different races of the population. He later became President of the Institute from 1961-1963. He also served for two years as Chairman of the European-African Joint Council.

After his elevation to the Bench, he refrained from becoming an office bearer of any organisation that had any political overtones.

3.2 Coloured vote constitutional crisis

The coloured vote constitutional crisis arose in the Union of South Africa in the 1950s as a result of the operation by the Nationalist government to remove Coloured voters in the Cape Province from the common voters' rolls. This constitutional crisis developed into a difference of opinion regarding Parliament and the Executive’s ability to amend any clause in the Constitution (*South Africa Act*), on one hand, and on the other hand, the power of the Appellate Division of the Supreme Court to overturn any such amendment as being unconstitutional and invalid .

The Government needed to amend the Constitution in order to achieve the objective of removing the Coloured voters from the common roll. This was because section 35 of the *South Africa Act* 1955 provided that no law could alienate voters in the Cape Province on the

basis of race, unless that law was passed by an absolute supermajority of two-thirds of the members of both Houses of Parliament sitting together in a joint session¹.

Parliament passed legislation that would remove the Cape Coloured and African voters from the roll. However in its haste to achieve this objective, Parliament had disregarded the established unicameral procedure and used a bicameral procedure instead to pass this legislation.

The Chief Justice of the Supreme Court at this time was Mr Justice A van der Sandt Centlivres. Centlivres declared the legislation removing Cape Coloured and African voters from the common roll invalid and of no effect because of the procedural defect. Oliver strongly affirmed that although Parliament was a supreme law creating body, it was still answerable to the laws that define the conduct and boundaries in which it acts. Oliver therefore concurred with Chief Justice Centlivres's judgment.

The Nationalist Government proceeded to find alternative avenues to amend the clauses of the Constitution to enable the *Separate Representation of Voters Act* 1951 to be validated.

3.2.1 The Senate Act 1955

The Nationalist Government party did not have the constitutionally required two-thirds majority in a joint session of both houses of Parliament they needed. The solution that was agreed upon was to alter the composition and electoral system for the Senate. Under the then Prime Minister, Johannes Strijdom, Parliament passed *The Senate Act of 1955*. The main purpose of the Act was to allow the Nationalist Government to circumvent the Constitution. With a two-thirds majority in a joint sitting, it would be possible to pass the *South Africa Act Amendment Act, 1956*.

There was opposition to this Act and an appeal was lodged to the Appellate Division to have the Act nullified. It appears that Oliver was a judge who was passionate and took up the cause of constitutionalism with great zeal. He believed strongly in the role of the Constitution to protect the judicial system. He stood for principles of a democratic state with fundamental laws which protect the country from the abuses of Parliamentary majorities. The Nationalist Government's concern was to urgently pass legislation to achieve its agenda of removing the coloured voters from the roll at any cost. On the other hand, Oliver's concern was that, if

¹ Coloured vote constitutional crisis 2012, Wikipedia: The free encyclopedia Available
http://en.wikipedia.org/wiki/Senate_Act,_1955#Packing_the_Senate

ad hoc Acts could be passed to amend the Constitution and circumvent its entrenched clauses, then this made the country's Constitutional guarantees defenceless and prone to abuse.

Oliver wrote to his wife Edna expressing his disappointment and disagreement regarding the appeal case. To which Edna responded reassuring him and expressing her pride and confidence that she knew his judgment was entirely unbiased and free from any prejudices or political influences. The following excerpts were taken from the letters he was writing to Edna:

“I've done about all that has fallen to my lot in the Senate case and for the rest it will take its course...Strictly between ourselves, I've written a dissenting judgment but no-one else agrees with me, so I must be wrong. ...Anyhow, between ourselves don't expect the appeal to be allowed or you will be disappointed” (Schreiner & Kahn 1983).

On the 9th of November the Appellate Division handed down its decision² (*Collins v Minister of the Interior*, 1955). In the decision it was ruled that Parliament had the power according to the South Africa Act to alter the composition of the Senate, and its motivation to do so was irrelevant. As Oliver had predicted and to his dismay, the Senate Act was therefore declared valid which meant that a joint sitting of the House of Assembly and the reconstituted Senate had the power to amend the sections in the Constitution.

3.2.2 Appellate Division Quorum Act, 1955

To further guarantee the success of removing Coloured and African voters from the roll, the government, in addition to the Senate Act, passed the Appellate Division Quorum Act of 1955. Oliver was Acting Chief Justice during this time when this Act was promulgated.

This Appellate Division Quorum Act expanded the Appellate Division to eleven judges. Since five judges sat in the Appellate division at the time, this required the additional appointment of six new judges who were presumed to support the Nationalist position. In all this, Oliver was unhappy about the Quorum Act and the newly appointed judges. He doubted their ability and willingness to work as hard as the judges had been doing in the past. He was not convinced that they had been promoted on merit and therefore was sceptical about their motives and impartiality. This is evident in the following excerpts from his letters to Edna.

² Coloured vote constitutional crisis 2012, Wikipedia: The free encyclopedia Available
http://en.wikipedia.org/wiki/Senate_Act,_1955#Packing_the_Senate

“It is said that they are busy preparing the Raadsaal for the eleven of us to sit there next month. I remember that old Ben [Tindall]³ when I first came to this court, used to speak of ‘The Big Five’. I always felt it was a trifle pompous. Can one now talk of ‘The Big Eleven’, without a mixture of laughter and tears? But time will put these things into proper perspective – not our time maybe, but the country’s time” (Schreiner & Kahn 1983: 39).

On 28 August 1955 before the newly appointed judges had sat, Oliver wrote to Edna:

“I’ve little doubt that most of the cases will be decided rightly – the job isn’t so difficult, thank Heaven. But it isn’t going to be a court to be proud of being on or it’s [sic] being one’s country of highest court. But we’ll live through these interesting unattractive times – at any rate in the long run the country is fairly certain to come right” (Schreiner & Kahn 1983: 40).

3.2.3 The South Africa Amendment Act

As expected, The South Africa Amendment Act 9 of 1956 removing Coloured voters from the common roll was passed by the required unicameral procedure, thanks to the Senate Act. By enlarging the Senate the ruling party gained the necessary two-thirds majority. Therefore the Separate Representation of Voters Act of 1951 was revalidated. Owing also to the Quorum Act (where the additional judges were rumoured to be appointed because of their support of the Nationalist Government policies), the enactment was found to be constitutionally in order.

Out of the eleven judges, there was one dissenting judgment. It comes as no surprise that it was Schreiner who dissented. He wrote a minority judgment in which he probed the substance over form. It was Schreiner’s view that Parliament may not itself sit in a disguised form in judgment on itself (Moseneke 2008:13). Schreiner’s judgment in this case has been described as a classic dissent. “To some South African lawyers it had a thrilling visionary quality, born of a mental power given to only a few judges, and not necessarily to everyone with a fine quality of mind” (Schreiner & Kahn 1983:47).

This is the time when the passing over of Schreiner as Chief Justice began.

3.3 Schreiner passed over – “The greatest Chief Justice South Africa did not have.”

The accepted practice during Schreiner’s time in the Appellate Division was that the next most senior judge of appeal after the Chief Justice succeeded to the office when the Chief Justice stepped down. In 1957, Mr Justice A van der Sandt Centlivres retired as Chief

³ Judge of appeal 1938-1949

Justice. At the time Schreiner was the next most senior judge, and was clearly certain to be the next Chief Justice.

The Nationalist Government did not want Oliver to hold the post of Chief Justice. Mr C R Swart, who was the Minister of Justice during this time, approached the outgoing Chief Justice, A van der Sandt Centlivres, asking him to stay on another year as Acting Chief Justice. Oliver was overlooked for this position. The passing over of Schreiner had been unprecedented.

As testimony to the good relationship between Centlivres and Schreiner, Centlivres openly informed Oliver what the Minister had proposed. Oliver wrote to Edna in confidence and shared this conversation with her. He said in his letter:

“I told Albert that he must not refuse on any view that he would be keeping me out of the job, as I am satisfied that the Government doesn't plan to offer it to me; this suggestion to Albert, of course, only confirms it” (Schreiner & Kahn 1983: 43).

Justice Centlivres in any event turned down the Minister of Justice's invitation to stay on in an acting capacity. In his place the Government appointed the third most senior judge of appeal, Justice Henry A Fagan, to take up the post as Chief Justice. Justice Fagan himself had tried to get the Government to reconsider and appoint Schreiner as Chief Justice. He tried via telephone and also wrote a letter to the Minister of Justice (Mr CR Swart) to change his mind and that of the Cabinet. They clearly were not willing to entertain the prospect of having Oliver as Chief Justice. Justice Fagan eventually accepted and held this office for three years from 1957 to 1959.

Once more, Schreiner was the next most senior judge of appeal. He was overlooked again, and this time in favour of Justice LC Steyn who was a new and relatively inexperienced judge. Eight years earlier Steyn had been appointed to the Transvaal Bench straight from his position as Government law advisor. This made the Johannesburg Bar very angry and it organised a temporary boycott of his court sittings. This rapid advancement of his judicial career meant that he became Chief Justice at a relatively young age, so he was Chief Justice for twelve years from 1959 to 1971. This in my view was very sad and embarrassing because it was Schreiner who rightly deserved to be appointed Chief Justice.

It would appear that Oliver was a renowned judge because in 1955 he was approached by a certain gentleman called Mr Stumbles to take up post as Chief Justice of Southern

Rhodesia. Oliver consulted Edna about this very appealing offer tabled before him and informed her of his decision to decline the invitation. In a letter his wife responded:

“My dearest love...of course there was no need to consult me...Indeed, it is quite clear to me that this is the very juncture when circumstances must dictate to any man of courage & honour. You could not possibly pull out at this moment without taking the easy – the too easy path...I am in full agreement that this course could not be adopted without sacrifice of the very qualities that make you who you are. We must stay and battle on and take what may be coming to us with courage and dignity” (Schreiner & Kahn 1983: 38).

Regardless of the fact that Edna was convinced that Oliver being appointed as Chief Justice was “extremely improbable”, she was still enraged. This excerpt from her letter to Oliver sincerely conveys the emotions and thoughts that surrounded the situation:

“I find myself shaking with rage. I’ve been walking backwards and forwards in the garden trying to get myself under control, but not very successfully. That this slur should be cast on you, the best man in the world, this imputation of incompetency or dishonesty, seems impossible to believe. I have to make myself remember that, coming from where it does, this slight is an honour to you. They are afraid of your strength & integrity, that everyone must realize that knows you at all, these mean & ignoble men. And so their despicable action just adds to one’s pride in you and joy in the honour of being close to you. If things were otherwise, how keenly one would feel on your behalf this loss of an appointment which should normally have been the finish of your career [sic]. Now, from that point of view, there are no regrets for the position, only the feeling that your grand career is indeed finishing on its highest note – a great, full note that should inspire all who have ears to hear...I burn with pride in you” (Schreiner & Kahn 1983: 49).

3.4 Conclusion

Given the political climate during this time it is no surprise that the government would not have wanted Oliver to become the Chief Justice given his clear stance against apartheid. He was the one judge who stood out against their manoeuvring and manipulation of law to achieve their objectives. In spite of his desire to progress to the pinnacle of his career and become Chief Justice, he chose to stand by his convictions rather than to compromise in exchange for the opportunity to be Chief Justice. Based on my research it would appear that it is because of politics that he did not reach the pinnacle of his career.

During Oliver’s time in the judiciary, literature has indicated that he was very brave to give his true and unbiased opinion regardless of the political implications. This not only highlights his integrity and honesty, but increases his judicial fame and reputation. He was impartial and looked at the merits of each case or situation without discrimination. It is my view that

Oliver had an exemplary devotion to duty and a distinguished selfless service to his profession and his oath.

As his aunt Olive said to him: “to go on living with a broken wing you are always trying to raise for flight & can’t is everything [sic]” (Schreiner & Kahn 1983). It is with astonishing courage that Schreiner carried on as if nothing had happened. What stands to Oliver’s credit is that although he suffered the humiliation of being passed over for the position of Chief Justice he continued with his work with impeccable attitude and remained determined to do it efficiently.

Based on this record, one can be assured that his judgments were fair, honest and true to his ability.

3.5 Tributes to Oliver Schreiner

Oliver Schreiner was held in high esteem by all, including his colleagues. He was admired not only for his work as a judge, but also as an individual, an academic, a friend, a mentor, a husband and a father. He was a selfless champion in the forging of our democracy. This admiration is evident from the following excerpts that were obtained from the tributes found in the essays written in honour of Oliver Schreiner (Schreiner & Kahn 1983): Lord Denning⁴ wrote:

“He had a mind of the highest calibre. As a judge, he was the foremost of his time. He contributed much to the discussion in the court itself. His judgments were very clear and well expressed. He took the greatest care over them. They rank with the best of judgments anywhere”.

