Extracted from the Monthly Notebook section in each issue

Words & Phrases 2009 to Date

EXTRACTED FROM THE NEWSLETTER BY COSTA DIVARIS

MONTHLY NOTEBOOK—WORDS & PHRASES
From 78 TSH 2009 to date

This is a free publication devoted to unearthing what is going on in the SA tax field. If it isn’t here, it never happened. Unless otherwise indicated (‘§’), every document listed is cumulatively included in the Tax Shock, Horror Database which is available monthly, quarterly or even individually, on DVDs, by post, for R260 each, inclusive of VAT at 15%.
This is perhaps the only newsletter in the world with its own stylebook (also free), by Costa Divaris & Duncan McAllister (2020 ed).
Bsp Seminars® publications—tax and tax-related acts, books, databases and newsletters by and compiled by Costa Divaris.
All past issues from 2009 to date. All cases, all trust cases, all estate cases listed in this section from 2005 to date. Visit our website.
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Words & phrases—I

‘And’ means ‘or’!

ITA s 64C(4)

(4) The provisions of subsection (2) shall not apply—
(a) where the amount constitutes a dividend or would have constituted a dividend but for the provisions of paragraphs (a) to (l), inclusive, of the definition of ‘dividend’ in section 1;

(b) and
(c) to any amount contemplated in subsection (2)(a), (b), (c), (d) or (g) distributed, transferred, released, relieved, paid, settled, used, applied, granted or made available by a company for the benefit of any controlled group company in relation to that company.

When is prescription a fiscal event?
The term ‘prescription’ appears no fewer than eight times in the Income Tax Act, leading me to the conclusion that, unless it is specifically mentioned, it cannot be taken into account. Thus, despite what SARS might think, prescription cannot figure in this type of provision:

ITA Bth Sch para 12(5)(a)

Subject to paragraph 67, this subparagraph applies where a debt owed by a person to a creditor has been reduced or discharged by that creditor—
(i) for no consideration; or
(ii) for a consideration which is less than the amount by which the face value of the debt has been so reduced or discharged,

‘Includes’ means ‘excludes’!

ITA 8th Sch para 1 sv ‘asset’

[A]sset includes—
(a) property of whatever nature, whether movable or immovable, corporeal or incorporeal, excluding any currency, but including any coin made mainly from gold or platinum; and
(b) a right or interest of whatever nature to or in such property;

Demotic drafting sv ‘asset’ (ie how I would write it)

[A]sset means property under the common law, excluding circulating currency;

Words & phrases—II

What does ‘derived’ mean?
There are 318 instances of the usage of the word ‘derived’ in the Income Tax Act:

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<tr>
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<td>‘derived for’</td>
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<td>‘derived as a result of’</td>
<td>2</td>
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<tr>
<td>‘derived any’</td>
<td>2</td>
</tr>
<tr>
<td>‘derived wholly’</td>
<td>2</td>
</tr>
<tr>
<td>‘derived mainly’</td>
<td>2</td>
</tr>
<tr>
<td>‘derived out’</td>
<td>1</td>
</tr>
<tr>
<td>‘derived pursuant’</td>
<td>1</td>
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The remaining usages are either more complex or take no preposition.

It must follow that only a lunatic would assert that the term means ‘realized’ in the following passage:

ITA s 64B(5)(c)(i)

(i) distribution of profits derived during any year of assessment which ended not later than 31 March 1993, (other than any such profits derived by way of the revaluation of trading stock held by such company); or

Here is a flavour of what the words ‘derived during’ are supposed to mean (‘received by or accrued to’):

ITA s 11A

11A. (1) For purposes of determining the taxable income derived during any year of assessment by a person from carrying on any trade, there shall be allowed as a deduction from the income so derived, any expenditure and losses....

‘Legal title’ means ‘Mom! Watch me! Mom!’

ITA 8th Sch para 20(1)

(a) the expenditure actually incurred for purposes of establishing, maintaining or defending a legal title to or right in that asset;

Removal of the reference to ‘legal title’ would not change the meaning in any conceivable way.

There are only twenty-two references to the term in the SALR from 1977 to date. The most interesting is a quotation made by Brand JA in Bowring NO v Vrededorp Properties cc And Another 2007 (5) SA 391 (SCA) of Innes CJ in Willoughby’s Consolidated Co Ltd v
Now a servitude, like any other real right, may be acquired by agreement. Such an agreement, however, though binding on the contracting parties, does not by itself vest a legal title to the servitude in the beneficiary, any more than the contract of sale of land passes the dominium to the buyer. The right of the beneficiary is to claim performance of the contract by delivery of the servitude, which must be effected coram lege loci by an entry made in the Register and endorsed upon the title deeds of the servient property.

Words & phrases—the new estate duty abatement & ’any’

Harry Joffe (HarryJ@discovery.co.za), having been asked about a real-life situation, writes:

A dies, leaves R1 m to his kids and the balance to spouse B. Spouse B then remarries C. C then dies, leaving R2 m to the kids, and the balance to spouse B.

When spouse B dies, he or she may obviously use only the unused abatement of one of the pre-deceased spouses, not both. Can you choose which predeceased spouse’s abatement you want to use?