Arthur Suzman met Schreiner when he was still a student. He later appeared with Oliver as a junior and against him as an opponent. Arthur wrote this tribute:

“Schreiner must clearly rank amongst the great South African judges of the past, including Lord De Villiers, Innes and Greenberg. His passing over as Chief Justice was a reflection not on Schreiner, but on those responsible for judicial appointments,...I have long regarded Schreiner as perhaps the most all-round judge our country has produced and would liken him to that great English judge, Lord Denning. His outstanding contributions to our law will ever remain our ‘lucrative hereditas’.”

⁴ Hon Lord Denning of Whitchurch, Judge of the High Court of Justice of England and Wales 1944-8, Lord Justice of Appeal 1948-57, Lord of Appeal in Ordinary 1957-62

CHAPTER FOUR: GROSS INCOME - RESIDENCE

4.1 Introduction

In this chapter, the judgment that Schreiner delivered in the appeal case of *Cohen v CIR* [Cohen case], 1946 will be discussed.

Schreiner was elevated to the Appellate Division on the first of January 1945. It was on the 20th of November 1945 that he presided over the Cohen case. This appeal case was one of the earliest cases that Schreiner presided over during his career in the Appellate Division. This case laid a solid foundation for the concept of residence within the ambit of gross income in our Income Tax law. Looking at the Cohen case, it is in my view, apparent that from the commencement of Schreiner's career in the Appellate Division that he would forever make a valued contribution to our Income Tax law which we appreciate today.

The concept of residence was and still is a very fundamental part of the taxation of income. Prior to 2001 South Africa applied a source basis of taxation. Today we have a residence basis of tax whereby a person who qualifies as a resident is subject to tax on all receipts and accruals from all sources of income, albeit subject to certain exceptions. In determining whether a natural person is a resident, one of the tests applied is the concept of "ordinarily resident". Schreiner, through his cogent judgment clarified this concept which many considered opaque. The definition of resident in section 1 of the Income Tax Act includes a person who is "ordinarily resident" in South Africa.

The term "ordinarily resident" does not have a defined meaning. There remains no definition in the Income Tax Act of this term, "ordinarily resident". One of the many reasons why there is no such definition is that it is not possible to define adequately the requirements or qualities that will determine whether or not a person is "ordinarily resident". It is a tall task to create an accurate definition, (without producing an artificial meaning), that would provide a global test for determining whether or not a person is ordinarily resident in a specific country.

Without a statutory definition of the term "ordinarily resident", the judgment delivered by Schreiner in the Cohen case is without doubt one of the leading authority for the interpretation of the term "ordinarily resident".

Until this case was heard, none of our Courts had dealt with an appeal case such as this. Since this was the first in the Union, Schreiner's judgment set a precedent. This case is a

very good example of how Schreiner's judgments are distinguished by their clarity, insightfulness and their carefully ordered reasons. His judgments have a compelling persuasiveness. We see all these distinguishing qualities as he addresses the term "ordinarily resident".

4.2 "Ordinarily Resident" and the Cohen Principle

4.2.1 Facts of the case

The Appellant, Mr Cohen lived in the Union and was one of two directors of a company that was carrying on business in the Union. He was requested by his company to go overseas to act as the company's buyer, in view of the difficulty of obtaining merchandise, caused by war conditions.

Mr Cohen left the Union in June 1940 accompanied by his family. The permit authorising his departure contained the words "duration 9 months". In October 1940, he arrived in the United States of America and established his family in an apartment in New York, where he carried on the business operations which were the purpose of his visit.

In 1941, he was granted an extension of 12 months in respect of his permit to remain in America. From that date and up to the 30th of June 1942, neither appellant nor his family had returned to the Union.

In 1939, appellant had leased a flat in Sunningdale, Johannesburg, for a period of 5 years and had furnished it. This flat had been sub-let, with the furniture, during the period for which appellant had been in America.

During the year ended 30 June 1942, the appellant had derived his income from directors' fees and salary from various South African companies and also from interest and dividends. Dividends received by the appellant from public companies in the Union during the year of assessment ending 30th June 1942 amounted to £7,032. He claimed to be exempt from super-tax in respect of these dividends by virtue of the provisions of section 30(1)(a) of Act 31 of 1941, which exempt individuals "not ordinarily resident or carrying on business in the Union."

The Commissioner for Inland Revenue having assessed appellant in respect of these dividends on the grounds that he was both "ordinarily resident" and carrying on business in the Union during the year of assessment in question, appellant lodged objection and appeal

against the assessment made. The Special Court for hearing Income Tax Appeals held that appellant was not carrying on business in the Union during the year of assessment, but was ordinarily resident in the Union, and confirmed the assessment.

The appellant, not satisfied with this decision as being erroneous in law, required a case to be stated to the Witwatersrand Local Division of the Supreme Court, submitting for decision the following question of law. The judge of the Supreme Court, Murray, dismissed appellant's appeal.

The appellant's main argument was that income tax was an annual event therefore the facts relating to each year of assessment must be examined independently in order to see whether in the year in question the appellant was resident within the Union. Mr Cohen contended that 'residence' in the country requires physical presence in that country for at least some portion of the year of assessment. In his argument the appellant insisted that by proving that he was out of the Union during the whole of the tax year, this established that he was not resident in the Union. By virtue of being absent from the Union in that year the appellant argued that the provisions of section 30(1) (a) of Act 31 of 1941 applied and exempted him from super tax because he therefore was not ordinarily resident.

In the alternative the appellant argued that the Special Court's findings were erroneous in law because even if physical absence from the Union during the whole of the tax year did not conclusively, and as a matter of law, establish that the taxpayer was not ordinarily resident in the Union in such year, it was argued that no reasonable person could, on the facts found by the Special Court, have come to the conclusion that the appellant had not proved that in the tax year he was an individual not ordinarily resident in the Union.

The appellant on his return was living in the Union and continued as a director of some companies that were carrying on business in the Union.

4.2.2 Schreiner's judgment and insight on "ordinarily resident"

At the time the Cohen case was heard, there had never been a case such as this in the Union. Schreiner, in his judgment, referred to principles applied in a number of cases decided in the British courts. The cases include: *Levene v IRC*, 1927; *IRC v Lysaght*, 1928 and *Turnbull v Solicitor of Inland Revenue* (42 S.L.R 15). Schreiner looked at these British cases because they were considered to have great authority on the meaning of "ordinarily resident" under the British Tax Act at the time. By referring to foreign precedent it shows how thorough Schreiner's research was in preparing his judgments. We see him applying his

mind to the foreign precedent to ensure he delivers a quality judgment to the best of his ability. The end result is an undoubtedly robust judgment that sets the precedent we see today.

Before one needs to ponder the relevance and applicability of these cases from the foreign Courts of Great Britain to the Union, Schreiner in his judgment addresses this matter. He points out the parallel between our courts and those in the United Kingdom. Schreiner explains that in the Union, the statutory approach of a Court of Appeal to the findings of the Special Court is the same as that of Courts in the United Kingdom to the findings of the Commissioners. Schreiner also clearly highlights that one must bear in mind that:⁵“apart from differences in the contexts of particular sections, the incidence of taxation under the Union Statute rests, in general, upon a different basis from that of the British Act”. This balanced approach by Schreiner illustrates how carefully marshalled his judgments are.

In light of the appeal case before him, Schreiner scrutinised the judgments from the cases decided in the British courts. He was able to find a definitive solution to the conundrum of “ordinarily resident”. What follows is that we get to see the learned judge’s great mind at work. Schreiner regarded the most important of these decisions to be from the case of *IRC v Lysaght* 1928, Lord Warrington of Clyffe stated the following in his judgment⁶:

“I have reluctantly come to the conclusion that it is now settled by authority that the question of residence or ordinary residence is one of degree, that there is no technical or special meaning attached to either expression for the purpose of the Income Tax Act, and accordingly a decision of the Commissioners on the question is a finding of fact and cannot be reviewed unless it is made out to be based on some error in law, including the absence of evidence on which such a decision could properly be founded.”

Schreiner’s judgment in the Cohen case confirmed that indeed the question whether the appellant was, in that year, an individual not ordinarily resident in the Union is:⁷“...essentially a question of degree to which no single, certain, answer could be given; the answer depends on the weight to be given to the various factors set out in the stated case.”

Throughout his career Schreiner displayed this philosophy of always placing sufficient emphasis on the various factors set out in each case and their context. This approach that Schreiner set about interpreting tax law constantly ensured that his judgments remained impartial, brought about clarity and promoted simplicity. We see this philosophy in his

⁵ At page 369 of 13 SATC 362

⁶ *I.R.C. v Lysaght* (1928, A.C. 234 at p. 249)

⁷ Page 366 of 13 SATC 362

judgment case of *Jaga v Donges*, 1950. Here Schreiner stated: “The legitimate field of interpretation should not be restricted as a result of excessive peerage at the language to be interpreted without sufficient attention to the contextual scene.”

Schreiner began his judgment in the Cohen case by addressing the appellant’s second contention. The argument here was that residence in the country requires physical presence in that country for at least some portion of the period in respect of which the inquiry is being made.

To this the learned judge responded that physical absence during the whole of the year of assessment was not decisive of the question of “ordinary residence”. Schreiner held that the question whether the appellant was ordinarily resident in the Union in the year of assessment was not to be determined solely by his actions during that specific year. Where a person is absent from the Union for a full year of assessment and it is his intention is to return to the Union as his real home, he is “ordinarily resident”. The circumstances making the appellant an ordinary resident during that year could be determined by evidence found in the way he lived his life outside the year of assessment.

According to Schreiner, whether the appellant was resident or ordinarily resident in the Union for the purposes of the Income Tax Act was one of fact. There was clear evidence found in the undisputed facts upon which the Special Court was justified to find that appellant had not proved that he was not ordinarily resident in the Union. Here we see clearly the effectiveness of Schreiner’s philosophy of giving sufficient attention to the facts and the context of the case. This approach contributed to what resulted in a quality judgment.

He said in this judgment that the appellant’s contention would certainly be giving to residence:⁸ “a special or technical, indeed a highly artificial meaning, if one required the physical presence to have existed during the year of assessment..., the residence or ordinary residence in the country still remains a quality of the taxpayer.”

Schreiner concluded that:⁹

“If, though a man may be ‘resident’ in more than one country at a time, he can only be ‘ordinarily resident’ in one, it would be natural to interpret ‘ordinarily’ by reference to the country of his most fixed or settled residence. . .his ordinary residence would be

⁸ Page 373 of 13 SATC 362

⁹ Page 371 of 13 SATC 362

the country to which he would naturally and as a matter of course return from his wanderings, as contrasted with other lands it might be called his usual or principal residence and it would be described more aptly than other countries as his real home.”

In this appeal case, Schreiner found it unnecessary to decide or express an opinion on the issue of whether a person may not be held to be ordinarily resident in more than one country at a time. The appeal was dismissed and the assessments confirmed.

4.3 Conclusion

4.3.1 Application of “ordinarily resident” in the Kuttel case

Schreiner’s judgment in the Cohen case remains a cornerstone in the determination of residence. This case is only but one of the numerous examples of the contribution that Schreiner made to the development of our Income Tax Law. His judgment in this case created a test that brought clarity to this concept and has simplified it for us. Schreiner’s contribution subsequently proved to be vital to our Income tax law today as South Africa adopted a residence basis of taxation in 2001.

Long after Schreiner had retired from his judicial career and passed on, the test of “ordinarily resident” is still being applied showing his everlasting contribution. The Cohen case continues to be cited, applied, discussed and distinguished in numerous tax cases in the different courts, including the Appellate division.

One brief example of this is the appeal case of *CIR v Kuttel* [Kuttel case], 1992. The background of the case was as follows:

Kuttel was a shareholder in a fishing business who moved to New York to open office there to grow the business. He took up residence there. Kuttel joined a church, bought a car and opened bank accounts. Prior to leaving SA he realised a substantial amount of investments and invested the proceeds in Eskom stock. He could not take all assets out of SA due to exchange controls. Kuttel also owned shares in a company that owned a house in Llandudno.

Kuttel returned to SA on 10 occasions in 3 years for less than two months at a time. The reasons for his return were, among other things, to attend directors meetings and manage his investments. He also had some personal reasons such as seeing his children in school and participating in yachting events. During his stay in the country he was living in the Llandudno house.

This appeal case of Kuttel was heard more than 30 years after Schreiner's retirement from the Appellate Division, and still the robust principles from his judgment in the Cohen case were adopted. The two main principles are that:

- i. An individual's pattern of life before and after the end of the year of assessment could be taken into account to determine where he is 'ordinarily' resident.
- ii. "Ordinary residence would be the country to which he would naturally and as a matter of course return from his wanderings; as contrasted with other lands, it might be called his usual or principal residence and it would be described more aptly than other countries as his real home."

The court relied on these principles laid by Schreiner in deciding the Kuttel case (1992). In his judgment Goldstone JA said that: "if one applies Schreiner's principle that a person is "ordinarily resident" where he has his usual or principal residence to the words "ordinarily resident", there can be no uncertainty that during the periods in question the respondent was not ordinarily resident in the Republic". Based on the application of Schreiner's principle the outcome was that the appeal was dismissed as it was held that Mr Kuttel was ordinarily resident in New York.

Chief Justice Corbett and the other honourable judges hearing this appeal case concurred with Judge Goldstone's judgment and, by inference, his use of the principles of "ordinarily resident" laid by Schreiner in the Cohen case.

What Goldstone JA said is testimony to Schreiner's remarkable contribution to the development of our income tax. It is undisputed that Schreiner's principles, when applied left no uncertainty as illustrated in the Kuttel case. Schreiner, in the Cohen case, resolved that it was not necessary to decide on the issue of whether a person may not be held to be resident in more than one country at the same time and Judge Goldstone also adopted this in his judgment of the Kuttel case.

To this day we use these principles set out by the learned judge Schreiner in clarifying the concept of "ordinarily resident". He clearly made a mark that cannot be erased.

CHAPTER FIVE: GROSS INCOME – “SOURCE”

5.1 Introduction

In this chapter the judgments delivered by Schreiner on the topic of “source” in the definition of gross income will be analysed irrespective of whether they were a majority judgment or the minority dissenting judgment. Naturally in those cases where Schreiner delivered the majority judgment, such as *CIR v Black* [Black case], 1957, these set a precedent unless it was distinguished based on the facts and not applied. Schreiner’s minority dissenting judgments in the cases of *CIR v Lever Brothers* [Lever Brothers case], 1946 and *CIR v Epstein* [Epstein case], 1954 are known to have served as persuasive authority.

It would be an injustice not to discuss these dissenting judgments because even when Schreiner stood in the minority he still made a resounding impact. In displaying his intellect, Schreiner’s minority judgments demonstrated that there can be no absolute in our tax law. To this day Schreiner’s dissenting judgments are famous for being well argued, very credible and indeed cogent. This fact in my view certainly accentuates the learned judge’s great mind.

Before 2001 South Africa used a source basis of taxation which meant that both residents and non-residents alike were taxed only if the source of their income was located in South Africa. Although South Africa now uses the residence basis of taxation, establishing the source of income remains very relevant in our tax system today because non-residents are still taxed on the source basis.

There is no definition in the Income Tax Act for the term “source” which leaves our courts to be guided by precedent found in case law. This precedent is set by the judgments delivered by the champions of our Income Tax law, such as Schreiner. They laid the required foundation and played the key roles essential for the development of our tax system as we know it today.

5.2 Originating cause (Lever Brothers case) -Schreiner dissenting

5.2.1 Introduction

The reason for the absence of a definition for the term “source” is that it is almost impossible to satisfactorily outline those universal qualities that will accurately determine what the source of income is in all the possible situations that can arise.

The Lever Brothers case was heard in the appeal court early during Schreiner's career in the Appellate Division. He had been a judge of appeal for a just over a year at this point.

The Lever Brothers case is recorded as being the leading authority on the interpretation of the word "source" included in the definition of gross income found in section 1 of the Tax Act. The majority judgment was delivered by Chief Justice Watermeyer who is certainly one of the titans of our judicial system. In this appeal case, identifying the originating cause of the income is what was needed to assist in determining whether or not the income was received from the Union.

Watermeyer CJ came to the conclusion that the agreements whereby the debt was incurred should be regarded as the source of the respondent's income. Schreiner on the other hand held the position that the source was in the Union because "the debt exists where the debtor resides", which is what Lord Buckmaster held in the appeal case of *English, Scottish and Australian Bank Ltd v CIR*.

5.2.2 Facts of the case: *CIR v Lever Brothers and Unilever Ltd, 1946*

A Dutch company with its registered office in Rotterdam acquired assets from the respondent and became indebted to the respondent for an amount of £11,000,000. It agreed to pay interest on this debt at a rate of 3% per annum subject to any subsequent agreements. Certain shares in an American company owned by this Dutch company were transferred to an English company which acted as a trustee of the shares. These shares were held as security for the debt owed by to the respondent company.

There were numerous agreements entered into that are not relevant to list individually. The agreements between the interested parties resulted in a decision that a company was to be incorporated in the Union. The Dutch company transferred all its interests in the shares held as security to this newly incorporated company in the Union. The respondent had made this arrangement because there was fear of an invasion by the enemy which could result in the potential loss of the Dutch company's obligation. None of these arrangements or agreements was entered into in the Union.

The net effect was that the company incorporated in the Union was substituted in the place of the Dutch company. Essentially this company took over the Dutch company's obligation and was now responsible for the interest payments. These payments were made from income received as dividends from the American shares held.

It was the Commissioner's contention that based on the facts at hand, the source of these interest payments was the Union and therefore taxable. According to the Commissioner debt in law was located where the debtor resided. Since the company had been incorporated in the Union this meant the debt was located in the Union.

5.2.3 Majority judgment – Watermeyer CJ

In his judgment Watermeyer CJ said the following:

“A series of decisions of this Court and of the Judicial Committee of the Privy Council upon our Income Tax Acts and upon similar Acts elsewhere have dealt with the meaning of the word “source” and the inference, which, I think, should be drawn from those decisions is that the source of receipts, received as income, is not the quarter whence they come, but the originating cause of their being received as income and that this originating cause is the work which the taxpayer does to earn them, the quid pro quo which he gives in return for which he receives them. The work which he does may be a business which he carries on, or an enterprise which he undertakes, or an activity in which he engages and it may take the form of personal exertion, mental or physical, or it may take the form of employment of capital either by using it to earn income or by letting its use to someone else. Often the work is some combination of these.”¹⁰

In summary, Watermeyer dismissed the appeal and held that it was the agreements (the quid pro quo) between the companies that were the source or originating cause of the receipt. It was not the actual debt that was owed but how the obligation came about. The source was therefore not in the Union.

5.2.4 Schreiner's minority dissenting judgment

Schreiner's approach of always placing sufficient emphasis on all the important factors set out in each case has continually resulted in pertinent issues being identified and therefore produced a good quality judgment as will be illustrated below. Schreiner begins by highlighting that in his view, what is crucial in deciding cases such as Lever Brothers is recognising the distinction between:

- (a) income that is derived from the use of taxpayer's property,
- (b) income derived from services rendered by him and
- (c) income derived from some profit-making activity i.e. “business cases”.

Schreiner raised a valid concern that, at the time this appeal case was heard, the courts were obligated to find some activity of the taxpayer, as in all cases, to determine the source

¹⁰ Page 8 of 14 SATC 1

of his income. This pressure he attributed to the influence of decisions made on cases falling under the category (c) above, the “business” cases. Schreiner stated that in his opinion, the judgments that came from these business cases that were being used by the courts would not be applicable in the type of case such as Lever Brothers. He indicated that the Lever Brothers case would be more suited to be categorised under (a) above, which is the category where income is earned from the use of a taxpayer’s property. This is very valid logic and it is hard to argue against what Schreiner has deduced here.

From the outset, one can immediately recognize that the Chief Justice took the “business cases” approach of looking at the taxpayer’s activities to determine the source of income (i.e. the contracts or agreements). Schreiner on the other hand held this approach to be inapplicable to the Lever Brothers case. Schreiner said:¹¹

“Where we are dealing with income which the taxpayer gets because someone is using his property and is prepared to pay him for its use, the taxpayer’s activities, whether past or present, are in practice disregarded in describing the source of his income.”

What Schreiner says here is certainly logical.

He went on to clarify his position by stating that,

“What is important is that no one would ordinarily speak of the taxpayer deriving his income from the contract by which he leased the land or bought the shares or loaned the money. In the case of shares it is possible that the shareholder might under some income tax statutes be looked upon as a partner in the company’s business, but no one would speak of the purchase of his shares as the source of his income any more than one would speak of the partnership agreement as the source of the income of a partner. Since in ordinary speech we ignore the taxpayer’s activities in describing the source of these kinds of income, there is, in my view, no good reason for treating such activities as the source of such income in contemplation of law.”

Here it is difficult to dispute what Schreiner has simply put. It is true that in daily language we ignore the ‘activities’ in discussing income derived from the use of an asset which makes what Schreiner said very reasonable indeed. It is not practical to treat the very same thing differently for law purposes than we do in the daily speech because as Schreiner said,¹² “common parlance... is a sound rule to judge definitions”. After considering what Schreiner said in this judgment, it is a valid point that the activities ‘test’ may not be the ideal approach for a case such as the Lever Brothers case.

¹¹ Page 17 of 14 SATC 1

¹² Page 17 of 14 SATC 1

In his judgment Schreiner raised a crucial point, that according to the law, Lever Brothers would have had every right to sue Overseas Holdings in South Africa to recover the capital and interest. This surely points to the fact that the source was indeed South Africa. He also noted that the Special Court in arriving at its decision, appeared to have treated as decisive, the fact that the actual money with which Overseas Holdings paid the interest that it owed to Levers came almost entirely from America, with a small portion coming from London. To this Schreiner correctly stated that where the debtor obtains the means to pay the interest on his debt and what arrangements he makes for the transfer of the funds to the creditor is irrelevant. Looking through Schreiner's judgment, it can only be true that "source" is not where the actual money comes from.

Schreiner's dissent is incisive and unarguably well-reasoned. This judgment simplifies what seems complex, and he states:¹³ "... I am disposed to think that a practical business man would be surprised if he were informed that the source of interest on a long term loan was the contract, made possibly decades ago, and not the loan debt itself." This here sets out the point of departure between Watermeyer CJ, and Schreiner.

According to Schreiner the income in question in this case, was, derived from property owned by Levers in the Union, namely, the debt owed by Overseas Holdings. He would have allowed the appeal.

5.2.5 Conclusion

Schreiner's minority dissenting judgment was indeed very persuasive and well-reasoned. It is unfortunate that his judgment was not supported by his colleagues.

5.3 Dominant cause – (Epstein case) -Schreiner dissenting

5.3.1 Introduction

In the pursuit of determining the source of a taxpayer's gross income, the established first step was to determine the originating cause of the receipt. The challenge comes when there is more than one originating cause. The application of the principle of establishing the 'dominant cause' was the focus of the Epstein case.

Yet again we are privileged to witness Schreiner's great mind at work through the clarity of his thought process, the validity of his judgments and how well reasoned his dissensions were. One cannot say his judgment was wrong or flawed. In interpreting and identifying the

¹³ Page 22 of 14 SATC 1

“dominant cause”, what Schreiner said in the appeal case of *Savage v CIR*, 1951 is appropriate. He said: “The literal meaning is not something revealed to judges by a sort of authentic dictionary; it is only what individual judges’ think is the literal meaning, if they employ that term.”

5.3.2 Facts of the case:

The respondent carried on a business in Johannesburg as an agent for foreign firms. He entered into partnership agreement with a dealer carrying on an asbestos business in Argentina. The agreement was that the respondent would purchase the product from a supplier in the Union and then ship it for sale by the partner in Argentina.

Under the terms of the arrangement included in this agreement, the partner in Argentina found purchasers of asbestos in that country and then notified the respondent about the quantity and quality of asbestos required. This indicated specifically the producer who should be approached to supply the asbestos and included the price which could be paid for it.

The respondent would approach the identified producer and ascertain the quantity of the required quality available and its price f.o.b. Once this was all confirmed, the information was relayed to the partner, which then concluded a sale in its own name to the prospective purchaser, on terms based upon this information.

Once the sale was concluded by the partner in Argentina, the respondent would then be instructed to conclude a purchase agreement with the producer in his own name on the terms and conditions quoted. When respondent had concluded his purchase, he advised the partner, which then required the purchaser in Argentina to open a credit in favour of the respondent at a bank in the Union, covering the purchase price due by the purchaser in Argentina plus the cost of freight and insurance. When this credit had been established the respondent arranged in his own name for the shipment of the asbestos directly to the Argentine purchasers and paid all expenses in connection therewith.

The profit remaining after payment of the amount due to the producer and the costs of shipment was divided evenly between the respondent and the partner. Each of the participants met his own costs and overhead expenses. On one occasion when a shipment was made at a loss, the loss was borne by the respondent and the partner in equal shares.

The Commissioner for Inland Revenue included in respondent’s taxable income the amounts received by him from these transactions during the years of assessment ended 30th June

1946, and 30th June 1947. The respondent appealed against the assessments and Special Court allowed his appeal on the ground that the amounts received were derived from a source outside the Union. The Commissioner appealed from that decision to the Transvaal Provincial Division of the Supreme Court. The Transvaal Provincial Division dismissed the appeal, confirming the decision of the Special Court.

5.3.3 Majority judgment delivered by Chief Justice Centlivres

Chief Justice Centlivres allowed the Commissioner's appeal with costs. Here the profits were deemed to have been derived from a source within the Union. The great judge referred to Chief Justice Watermeyer's judgment in the Lever Brothers case where he said:

“the source of receipts, received as income, is not the quarter whence they come, but the originating cause of their being received as income and that this originating cause is the work which the taxpayer does to earn them, the quid pro quo which he gives in return for which he receives them.”

He also applied Solomon CJ's obiter dictum in *Millin v CIR* [Millin case], 1928. Where he said:

“It was the exercise of her wits and labour that produced the royalties. They were employed in the Union, ... Her faculties were employed in the Union both in writing the book and in dealing with her publishers, and, therefore, on the test applied in the cases cited, the source of the whole of her income would be in the Union.”

Centlivres CJ held that it was the taxpayer's activities in the Union which gave rise to the income. These activities (quid pro quo) constituted the 'originating cause' of his share of the profits. According to the Chief Justice, since all the activities of the taxpayer took place in the Union the profits were from a source in the Union. The taxpayer's share of profits accordingly constituted gross income.

5.3.4 Minority dissenting judgment – Schreiner

Schreiner was obliged by "stare decisis" to respect the precedent set by Watermeyer in the Lever Brothers case. He too, like Centlivres CJ, cited Watermeyer's obiter in the Lever Brothers case that,

“the source of receipts, received as income, is not the quarter whence they come, but the originating cause of their being received as income and that the originating cause is the work which the taxpayer does to earn them, the quid pro quo which he gives in return for which he receives them.”

In the Epstein case Schreiner's view was that it would not have made any difference if the partnership had changed places as they in essence were one in the same. He likened the

partnership as being a single merchant. The transactions in both countries were the transactions of both partners and the income which each received originated in the same place. I am inclined here to agree with Schreiner looking at how the transactions were executed. By placing sufficient emphasis on the facts of the case it is evident that Argentinian partner was in charge. The vital transaction that had to occur was to secure the sale contract first which points to the fact that the source was in Argentina.

Schreiner's approach that he took in the Lever Brothers case reinforces his logical approach to his judgments that is persuasive and resulted in a robust judgment. In the Lever Brothers case he stressed that the very first vital step is to determine which type of income the taxpayer is earning in the case in question. This here was the point of departure with Watermeyer CJ and now with Centlivres CJ. Watermeyer drew inference from previous cases decided that related to "business cases" in his judgment of the Lever Brothers case (1946) which, according to Schreiner, was more aptly classified as income from the use of a taxpayer's asset. In this Epstein case, the learned judge Centlivres seems to have done the same as Watermeyer as he is drawing inference from cases such as the Millin case that relates more to income from the use of a taxpayer's asset and not business transactions. This according to Schreiner is the incorrect approach.

In considering the learned judge Watermeyer's dictum that originating cause is the work which the taxpayer does to earn them, Schreiner here points out that, since a business may be carried on through many different associates or agents contributing to the business, the place where the taxpayer's income originates cannot always be where he personally exerts himself, but certainly is where the business profits are realized.

Schreiner then refers to the similar case of *COT of Western Australia v Murray Limited* that sums it all up concisely. Here judge Dowling said that it was his opinion that the whole profit of a business is made where the goods are sold. In recognising that there can be numerous essential steps in the process of conducting a profitable business, he stated that in order to determine where profits were made, it would not be productive to inquire into each and every cause or contribution in the profit making process.

Judge Dowling went on to say that,¹⁴

"If it were possible to discover and discriminate among the innumerable factors which contributed to a profitable exercise of a trade and to assign locality to each of them, still no light would be thrown upon the place where the profits were made."

¹⁴Page 236 of 19 SATC 221

By solely pursuing these contributory factors, he said, it will result in departure from the true nature of the question, which is not why the profits were earned, but where the profits were earned. One cannot ignore how Schreiner's ingenious approach to this judgment clearly points out how the court was focusing more on reason the profits were earned instead of location of the profits which is the "source".

5.3.5 Conclusion

In my opinion, there can be no arguing with Schreiner's robust judgment. He held that the source was not in the Union, and would dismiss the appeal with costs. In analysing Schreiner's judgment it is a wonder that all the other judges concurred with Centlivres CJ and not Schreiner.

5.4 Dominant Cause - *CIR v Black* [Black case], 1957

5.4.1 Introduction

1957 was the year Schreiner was overlooked for the position of Chief Justice. In his stead Henry Allen Fagan was appointed as Chief Justice. To his credit, in spite of the injustice of being denied his rightful promotion, Schreiner carried on with his judicial duties as if nothing had happened. He continued to perform his duties to the best of his ability. When the Black case was heard, Schreiner was Acting Chief Justice at the time.

Looking now at his judgment in the Black case, it is all the more evident that he proceeded to apply himself fully and once again delivered an enduring judgment. Similar to the appeal case of Epstein that was heard 3 years prior, the Black case also dealt with the issue of identifying the dominant cause when determining the "source" of income. As discussed above, Schreiner delivered a compelling dissenting judgment in Epstein.

Based on the same principles he applied in the dissension of the Epstein case, Schreiner delivered an equally robust majority judgment in Black. His judgment in the Black case subsequently went on to impact some important cases. We see how Schreiner contributed in laying a foundation on which our Income Tax law has continued to be built on. In this section, there will be a brief analysis of the well-known appeal case of *Essential Sterolin Products (Pty) Ltd v CIR* [Essential Sterolin Products case] that was heard in 1993. The principles found in Schreiner's judgment of this appeal case of Black were applied in the judgment of the Essential Sterolin Products case and so will be discussed in this section.

5.4.2 Facts of the case

The respondent lived in Johannesburg and carried on the business of a stockbroker there in partnership with two other persons. He was not a member of the London Stock Exchange. The respondent's firm did not trade in shares on its own account but it carried on arbitrage business on joint account with a firm of London brokers. The firm's share of profits was returned for Union tax purposes and the partners are taxed on the profit.

In July, 1953, the respondent sent £7,000 to the London firm to enable them to deal on his behalf in shares on the London Stock Exchange without reference to him. His intention was not to acquire shares for dividends but to make a profit on the resale of shares. Since the two firms were in daily communication by telephone, and it was thus easy for the London firm to refer matters to the respondent. In the majority of cases transactions in London were only effected after the London firm had discussed the sale or purchase (as the case might be) with the respondent over the telephone. This was done during the course of their normal telephone calls relative to the arbitrage business of the two firms, and he would authorise share purchases and disposals. The purchases and sales of the shares were done by the London firm in London where the shares were paid for, held and delivered and where the proceeds were received.

From these London share-dealings the respondent made a net profit in the tax year of £1,694. As from July, 1953, the respondent bought and sold shares on speculative account in Johannesburg and made a profit in the tax year of £2,808. The Commissioner included the sum of £1,694 in the respondent's income and assessed him for income tax and super tax. It was the Commissioner's contention that the source of the income was in the Union. Counsel for the Commissioner argued that the originating cause in the present case was the decision made by respondent in Johannesburg to buy or to sell. Even where no express authority was given at the time but respondent subsequently ratified the transaction therefore applying his "wits".

The respondent objected to the assessment. The objection was overruled so he appealed to the Special Income Tax Court. The grounds of the respondent's objection and appeal were that, firstly the business giving rise to the income was carried on wholly in London, and that consequently the source of the income was outside the Union, so that it did not form part of the respondent's taxable income. In the alternative, the respondent argued that if the transactions formed part of a business carried on by the respondent in the Union such business extended to a country outside the Union and there should therefore be apportionment in terms of section 17 of Act 31 of 1941.

The Commissioner's appeal was dismissed by Schreiner with all the judges concurring.

5.4.3 Schreiner's Judgment in the Black case

It is interesting here to note that the Epstein case and the Lever Brothers case were cited by the court and Schreiner had delivered dissenting judgments in both these cases. Schreiner was once again obliged to follow the precedent set by his brothers in the judiciary, namely; Centlivres CJ in the Epstein case and Watermeyer CJ in the Lever Brothers case. The facts in Epstein, (as discussed above), were distinguished from those in this appeal case of Black. The principles in the Lever Brothers case were however applied in this case.

What becomes very exciting is that it is all the more evident that Schreiner was right in the dissenting judgment he delivered in the Lever Brothers case. In Black, Schreiner was able to apply the principles set in the Lever Brothers case by Watermeyer CJ because the Lever Brothers case (as discussed above) was decided incorrectly on the basis of the "activities test", which applies to profit making activities such as those found in the Black case. Schreiner clearly pointed out that the Lever Brothers case was actually related to income from the use of a taxpayer's property or asset, being the debt and not business activities where the 'activities test' would apply.

Schreiner's approach to his judgments is very systematic. His judgments are indeed cogent and have clear steps that are simple to follow and when applied, they provide clarity to issues that many would have considered opaque.

As analysed above in the Lever Brothers case Schreiner said that,

"Recognition of the distinction between income derived from the taxpayer's property and income derived on the one hand from services rendered by him and on the other from some profit-making activity is in my view crucial to the decision of this case."

In applying this approach, it is evident that what Black had embarked on was a profit making activity of buying and selling shares. Therefore the 'activities test' is applicable because his activities would need to be analysed to determine the source by identifying the dominant cause.

In his judgment, Schreiner said that "the basic and real reason" why the respondent received income was the activity of buying and selling the shares which took place in London. According to Schreiner, ¹⁵

¹⁵ Page 235 of 21 SATC 226

“If there was a distinct business of buying and selling shares in London, it cannot be said that because of the factor of authorisation or confirmation the true and only reasonable conclusion was that the cause of the accrual of income was that factor.”

I agree with Schreiner at this point because the average man (in all probability) would not identify the respondent’s telephonic authorisation of the transactions as the real or dominant cause of the income over the actual transactions that occurred and their location.

Schreiner has a comprehensive approach to his judgments and is always considering all possible approaches. We see an example in this case where he went on to consider what the outcome of his judgment could have been based on a different but valid approach using the same facts of the case. Schreiner explored the potential that the income in question could be regarded as the product of the use of the taxpayer’s capital instead of a profit making activity (as was discussed mainly).

Schreiner said,¹⁶

“At least another reasonable conclusion which could not be said to be untrue was that the main, the real, the dominant, the substantial source of the income was the use of the respondent’s capital in London and the making and executing of the contracts in London.”

This actually confirmed that his judgment was robust as the source was therefore held to be in London and not in the Union. Appeal was dismissed.

To this day, when there is a case whereby one is required to deal with an issue relating to the source of income, that the source will probably be established in accordance with the principles that were laid down in Black. This is evidenced by the many cases that followed, such as the Essential Sterolin Products case (discussed below) where the principles found in the Black case were applied. “The mark” Schreiner made is evident in those subsequent cases went on themselves to be applied in other cases and so the baton keeps getting passed on as our South African Income Tax law continues to develop.

5.5 Application of the ‘Black’ principle in the case of Essential Sterolin Products (Pty) Ltd

5.5.1 Introduction

The appeal case of *Essential Sterolin Products (Pty) Ltd v CIR* [Essential Sterolin Products case], was heard in the Supreme Court of Appeal in 1993 which was 36 years after Schreiner delivered the judgment in the Black case. The principles set out by Schreiner set a

¹⁶ Page 235 of 21 SATC 226

precedent that was applied by in the Essential Sterolin Products case long after he had passed on. The Essential Sterolin Products case is, to this day (20 years later), a significant case that illustrates the principle of “dominant cause”. The judgment was delivered by Corbett who was the Chief justice at the time. Corbett is one of the great fathers of our judiciary. Schreiner clearly passed on the baton and made “a mark that cannot be erased” from the development of our income tax.

5.5.2 Facts of the case – Essential Sterolin Products (Pty) Ltd v CIR [Essential Sterolin Products case], 1993

The taxpayer in this appeal case had developed a medicine in South Africa for a certain medical condition. The medicine was registered in West Germany through a West German corporation. Due to the fact that it was a medicine, it was vital that it was properly registered and patented. A medicine cannot be sold in a country unless it is properly registered with the health authorities in that country. Germany was therefore the only country where the medicine could be sold.

The active substance in the medicine was manufactured by the appellant in South Africa and then exported to Germany where the German corporation would put the compound into capsules, after which it was packed and marketed under the registered trademark. There were various companies and subsidiaries registered for various reasons and functions that are not important to detail here.

Of relevance is that an “Agreement to Allow Manufacture in the Event of Inability” (the inability agreement) was also concluded between the appellant and the respective entities. This agreement provided that, should the appellant be unable to supply the active substance to the German corporation, then only in such event, the appellant granted to the German corporation the sub-licence to manufacture the active substance exclusively and for no other purpose. Certain other agreements were also concluded. The various agreements were duly implemented. During the year of assessment ended on 28 February 1983 the appellant was paid the consideration due to it in terms of the inability agreement.

In a revised assessment issued in 1986, the Commissioner for Inland Revenue (respondent) included such consideration ('the inability consideration') in the appellant's taxable income. The dispute was about the sum paid to the company in exchange for the right to be able to manufacture the medicine in the event that the company was unable to do so. The appellant's objection was disallowed by the respondent and an appeal to the Income Tax Special Court failed.

5.5.3 Chief Justice Corbett's application of Schreiner's principles to the Essential Sterolin Products case

Corbett acknowledged that the legal principles to be applied in determining whether or not an amount was received from a source in the Republic had already been stated in a number of preceding decisions of the Court. The learned Chief Justice proceeded to specifically mention the case of *CIR v Black*, 1957. Schreiner had led the way for Corbett CJ over 30 years prior which enabled the learned Chief Justice to deliver a quality judgment in the Essential Sterolin Products case that is one of the well-known cases recorded in the history books of our tax development. From the great minds of the learned judges such as Schreiner the development of South African Income tax continues to progress.

In the Black case discussed above, there also existed a number of causal factors that were relevant to the ascertainment of "source" just as we see in this appeal case of Essential Sterolin Products. Corbett CJ was able to look to the precedent set by Schreiner in his judgment of the Black case and then apply these principles to the Essential Sterolin Products case.

Just as Schreiner did, Corbett had to ascertain the source by weighing these causal factors in order to determine the "dominant cause", or as Schreiner put it; "the real and basic cause of the receipt". Corbett CJ therefore held that of fundamental importance in the present case was that, at the time when the Sale and Manufacturing Agreement together with the 'Inability Agreement' were entered into, the business operations from which the appellant derived income were conducted predominantly outside South Africa. There was no market whatsoever for the appellant's product in South Africa. Similarly in the Black case, the purchases and sales of the shares were done by the London firm in London where the shares were paid for, held and delivered and where the proceeds were received.

In applying the principle set by Schreiner about isolating, "the real and basic reason" for a receipt to the Essential Sterolin Products case, it was therefore the Chief Justice's decision that in all the circumstances, the originating cause of the receipt of the 'inability consideration', and the source thereof, was not within South Africa. The whole foundation of the appellant's business rested upon the rights flowing from registration (of the medicine), the patent and trade mark rights and the contractual rights, all of which were acquired and exercised in West Germany. The appeal was allowed as a result.

5.6 Conclusion

With the advent of the residence-based taxation in South Africa, the decisions made in the cases discussed above, namely: Black; Epstein; and the Lever Brothers case have become of lesser importance though still very relevant. However where the issue of source is under consideration, the above cases have the vital principles the Courts can apply to the facts of their case since there is no definition of the word “source” in the Act.

CHAPTER SIX: INTEREST ON MONIES BORROWED

6.1 Introduction

In this chapter, the judgments that Schreiner delivered in the following appeal cases will be discussed:

- i. *CIR v Genn & Co (Pty) Ltd*, 1955 (3) SA 293 (A)
- ii. *CIR v Drakensberg Garden Hotel (Pty) Ltd* 1960 (2) SA 475 (A)

In analysing Schreiner's judgments in the above mentioned cases, the principles regarding the deductibility of interest on monies borrowed will be highlighted. Over five decades later, our courts continue to apply these principles to this day.

6.2 *CIR v Genn & Co (Pty) Ltd* [Genn case], 1955

6.2.1 Introduction

In the Genn case, Schreiner delivered a judgment that covers the fundamentals of our income tax, namely, gross income and deductions. The Genn case illustrates Schreiner's contribution to moulding the basic principles of our income tax, thereby laying the solid foundations that our tax has continued to be built upon. I will place more focus on the gross income aspect. The Genn case went on to be applied in over fifty Supreme Court cases, and those cases were also applied in countless subsequent cases as our Income Tax has continued to develop over the decades.

Some of the well-known tax cases where the Genn case was applied are cases such as *CIR v Brummeria Renaissance (Pty) Ltd*, 2007 which dealt with key issues relating to notional interest and the powers of the Commissioner with regards to assessments. *CIR v Scribante Construction (Pty) Ltd*, 2002 addressed a similar issue regarding the deductibility of interest on monies borrowed. Other cases include *Burgess v CIR*, 1993, *Ticktin Timbers v CIR* 1999 and *Tuck v CIR* 1988.

6.2.2 Facts of the case

The respondent company, (Genn & Co (Pty) Ltd), carried on business as hardware and timber merchants. In the course of its business it purchased some of its stock-in-trade locally, while it also imported goods on a large scale. To facilitate these purchases and to enable it to earn discounts by prompt payment of cash, Genn & Co entered into an arrangement with a company called General Trust and Investment Company (Pty) Limited

(the G Company), under which this company was to obtain for Genn & Co short term loans locally at a total cost of 10 per cent per annum. This percentage included the interest payable to the lenders and a commission or raising fee for the G Company.

During the year of assessment ended 30th June, 1951, the respondent company paid to the G Company raising fees in respect of these loans amounting to £290, which it sought to deduct under the classification of “interest and finance charges on loans”, in the determination of its taxable income for that period.

In his assessment of Genn & Co for that period under review, the Commissioner allowed the deduction of the interest paid on the moneys borrowed, but disallowed the deduction of the raising fees paid to the G Company, on the grounds that such payments constituted expenditure of a capital nature.

It was submitted on behalf of the Commissioner that since the raising fees were paid for securing additional working capital, they had been expended in respect of amounts received, which were not included in the term “income” as defined in the Income Tax Act. The Commissioner’s contention was that the raising fees in question were not expenditure incurred in the production of income as they related to a receipt of the loan which is of a capital nature.

Genn & Co objected, arguing that this commission was indeed in production of income and deductible. When the objection was disallowed Genn & Co appealed successfully to the Special Court. The Commissioner therefore appealed to the Appellate Division.

The appeal was dismissed with costs by Schreiner with all judges concurring.

6.2.3 Brief analysis of Schreiner’s judgment

i. Receipts – Gross Income

The portion of the definition of ‘gross income’ that is relevant to this case reads the following:

“the total amount whether in cash or otherwise received by or accrued to or in favour of any person, excluding such receipts or accruals of a capital nature”. Schreiner addressed this portion of the Commissioner’s argument by clarifying and illustrating that borrowed money is not “received” for the purposes of the definition of ‘gross income’.”

Considering Schreiner's obiter, it becomes evident that the Commissioner's argument is flawed from the onset. Here the learned judge of appeal said the following¹⁷:

"It certainly is not every obtaining of physical control over money or money's worth that constitutes a receipt for the purpose of those provisions..."

"It is difficult to see how money obtained on loan can, even for the purposes of the wide definition of 'gross income', be part of the income of the borrower, any more than the value of the tractor which a farmer borrows is to be regarded as being income received otherwise than in cash."¹⁸

Schreiner's philosophy and approach is consistent. He is always very careful not to treat a term differently for tax law purposes and for everyday usage. In his minority judgment in *Lever Brothers* he said that "common parlance... is a sound rule to judge definitions". Here in *Genn* Schreiner also says:

"Neither in the case of the borrowed or hired tractor nor in the case of the borrowed or 'hired' money does it seem to accord with ordinary usage to treat what is borrowed or hired as a receipt within the meaning of the definition of "gross income", or to treat what is paid as rent or interest as paid in respect of something received within the meaning of section 12(f)." ¹⁹

The *Genn* case was applied in judgment of the appeal case of *CSARS v Brummeria Renaissance (Pty) Ltd* 2007. Cloete JA noted in the *Brummeria* judgment that it was important to emphasise that the *Genn* case set precedent that a receipt of loan capital, as such, is not a receipt for the purposes of such definition of gross income.

With respect to gross income, Schreiner's judgment lays a principle in *Genn* (which admittedly has some limitations), that interest is usually regarded as being of a revenue nature on the basis that it is consideration that is paid for the use of money. The learned judge compares this to rent being paid for the use of something. As with most of his judgments, we see how Schreiner adds an element of simplicity to these principles by the practical illustrations that he gives in addition to his cogent reasoning. This aspect of Schreiner's approach enables the courts to apply the principles in his judgment but with a greater understanding. This is evident in the numerous cases the *Genn* case was applied in subsequent judgments. An example is that of *CIR v Drakensberg Garden Hotel (Pty) Ltd*, 1960 that will be discussed below.

¹⁷ Page 123 of 20 SATC 113

¹⁸ Page 122 of 20 SATC 113

¹⁹ Page 122 of 20 SATC 113

ii. Deductions

As noted in the facts of the case detailed above, Genn & Co sought to deduct from their income the commissions it paid to the G Company for raising the loans that Genn & Co used for their operations. The Commissioner disallowed the deduction of the commission, but allowed the deduction of the interest.

In Schreiner's approach, we again see that he is particular about considering not only the facts, but a step further, being the contextual scene. It is a clear fact in the *Genn* case that the commission together with the interest in effect formed one consideration which the company had to pay for the use of the money for the duration of the loan. In considering the facts, Schreiner could not find a reason to justify a difference in treatment between the interest on the loans and the commissions paid to raise the loans.

The inseparable connection between the interest and commission expense is certainly logical as Schreiner pointed out in his judgment. The purpose of both expenses was to facilitate the production of the same income. Since the Commissioner had allowed the deduction of the interest, (distinguished from the commission), it is rational that the principles to be followed are equally applicable to both the commission and the interest.

6.2.4 Conclusion – Principles from Genn case

Schreiner's judgment contained vital principles that are fundamental. We see that to qualify as a deduction in respect of S11(a) read with S23(g), expenditure must be actually incurred, during the year of assessment, in the production of income provided it is not of a capital nature. S23(g), further provides that expenditure is only deductible to the extent that it is incurred for the purpose of trade. Interest is usually regarded as being revenue in nature. It is consideration for the use of money akin to rental for the use of an asset therefore also includes raising fees.

Regarding deductions, two main principles are gleaned from the *Genn* case about the deductibility of interest incurred on borrowed monies. The first is that interest paid on money borrowed and used for the purposes of a business constituted expenditure actually incurred in the production of the income of the business is deductible. This is regardless of whether the loan was for the acquisition of fixed or floating capital.

The second, important principle is that, in deciding the deductibility of the interest in question, it is imperative that one must assess the closeness of the connection between the

expenditure and the income earning operations. Consideration must be given both to the purpose of the expenditure and to what it actually effects.

6.3 CIR v Drakensberg Garden Hotel (Pty) Ltd [Drakensberg case] (1960)

6.3.1 Introduction

In general terms interest incurred on funds borrowed to purchase shares will usually be deductible only if the taxpayer is a share dealer. Interest that is otherwise incurred produces dividends which do not constitute income in the hands of the taxpayer, making the expense non-deductible. In this section, this issue surrounding the deductibility of interest on monies borrowed to purchase shares will be analysed through Schreiner's judgment of the Appeal Court case of *CIR v Drakensberg Garden Hotel* 1960. This is a very significant case that continues to assist our courts in clarifying the issue of whether or not interest expenditure was incurred in the production of income and thereby qualifying for a deduction.

In light of *stare decisis*, Schreiner was obliged to respect the precedent established by prior decisions. Of course, in this Drakensberg case the precedent is contained in the judgment Schreiner himself delivered in the appeal case of Genn above. This here is a good example of how robust his prior judgments are and how enduring these principles are, even to this day as our tax law continues to develop.

6.3.2 Facts of the case

Drakensberg Garden Hotel (Pty) Ltd (Respondent) leased a hotel from J & M Stiebel (Pty) Ltd. This lease was for 4.5 years. The rental was charged at £120 per month and the lease conditions included the following:

- There was a right of renewal for 15 years with rental at £125.
- Rental would however increase if the lessor made improvements to the buildings at his own cost.

Drakensberg Garden Hotel sub-let the hotel premises to its shareholders, Mr & Mrs Robinson, and the rent was variable in relation to Drakensberg Garden Hotel's liabilities. Drakensberg Garden Hotel also leased a farm with a trading store from the Stiebel company. The company traded in the store at all times. Drakensberg Garden Hotel's income was derived from rental income from the sub-lease and profits from the trading store.

In March 1954 the Respondent purchased all the shares in the Stiebel company for £31,500. Interest of 7% was payable on the outstanding balance to Mr and Mrs Stiebel. Drakensberg acquired the shares to obtain absolute control over properties. The shareholders intended to make improvements and to sublet without having to get the consent of third parties or having to pay increased rentals. The hotel business improved and the hotel was in need of improvements but the Stiebel company was not prepared to finance or permit Drakensberg to effect the improvements.

Instead of buying the property outright, the Respondent acquired the shares in the Stiebel company in order to avoid paying transfer duty. During the year under review Drakensberg Garden Hotel received £3,600 from the rental income and £637 in the form of profit from the store. They paid £1,626 to for rent, and £2,311 in respect of interest.

Drakensberg Garden Hotel deducted the interest paid but this deduction was disallowed by the Commissioner on the grounds that:

- The liability for interest had been incurred in the acquisition of shares. The proceeds from the shares were in the form of dividends that are exempt income.
- Due to the fact that the respondent did not buy the land but the shares in the owning company and it was contended on behalf of the Commissioner that this made an important difference in the legal consequences.
- It was also the Commissioner's contention that the link between the purchase of the shares and the production of the income by way of rentals was not sufficiently close to warrant the deduction.

The respondent submitted that the interest was incurred for the purpose of producing its rental income and therefore the interest was deductible. Its purpose in acquiring the shares was to obtain absolute control of its premises in order to ensure security of tenure and hence the continuation of its income. This appeal was upheld by the Special Court because there was a sufficiently close connection between the interest payment and the production of the respondent's rental income. The purpose of buying the shares was to ensure continuance of own income and to increase income from sub-letting and trading.

Schreiner JA delivered a majority judgment and dismissed the Commissioner's appeal because the taxpayer was able to show a clear connection between interest paid on the loan to purchase the shares and the business income. Van Wyk AJA delivered a minority dissenting judgment which will be discussed briefly.

6.3.3 Conclusion - Schreiner's judgment and robust principles

Schreiner begins by pointing out an obvious fact that the income from which the deduction is being made is not from the dividend income of the respondent, but incomes from rent and business profits therefore the Commissioner's first argument failed.

Schreiner in his judgment sets out two fundamental principles regarding the deductibility of the interest and are discussed below. These are the purpose of the expense and the close link or connection between the expense and the income. The interest was allowed as a deduction as the purpose of acquiring the shares was to obtain absolute control of the leased premises, enabling improvements to be effected and thereby increasing its income earning capacity.

i. Purpose

The first principle found in Schreiner's judgment requires that, if it can be shown that the sole or main purpose of the acquisition of the shares is to secure the production of income from trading or business operations, then the interest expense should be deductible.

Any receipt or accrual of dividends on these shares should be purely incidental to the main purpose. The 'purpose' is a key for determining the deductibility of the interest. This principle is found also in the Genn case discussed above. However, the interest will not be deductible if an income-producing purpose in borrowing the money was merely incidental to a true purpose of deriving dividends.

Schreiner, in his judgments, has continually placed great importance on giving "sufficient attention to the contextual scene" as he noted in the judgment of *Jaga v Donges* 1950. This philosophy is what makes Schreiner's judgments equitable and valuable in their contribution to our income tax law. If one does not consider the circumstance or background of a scenario the 'purpose' may not be accurately identified which, as a consequence, could result in an inequitable judgment. This is illustrated in the Drakensberg case where Schreiner said:

"In the present case the respondent had a capital asset – the leases – which the acquisition of the shares would no doubt help to protect and preserve so long as they lasted, while ensuring their renewal after expiration. But on the findings contained in the stated case the respondent's purpose in buying the shares was to ensure the continuance of its income from sub-letting and trading and to secure an increased income therefrom."²⁰

²⁰ Page 259 of 23 SATC 251

Schreiner held that the interest here could not be of a capital nature as the ability to subsequently protect and preserve the “asset” was merely incidental to the respondent’s true purpose of increasing income from renting and trading.

It should be noted that Schreiner’s decision was based on the findings of the special court. At that time, there was no provision for the appeal on findings of fact. We can only speculate as to the possible result had the court been able to re-examine the factual findings.

ii. Close link or connection

The second principle found in the judgment Schreiner delivered in Drakensberg is that of establishing a close enough link between the income and the expense.

According to the Commissioner’s argument there were two factors which made the link unconvincing. The first was the fact that it was shares and not the land that was bought, and the second was the contention that the expenditure was not to acquire or make the income-producing asset more productive but to protect or preserve it.

Schreiner in his judgment was not distracted from the link or connection merely because the circumstances influenced the respondent’s decision to choose to buy the shares instead of the land. To this Schreiner said, “The fact that this was to be achieved by buying the shares does not seem to me to remove the interest payments too far from the production of the income to permit of their being deducted.”²¹

I tend to agree with Schreiner’s logic here because the two options available to the taxpayer achieve the very same thing, which was to produce increased income. It is merely the choice the respondent made to buy the shares for the legitimate reason of avoiding the transfer duty. Therefore the connection between the purchase of the shares and the production of the income could not be eradicated as a result.

iii. Dissenting judgment

Van Wyk A.J.A. delivered a minority dissenting judgment. The honourable judge presented a very interesting viewpoint that was not supported by his colleagues but which, with respect, does not accord with established tax principles. He came to the conclusion that the interest paid was of a capital nature and not wholly or exclusively expended for the purpose of its

²¹ Page 258 of 23 SATC 251

trade. It is now virtually trite law that interest by its very nature is revenue whether as a receipt or as an expense.

In his dissension judge Van Wyk decided that it was the intention to make a profit by the taxpayer that was important. He pointed out that there was no finding that it was the taxpayer's intention to be profitable. The learned judge said:

“The primary object of a trading company is to make a profit. There is no point in having an increased income if the increase is wiped out by increased expenditure. Where, therefore, a company enters into a transaction with the knowledge that although its income may increase it would derive no trading profits therefrom, the purpose of the transaction must be something other than to obtain the increased income. In such a case it would probably be to obtain an advantage of a capital nature or to benefit some other person.”²²

Honourable judge Van Wyk's judgment in essence implied that only if profit is the aim can a deduction be claimed, which cannot always be the case. Judge Van Wyk held that increased income was merely incidental to its true object, which was to secure and improve its capital assets, so it was also of a capital nature. The findings of fact by the Special Court was that the purchase of was for the purpose of increasing income. As a result the facts could not be disputed.

In his judgment Van Wyk AJA concurred with the fact that the gross income was increased as a result of the purchase of the shares. He also acknowledged the close connection that Schreiner indicated. Therefore there can be no doubt that in this case the interest was deductible.

6.4 Conclusion

The robust principles set by Schreiner are invaluable and laid a solid foundation in our income tax law relating to deductions as seen in this case. The principle that consideration must be given both to the purpose of the expenditure and to what it actually effects is clearly applicable and resulted in a quality judgment. I agree here with Schreiner because the ultimate destination and use of the profits is not necessarily the decisive factor.

²² Page 260 of 23 SATC 251

CHAPTER SEVEN: DISSENTING JUDGMENTS

7.1 Introduction

In this chapter the minority judgments delivered by Schreiner during the time he served in the Appellate Division will be discussed. His dissensions in *Lever Brothers* and *Epstein* have been analysed in the earlier chapters. The specific case to be analysed in this chapter is the appeal case of *CIR v Richmond Estates (Pty) Ltd* [Richmond case] 1956. This section will also indulge in the speculation as to the potential impact the *Richmond Estates* case could have had on SA tax law if Schreiner's judgment had been the majority. This exercise will be done by analysing whether the judgments in *John Bell & Co (Pty) Ltd v SIR* [John Bell case] 1976 and *Natal Estates Ltd v SIR* [Natal Estates case] 1975 would have had a different outcome in their judgments if Schreiner's principles in *Richmond* had been applied. If the outcome of the judgments would have differed, then consideration will be given as to whether our tax law would have been better or worse off if Schreiner's judgment was the majority.

7.2 *CIR v Richmond Estates (Pty) Ltd* [Richmond case] 1956 - (*Schreiner dissenting*)

7.2.1 Introduction

The Appeal Court case of *CIR v Richmond* 1956 is considered one of the more famous tax cases when dealing with the capital versus revenue debate in respect of the gross income of companies. In determining whether a receipt from a disposal is revenue or capital in nature, an essential "test" that is used by the courts is that of establishing the "intention" of the taxpayer as is evident in the *Richmond* case. This test entails determining the objective a taxpayer had at three key stages. These are his intentions:

- when he acquired the asset,
- during the entire period he held the asset,
- and lastly, at the time he disposed of the asset.

7.2.2 Facts of the *Richmond* case

Respondent company, which was registered in 1939, was formed for the purpose of controlling the investments and savings of Caplan. Caplan was the sole shareholder and the sole director of the company as well as being its managing director.

The memorandum of association of the company empowered it to purchase land, deal in land, turn land to account, develop land and prepare land for building purposes. From its registration the company carried on business as a speculator in land and also earned rent from certain properties which it let. The amounts accruing from such sales were accounted for as income in the returns that were submitted for income tax purposes.

A large part of the business of the company consisted of buying and selling land in Lady Selborne which was a native township. In 1945, because of the Native (Urban Areas) Consolidation Act, it became impossible for respondent company to purchase plots in this township from Natives except with the approval of the Minister of Native Affairs. This law made it difficult to replenish the company's stock, so Caplan decided in 1948 that the company should cease selling its plots in the township and for the future develop its holding of eighteen plots in the township as rent-producing properties. No formal resolution recording this decision appeared in the company's records.

In 1950 the Group Areas Act was passed and in March, 1951, was brought into operation in the Transvaal. At the same time the Minister of Native Affairs was reported to have stated that the Government intended to remove the Native inhabitants from the Lady Selborne Township in which the company owned land.

Since this would make it impossible for the company to sell or let its plots to Natives, Caplan decided that it would be better for the company to dispose of all its land in the township, both improved and unimproved. In light of this decision the respondent company disposed of fifteen out of its eighteen plots in the township in the year of assessment ended 30th June, 1952. These properties were sold at a substantial profit.

The Commissioner for Inland Revenue included the profits derived from these sales in the company's taxable income. The company appealed against the assessment and the Special Court allowed its appeal, holding that "the stock-in-trade of land was converted in 1948 by a change of policy and intention into a fixed capital asset".

Counsel for the Commissioner contended that in deciding the issue at hand, one must look at the purpose the respondent had when it originally acquired the fifteen properties. Here the original purpose was to resell at a profit and the respondent achieved that purpose when it resold in 1951. The Commissioner included in his appeal that the intention of the company, which is an artificial or juristic person, is separate from that of the shareholders. There was no formal resolution recording this decision in the company records to prove the alleged change of intention.

The final outcome was that Centlivres CJ dismissed the appeal with costs, confirming the profits to be of a capital nature but Schreiner dissented.

7.2.3 The Chief Justice Centlivres' judgment

It is noteworthy that Centlivres CJ begins his judgment by quoting Schreiner's obiter dictum in *Morrison v Commissioner for Inland Revenue* 1950. Here Schreiner said, at page 513, "it is a matter of great difficulty to state with precision the test or tests to be applied in distinguishing questions of fact from questions of law".

The honourable Centlivres held that the Special Court's finding that the taxpayer changed its intention in 1948 to hold the asset as capital investment property could not be disturbed. During the time when this judgment was delivered, there was no provision for the Appeal Courts to re-examine or challenge the Special Courts' findings of fact. It is no surprise that the Chief Justice dismissed the Commissioner's argument that there was no evidence to prove the alleged change of intention especially because Caplan was not only the sole shareholder, but he was the only manager and director of the entity. Centlivres held that there were no grounds to raise the issue because it was a finding of fact by the Special court that there was a change of intention.

According to Centlivres CJ, the fact that in 1951 the respondent company subsequently decided to sell the property, due to the new factor regarding the Minister's apparent announcement, could not change the profits back to being of a revenue nature. The Chief Justice pointed out in his judgment that a mere decision to sell does not make the resulting profit taxable. He said "At the end of 1948 the respondent decided to hold the fifteen properties as capital assets: the mere fact that it decided in the fiscal year to sell them is not proof that it decided thenceforth to hold them as stock-in-trade."²³

7.2.4 Judge Schreiner's ratio decidendi

Schreiner's approach to his judgment reflects the principles in his earlier judgments. His thoughts and reasons are well marshalled. In the Richmond case, Schreiner highlights and addresses the important facts in the contextual scene.

i. The objects of the company

Firstly he highlights the objects of the company at incorporation, which here included land-jobbing and letting land, improved or unimproved. Throughout its existence, Richmond

²³ Page 608 of 1956 (1) SA 602 (A)

Estates Ltd used both its jobbing and its letting powers. For example, one piece of land that might be bought for the company's business could be let in the interim by the company and later be sold at a profit. In Schreiner's judgment we find the principle that, in a scenario where a taxpayer has alternative methods of utilising the same asset, either by holding it to earn income or for profitable resale, the proceeds from the sale of such asset are likely to be revenue in nature and taxable. Looking at Schreiner's ratio here in this specific scenario, there can be no uncertainty that the proceeds from the sale of these properties are of a revenue nature and should be taxable.

I fully agree with this principle because where the taxpayer is already trading in the same or similar kind of assets to those that it is also holding as capital investments then the profits on the realisation of these assets are likely to be income. If this principle is ignored, a taxpayer is able to decide how to classify the proceeds from the disposal of such asset, either as capital or revenue, depending on what will be most advantageous to him at that point in time. This will clearly be to the detriment of the fiscus.

ii. Change of intention

The second important fact is in connection with a change of intention. Intention is a significant factor that must be addressed in a capital versus revenue debate. Regarding this matter, Schreiner held that the Special Court's decision that the change of intention in 1948 governed the case had been wrong in law. He said, at page 364, "The Special Court did not deal specifically with the question whether, assuming that there was a conversion in 1948-9, there was or was not in 1951-2 a reconversion into stock-in-trade by a second change of policy or intention..."

Evidently the Special Court did not consider decision made in 1951 as significant in the same way it did for the decision made in 1948. The first decision came about when the Native Consolidation Act was promulgated which presented the difficulty of replenishing stock. Caplan decided at this point that it would be better to hold the property as income producing assets which by inference is the change of intention that was identified. According to the Special Court, it was this decision that altered the character of the assets from being of a revenue nature to capital.

Two years later, the Minister of Native Affairs announced the plan to remove the Natives from the township. This announcement presented Caplan with another challenge because now it would be impossible to sell or let the holdings to the Natives. At this point Caplan decided that it would be better for him to dispose of all the holdings in the township. As

Schreiner pointed out, if the same principles used by the courts in respect of the 1948 decision had been applied to the subsequent decision in 1952, it is undeniable that 1952 would have been identified as a second change of intention.

In this regard the learned judge Schreiner said,

“²⁴If the Special Court was right in not inquiring into what was the policy of the company in 1951-2, this alone should make one doubt whether it was right in holding that a change of intention in 1948-9 ipso facto changed the character of its lots in Lady Selborne.”

Using Schreiner’s reasoning, it is clear that, if the courts had also inquired into the second decision the same way as the first, it would be difficult not to conclude that the proceeds were taxable as there was a reconversion of the assets to stock-in-trade in 1952. Unfortunately Special Court erred by treating the change of intention in 1948 as decisive.

iii. Schreiner’s obiter dicta

The Richmond case contains one of Schreiner’s famous obiter dicta that we find has been quoted in almost all the tax cases that have dealt with the subject of change of intention in companies. We see his brilliant mind on display. Schreiner’s obiter in his minority dissenting judgment was acknowledged and applied in many judgments. In his dicta the learned judge Schreiner said,

“²⁵One must not lose sight of the true nature of the inquiry in cases of this kind. There is no legislative provision that makes the intention of the taxpayer decisive of whether the receipt or accrual was of a capital nature or not. The decisions of this Court have recognized the importance of the intention with which property was acquired and have taken account of the possibility that a change of intention or policy may also affect the result. But they have not laid down that a change of policy or intention by itself effects a change in the character of the assets.”

To this day, Schreiner’s dissension in Richmond is well-regarded and continues to be admired by the many learned judges through the decades. It is irrefutable that Schreiner delivered an excellent judgment as evident from the comments of the other judges who have referred to the nuggets found in his dissension and quoted his dicta. Many honourable judges have included Schreiner’s his obiter in their famous judgments, and lauded his dissension in Richmond. Examples are:

Corbett JA in *SIR v Rile Investments (Pty) Ltd* 1978 at page 749;

Holmes JA in *Natal Estates Ltd v SIR* 1975 at page 200;

²⁴ Page 610 of 1956 (1) SA 602 (A)

²⁵ Page 610 of 1956 (1) SA 602 (A)

Botha JA in *SIR v The Trust Bank* 1975 at page 666;

Wessels JA in *John Bell & Co (Pty) Ltd v SIR* 1976 at page 427 and

Wessels JA in *Elandsheuwel Farming (EDMS) BPK v SIR* 1978 at page 119.

In a judgment delivered by Ogilvie Thompson JA, the Appellate Division of the Supreme Court in *CIR v Strathmore Consolidated Investments Ltd* 1959 agreed with Schreiner's dissension in Richmond. One of the vital principles that our courts gleaned from Schreiner's minority judgment in Richmond is that a change of intention is merely a contributing factor in indicating a change in the character of an asset. The change of intention alone does not necessarily indicate a change in the character of the asset and cannot be the decisive factor.

7.3 Application of Schreiner's ratio in Richmond to the John Bell case

7.3.1 Introduction

This section of the chapter will now speculate as to whether the outcome of the judgment delivered by Wessels JA in *John Bell & Co (Pty) Ltd v SIR* in 1976 would have been different if the solid principles found in Schreiner's 1956 minority judgment in Richmond were applied to this case. Schreiner began his judgment in Richmond by immediately focusing on the main issues. Here he said, "...²⁶it may make what follows clearer if I summarize those facts that seem to be crucial." As we analyse the appeal case of John Bell, we will follow Schreiner's approach to his judgment in Richmond and focusing on what he identified as crucial issues.

7.3.2 Brief summary of the John Bell case

The company was formed primarily to take over a business of fruit merchants, exporters, importers and distributors. The objects of the company also allowed land-jobbing. In 1924 business premises were purchased. In 1956 ownership changed to new shareholders intending to carry on a tailoring business in the premises. A year later the new shareholders moved their tailoring business to different premises. It is noted that from the beginning the new shareholders were always conscious of the possibility of disposing the business premises for a profit.

After discontinuing use of the premises the intention was to dispose of the asset. A decision was made to wait until the market was favourable, so they let the premises for 11 years whilst they waited. In 1967 the property was sold at a profit and the Secretary included the profits in taxable income.

²⁶ Page 608 of 1956 (1) SA 602 (A)

The Special Court dismissed the appeal and found that in 1957 after the business changed premises, the intention changed to sell the property which altered the character of the asset from capital to stock in trade. The company just merely delayed the process with the object to sell at a higher profit based on the markets.

On appeal, the Appellate Division allowed the appeal. Wessels JA held that the profits were of a capital nature because:

- There was no evidence to reasonably conclude that there was a change of intention from holding the asset as capital, to becoming a profit making business dealing in land (stock in trade)
- The Special Court erred in law. The mere decision to sell the property when the markets are favourable does not affect the character of the asset to become of a revenue nature.
- Something more was required to transform the asset and render the proceeds gross income.

7.3.3 Application to John Bell

In Richmond, Schreiner looked at the following crucial factors that are now applied to the John Bell case:

i. Objects – at acquisition

The first fact to be analysed was the objects of the company. The main object of John Bell & Co Ltd at acquisition was to run a business as fruit merchants that was being run from the premises. It subsequently became a tailoring business. The memorandum did however include land-jobbing. In Richmond a principle emerged from Schreiner's dissenting judgment that, where a taxpayer has alternative methods of utilising an asset, either by holding it to earn income or for profitable resale, the proceeds from the sale of such asset are likely to be revenue in nature and taxable.

An important distinguishing fact between the two cases is that Richmond Estates Ltd was an active speculator in land from the onset and used both its letting and jobbing powers. In contrast John Bell & Co never embarked on speculation in land and did not bring to life the power of land-jobbing that the memorandum empowers it to do. Just having the power did not mean any profits would be revenue. The business premises were clearly of a capital

nature at this point because the company was running its trade in the premises during 1956 and was not trading in similar assets.

ii. Change of intention – when the asset is held

The second important factor is the taxpayer's intention during the period the asset is held. After an asset is purchased the initial intention can change. This is evidenced by a taxpayer's subsequent decisions and activities. As a principle Schreiner emphasised in Richmond that a change of intention is not on its own a decisive factor. In his dissenting judgment Schreiner said, "...the change of intention on the part of the company in 1948 did not preclude consideration whether there had not been a further change in 1952 under which the properties had been sold in accordance with the intention of their purchase..."

Based on Schreiner's ratio, it is important to look thoroughly at all subsequent decisions and activities. By not inquiring into any further changes of intention, Schreiner was of the opinion that a court would not be fully investigating the issue. In Richmond Schreiner said, "That was in my view only a part of the matter to be investigated..." In John Bell the Special Court held that only the decision to sell the premises at a profit in 1957 was decisive and sufficient to alter the character of the asset from capital to stock in trade. In his judgment of John Bell the learned Wessels JA identified this as an error on the part of the Special Court, and so too did Judge Schreiner in Richmond where the Special Court held that the decision in 1948 to hold the land for rental was decisive and so did not inquire into the 1952 decision.

Since the Special Court in John Bell held that there was a change of intention from capital to revenue in May 1957 when the decision to sell the premises was made by John Bell & Co, following on with Schreiner's logic and principles in Richmond, a further inquiry needs to be made to identify if there was a reconversion. In doing so, it is arguable that there was indeed a subsequent change of intention and reconversion. The following month in June, after the decision to sell was made, John Bell and Co decided to let the property to Starlite Cinema (Pty) Ltd. This decision to hold the property for rental arguably indicates a subsequent change of intention therefore altering the character of the asset again from being stock-in-trade, according to the Special Court, to becoming capital in nature.

For six months the lease was initially a monthly lease. In December the lease was converted to an eleven year lease with the option of renewal for a further period of five years. The signing of the new eleven year lease in December is an event that would signal a further change of intention and would certainly change the character of the asset. In this case the conversion to a long term lease confirms the character of the property as being of a capital

nature. The business premises transformed into being a long term investment from which John Bell & Co was expecting to earn rental income over a period of eleven years. An important distinguishing fact in this case is that during the entire period John Bell & Co did not trade in property.

In analysing the John Bell case, it is noted that at disposal of the premises eleven years after acquisition there was no identifiable factor that could indicate a further change of intention. No activities are found that would have altered the character of the asset to stock in trade. Instead the transaction was akin to the realisation of an asset.

iii. Conclusion

It is principles found in cases such as Schreiner's dissent in Richmond that have built the foundation of the development of our tax law. We see here that even though Schreiner delivered the minority dissenting judgment in Richmond, his wisdom cannot be disregarded or considered to be faulty. Instead it has become a cornerstone in our tax law especially around the capital versus revenue debate. It has been said that Schreiner, "clarified what for so long had been opaque, simplified what for many had been complex."²⁷ This comment rings true as proven in the case analysed above. It is evident that Schreiner's philosophy and principles found in this judgment are robust and continue to be very relevant.

It is my speculation that in this analysis, based on the principles applied and approach followed, Schreiner would have allowed the appeal and deemed the profits from the sale to be of a capital nature (not taxable). It is therefore my view that Schreiner's decision would not have differed from the final judgment delivered by Wessels JA that the profits were of a capital nature. Schreiner would have concurred with Wessels JA, albeit with a separate judgment.

In summary, the outcome of the judgment of both judges would probably have been the same which suggests that if Schreiner's judgment in Richmond was the majority judgment applied to the John Bell case, this, by inference, would not have changed the tax law.

²⁷R. Zimmermann 1996. Southern Cross: Civil Law and Common Law in South Africa - The Architects of a Mixed Legal system

7.4 Application of Schreiner's ratio decidendi in Richmond to the Natal Estates appeal case.

In this section the issue relating to the prescription of assessments will not be discussed.

7.4.1 Introduction

The Natal Estates case was heard in 1975, which is 19 years after Schreiner delivered his minority judgment in the Richmond case. *Natal Estates Ltd v SIR* 1975 is seen as one of the leading cases on the issue of how a change of intention can impact the decision of whether a company's profits would be of a capital or revenue in nature. In this section, the same speculative exercise performed above in the John Bell will be performed on the Natal Estates case. We will apply Schreiner's principles and follow his approach in a bid to determine whether this would have resulted in a different outcome in the judgment and as a result, a change in tax law.

7.4.2 Brief summary of the Natal Estates case.

The taxpayer was a company that was formed in 1920. The first object was to purchase all the assets of going concern that was a cultivator and miller of sugar. The appellant's memorandum did however authorise it to carry on the business of dealing in property for gain. The assets purchased included a very large piece of land (approximately 21,000 acres) north of Durban. The company carried on business as a grower and miller of sugar cane and a manufacturer of sugar. A large part of its land was farmland being used to grow cane. The company throughout the years purchased additional land to expand the business

The directors of the company were always aware of the possibility that the local authorities could expropriate the property for essential public development. Since they knew that the coastal land was liable to be expropriated they appointed town planners and surveyors to investigate possible residential development in the vicinity of the current La Lucia. It was decided to wait until the market was better developed and the project was suspended.

In 1962 a newly elected board of directors decided to proceed with the project. Consulting engineers and architects, as well as financial advisors and marketers were appointed to the project. The taxpayer proceeded with the development bit by bit, and started to sell developed land directly to the public, and to investors.

The Secretary included the proceeds of these sales in the taxpayer's gross income, and the taxpayer appealed against the decision. It was the Commissioner's contention that the taxpayer changed its intention from capital to income. The court expressed that there is a

difference between the realisation of a capital asset and the selling of an asset in the course of carrying on a business, or embarking on a scheme for profit making.

The Special Court held that, with the exception of a few identified properties in specific areas, the company changed its intention from holding the land in the coastal lands as capital to embarking on a business of selling this land in La Lucia and Umhlanga for profit. As a result of the change of intention, the Special Court held that proceeds from the sale of the land at La Lucia, Ottawa town-ship and Umhlanga formed part of the company's gross income and therefore were subject to normal tax. The few exceptions that were deemed to have remained capital in nature included a special three acre site in Umhlanga Rock which was disposed of after a notice of expropriation.

The taxpayer appealed against the decision by the Special Court on the basis that this constituted nothing more than a realization of its capital assets to their best advantage which attracted no tax. There was a cross-appeal by the Secretary whereby he challenged the Special Courts decision mainly on the grounds that all these sales fell within the ambit of a scheme of profit-making and using land as stock-in-trade.

On appeal the Appellate Division dismissed both the appeal and the cross-appeal. Holmes JA held the following:

- The fact that the initial intention of holding the land as capital was not a decisive to impede a change of intention.
- The Special Court found it a fact that the taxpayer was not merely realizing its capital asset to the best advantage. Considering the extent of the activities the taxpayer was carrying on a business of selling land for profit. The learned judge dismissed the appeal by Natal Estates Ltd and held these profits to be taxable.
- Judge Holmes dismissed the cross appeal by the Secretary regarding the special sale of the three acre site and the five separate sales of land further from the sea . The Special Court found it a fact that the profits from these disposals were capital in nature and therefore not taxable. Judge Holmes held that findings of fact are irrefutable on appeal.

To Schreiner's credit, his famous obiter dicta regarding the relevance of a change of intention was quoted here by Holmes JA in his judgment, at page 218.

7.4.3 Schreiner's ratio applied to the Natal Estates case

In this section of my analysis the cross-appeal against the decision of the Special Court upholding the appeal against the disallowance of the objection to the additional assessment for 1965 that had prescribed will not be discussed.

i. Introduction

It is important to firstly consider the objects contained in the memorandum of incorporation of Natal Estates Ltd as well as the intention of the taxpayer at acquisition. Although the memorandum gave the appellant power to deal in property, it is evident from the facts present that the object and intent of Natal Estates Ltd was to purchase a farming business and continue this business of cultivating sugarcane on the land. This was what the appellant did for decades. This land was undoubtedly capital in nature at acquisition.

I will begin the analysis of the Natal Estates case by scrutinising the cross-appeal by the Secretary.

ii. Cross appeal by the secretary

This cross-appeal by the Secretary was in respect of the three acre site sold after a notice of expropriation and another five areas of land located further from the sea. Here the Secretary argued that the taxpayer had not discharged the burden of proving that the profits derived from the sale of this land, was of a capital nature. The Special Court had found it as a fact that there was no change of intention to alter the nature of this profit from capital to revenue.

It is important to note here that when the Richmond case was heard in 1956 and Natal Estates, approximately 19 years later, the Special Courts' findings of fact were unassailable so therefore could not be challenged on appeal. The judges in the Appellate Division could not re-examine the facts and so they had to judge these cases within the parameters. In this situation Holmes JA dismissed the cross-appeal by the Secretary for the reason that it was a finding of fact that the appellant had at no time changed its original intention of holding and using this land as a capital investment. This finding of fact could not be disturbed on appeal. If Schreiner had presided over this case, he too would have had to dismiss the cross-appeal by the Secretary. Therefore Schreiner's decision on the matter of the cross-appeal would have been the same as that of Holmes JA.

iii. Appeal by Natal Estates Ltd

The main contention by Natal Estates Ltd was that there was never a change from the original intention that the land was a capital investment. The sale of the land was merely a

realization of their assets to the best advantage therefore these profits were not gross income. The appellant contended that the original intention is decisive and cannot change. On this matter Schreiner said in Richmond,

“²⁸One must not lose sight of the true nature of the inquiry in cases of this kind. There is no legislative provision that makes the intention of the taxpayer decisive of whether the receipt or accrual was of a capital nature or not.”

Judge Holmes said, “²⁹In my view the cases cited clearly demonstrate that the main contention on behalf of the appellant cannot be sustained. Indeed, to uphold it would be to flout the principle of stare decisis to the point of iconoclasm.” Based on the obiter above, I am of the view that Schreiner would have concurred with Holmes JA on this matter.

The Secretary argued here that the assets were acquired in 1921 with a dual intention, the other one being that of resale at a profit by way of sub-divisional development of residential land. With regard to the Secretary’s submission, Holmes JA said, “Lastly, this contention of an initial dual intention was raised in and dealt with by the Special Court; and it rejected it. I am unpersuaded that there are grounds warranting the avoidance of that finding.” I am convinced that Schreiner would have not have disagreed with the Special Courts’ regarding an unsubstantiated contention of a dual intention at acquisition. This is clear by the analysis of the original intention at acquisition performed above.

In the alternative, the appellant argued that it is only when a taxpayer carries on a business of buying land for resale that the land can be regarded as stock-in-trade. Natal Estates Ltd submitted that they already owned the land before it decided to sell it therefore it could not be considered as stock, but rather the realisation of a capital asset. Schreiner in Richmond looked at the change of intention and also investigated if there was a further change of intention by the taxpayer. In Natal Estates when the taxpayer applied for the desirability certificate under the Town planning for the coastal land and began engaging engineers and planners, their intention changed and the land became stock in trade.

In 1962 there was a change in control of the taxpayer, which could herald further change of intention, but the new board of directors proceeded with the plans for the development and sale of portions of land in La Lucia. This here confirms the land to be stock-in-trade thereby making any profits from these sales taxable. In Richmond, Schreiner indicated that it was important to investigate any further change of intention up to, and including disposal, to ensure that not just part of the matter is investigated. In doing so, it is apparent that all the

²⁸ Page 365 of 20 SATC 355

²⁹ Page 219 of 37 SATC 193

actions and activities of Natal Estates Ltd leading up to disposal of the land confirmed the land as being stock and therefore not of a capital nature. There was no evidence of a subsequent change of intention.

Natal Estates Ltd was at this stage dealing in property for gain. These were powers conferred upon it by its memorandum. By virtue of doing so they converted their land from being capital to stock-in-trade. This made any profits derived from these disposals taxable.

In Richmond Schreiner said,

“The profits were made in the course of the company’s profit-making business by the use of its capital in one of the ways contemplated in its memorandum as a means whereby it would make its income. I would allow the Commissioner’s appeal and declare the profits in question to be taxable.”

It is my opinion that Schreiner would have also held that the profits made by Natal Estates Ltd were taxable.

iv. Conclusion

Based on the above analysis, it is my view that Schreiner would have held that the profits from the properties sold were of a revenue nature and therefore taxable. The honourable Holmes JA held that these profits were taxable. It is my opinion that Schreiner would have agreed with Holmes JA that these profits were taxable. If Schreiner’s judgment in Richmond was the majority judgment and his principles were applied to Natal Estates, there would have been no difference in the outcome. As a result no changes in the tax law would have been made.

7.5 Conclusion

I have shown that Schreiner’s judgments were sound and well argued. They are incisive and have a compelling persuasiveness. His dissensions may not have changed the law but it is evident that there were many vital principles extracted from these minority dissenting judgments. Even in dissenting Schreiner produced nuggets that are part of our tax law. Decisions of Appellate Division are so balanced that one can scarcely argue with Schreiner or the other judges.

CHAPTER EIGHT: CONCLUSION

Schreiner has been recognised as one of the judges that made a significant contribution to the development of tax law in South Africa. During his career, Schreiner made a notable impact, not only in tax law, but across the legal spectrum. This dissertation has managed to look at only a fraction of Schreiner's career focused only on tax law. That fraction has revealed his wisdom and knowledge of tax law that has laid the solid foundations on which our tax law continues to develop. He made a mark that cannot be erased.

From the preceding chapters in this dissertation, we see Schreiner's brilliant mind on display and the quality judgments he delivered that have made an impact to the fundamentals of our tax law, therefore the research question has been satisfied. Schreiner's judgments have undoubtedly added value to our body of tax law. His passion and dedication to his oath and quest to ensure justice prevails is seen in his philosophy and approach to his judgments. One can be assured that his judgments were fair and true to his ability. His skill to simplify what many have considered complex accentuates his great wisdom and intellect.

Schreiner was not afraid to disagree with his colleagues as seen in his dissenting judgments that were discussed. His dissensions have been recognised for their compelling persuasiveness. They have been lauded by his colleagues and in a number of occasions cited and applied in subsequent cases. Elison Kahn articulated this well when he said,

“Looking over Schreiner's twenty-four years' service on the Bench, one can see why judges and writers on the law, especially where they express disagreement with a decision of his, are apt to pay deference to him by using such expressions as 'a great judge', 'so eminent a judge', or 'a most distinguished judge of appeal' (Schreiner & Kahn 1983: 79).

It is in my view sad that Schreiner did not get to the pinnacle of his career to become Chief Justice. Indeed Schreiner was the greatest Chief Justice South Africa did not have. There is so much more he could have contributed to our judiciary that South Africa did not get to experience. My research has shown that he was man of great character because even after being passed over to be Chief Justice, he continued with his work undeterred and remained faithful to his oath. Even though he was never appointed Chief Justice, we see that in everything he did, he made a mark that cannot be erased from the development of our tax law.

REFERENCES

Secondary Sources

The Listener (volume 108 no 2772 p. 4 (5 August 1982))

Emslie, T.S., Davis, D.M., Hutton, S.J. & Oliver, L. 2001. *Income tax cases and materials*. 3rd ed. Cape Town: The Taxpayer.

Kahn, E. 1983. *Fiat iustitia: essays in memory of Oliver Deneys Schreiner*. Johannesburg: Juta.

Moseneke, D., 2008. Oliver Schreiner Memorial Lecture: Separation of Powers, Democratic Ethos and Judicial Function. *S. Afr. J. on Hum. Rts.* Available at: http://heinonlinebackup.com/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/soafjhr24§ion=25 [Accessed June 19, 2013].

Schreiner, O. & Kahn, E., 1983. *Fiat iustitia: essays in memory of Oliver Deneys Schreiner*, Available at: http://scholar.google.co.za/scholar?hl=en&q=oliver+deneys+schreiner&btnG=&as_sdt=1%2C5&as_sdt=#1 [Accessed June 19, 2013].

Stiglingh, M.(Editor), Koekemoer, A.D., Van Schalkwyk, L., Wilcocks, J.S. & De Swart. R.D. 2012. *Silke on South African income tax: Income Tax Act 58 of 1962, 2010/2011*. Durban: Lexis Nexis.

Zimmermann, R. & Visser, D.1996. *Southern Cross: civil law and common law in South Africa*. Cape Town: Juta.

Coloured vote constitutional crisis 2012, Wikipedia: The free encyclopedia Available

http://en.wikipedia.org/wiki/Senate_Act,_1955#Packing_the_Senate

Beinart, B., 1957. The Modern Law Review: *The South African Senate* Available

<http://www.modernlawreview.co.uk/issue.asp?ref=00267961&vid=20&iid=6&oc=&s=&d=November+1957>

Cases

Burgess v CIR 1993 (4) SCA 161 (A)

CIR v Black 1957 (3) SA 536(A)

CIR v Drakensberg Garden Hotel (Pty) Ltd 1960 (2) SA 475 (A)

CIR v Epstein 1954 (3) SA689 (A))

CIR v Genn & Co (Pty) Ltd 1955 (3) SA 293 (A)

CIR v Kuttel (1992 (3) SA242 (A))

CIR v Lever Brothers and Unilever Ltd 1946 AD 441, 14 SATC 441

CIR v Richmond Estates (Pty) Ltd 1956 (1) SA 602 (A)

CIR v Strathmore Consolidated Investments Ltd 1959 (1) SA 469 (A)

Cohen v CIR 13 SATC 362 1946 AD 174

Commissioner of Taxation of Western Australia v Murray Limited, 42 C.L.R. 332

CSARS v Brummeria Renaissance (Pty) Ltd 2007(6) SA601 (SCA)

CSARS v Scribante Construction (Pty) Ltd 2002 (4) SA 835 (SCA)

Elandsheuwel Farming (EDMS) BPK v SIR 1978 (1) SA 101 (A)

Essential Sterolin Products (Pty) Ltd v CIR 1993 (4) SA 859 (A)

Harris v Harris 1949 (1) SA 254 (A)

I.R.C. v Lysaght (1928, A.C. 234)

Janga v Donges NO 1950 (4) SA653 (A)

John Bell & Co (Pty) Ltd v SIR 1976 (4) SA 415 (A)

Millin v CIR 1928 AD 207, 3 SATC 170

Morrison v Commissioner for Inland Revenue 1950(2) S.A. 449 (A.D.)

Natal Estates Ltd v SIR 1975 (4) SA 177 (A)

Savage v CIR 1951 (4) SA 400 (A)

SIR v Rile Investments (Pty) Ltd 1978 (3) SA 732 (A)

SIR v The Trust Bank 1975 (2) SA 652 (A)

Tickin Timbers CC v CIR 1999 (4) SA939 (SCA)

*Transvaal Property & Investment Co Ltd and Reinhold & Company v SA Townships
Mining & Finance Corporation Ltd and the Administrator, 1938 T.P.D 512*

Tuck v CIR 1988 (3) SA 819 (A)