In these circumstances, it would be better to use A’s unused deduction, since it is bigger. Does B’s estate have the choice? Logic would say No, B’s estate must use the most recent spouse’s abatement. Yet the new abatement (s 4A of the Estate Duty Act) uses the phrase reduced by the amount deducted from the net value of the estate of any one of the previously deceased persons in accordance with this section.

It seems that if you are ‘lucky’ enough to have had a few spouses you can choose which abatement you want to carry over!—

Tony Davey (tonyd@harding.co.za) responds:

Clearly the automatic portable deduction is limited to one predeceased spouse but the issue is whether the word ‘any’ confers a choice as to which predeceased spouse’s unused deduction may now be claimed.

The Oxford Dictionary defines the word ‘any’ as meaning ‘one, no matter which, of several’. Claassens Dictionary of Legal Words & Phrases quotes Innes JA in Hayne & Co. v Kaffrarian Steam Mill Co Ltd 1914 AD 371 as follows:

In its natural and ordinary sense, any—unless restricted by the context—is an indefinite term which includes all of the things to which it relates.

Subsequent cases have followed this broad approach.

Thus, in my view, the last-dying spouse’s executor is free to choose any predeceased spouse’s unused deduction so as to achieve the maximum result.—

And now for the real answer

The idiot draftsperson thinks that the word ‘any’ is a form of speech called an article, such as ‘a’, ‘an’ and ‘the’.

In fact, as the Bsp Stylebook will tell you at a glance, ‘any’ is in truth a quantifying determiner.

There are about 425 instances of the word ‘any’ in the Estate Duty Act, and no one may dare to presume that a particular usage of the word means anything particular unless he is prepared to show something distinctive about that usage.

I can do that. The revised s 4A uses not merely the term ‘any’ but the freshly compounded term ‘any one’.

Having, in his pathetic ignorance, depreciated the word ‘any’ into morbid meaningless, the idiot draftsperson is constrained to devise a neologism to take the place of the lost quantifying determiner—any one.

Words & phrases—‘contingent interest’

The once hugely controversial definition of a ‘beneficiary’ reads like this:

ITA s 1 sv ‘beneficiary’

‘[B]eneficiary’ in relation to a trust means a person who has a vested or contingent interest in all or a portion of the receipts or accruals or the assets of that trust;

A person with a ‘vested’ right—I prefer this usage to indicate property under the common law—is a beneficiary under a bewind or the nudum praeceptum rule, or, if a minor, who, in his guise as a beneficiary, is a trust creditor.

What, really, is a ‘contingent interest’? There are only eighteen references to the term in the SALR from 1977 to date. My guess is that it was plucked for this particular tax service from the judgment of Centlivres J in In re Estate Scholtz 1937 CPD 146 at 147.

My other guess is that its meaning is to be found in this quotation by Streicher J, in Minister of Environmental Affairs and Tourism and Others v Atlantic Fishing Enterprises (Pty) Ltd and others 2004 (3) SA 176 (SCA), of Watermeyer JA in Durban City Council v Association of Building Societies 1942 AD 27 at 33:

In the large and vague sense any right to which anybody may become entitled is contingent so far as that person is concerned, because events may occur which create the right and which may vest it in that...
person; but the word ‘contingent’ is also used in a narrow sense, ‘contingent’ as opposed to ‘vested’, and then it is used to describe the conditional nature of someone’s title to the right. For example, if the word ‘contingent’ be used in the narrow sense, it cannot be said that I have a contingent interest in my neighbour’s house merely because my neighbour may give or bequeath it to me; but my relationship to my neighbour, or the terms of a will or contract, may create a title in me, imperfect at the time, but capable of becoming perfect on the happening of some event, whereby the ownership of the house may pass from him to me. In those circumstances I have a contingent right in the house.

Thus a contingent interest is a formal capability, but not an immediate right, of acquiring property, such as that of a so-called discretionary beneficiary of a trust.

As already indicated, I myself try to distinguish between ‘contingent interests’ and ‘vested rights’.


My guess is that, in the tax statutes, a ‘contingent interest’ is an aberrant, elegant variation of ‘contingent right’, the term otherwise used exclusively, although, in my opinion, not so as to indicate anything different.

The same database of reported cases yields 100 hits for the term ‘contingent right’. The most interesting one appears in the judgment of Cloete J, in Reede v Softline Ltd and Another 2001 (2) SA 844 (W):

The difference between a vested right and a contingent right in the narrow sense in which the latter concept is used in law is succinctly stated in two judgments of the Appellate Division given by Watermeyer JA. In Jewish Colonial Trust Ltd v Estate Nathan 1940 AD 163 at 175–6, the learned Judge of Appeal said:

Unfortunately the word ‘vest’ bears different meanings according to its context. When it is said that a right is vested in a person, what is usually meant is that such person is the owner of that right—that he has all rights of ownership in such right including the right of enjoyment. If the word ‘vested’ were used always in that sense, then to say that a man owned a vested right would mean no more than that a man owned a right. But the word is also used in another sense, to draw a distinction between what is certain and what is conditional; a vested right as distinguished from a contingent or conditional right. When the word ‘vested’ is used in this sense Austin (Jurisprudence, vol 2, lect 53), points out that in reality a right of one class is not being distinguished from a right of another class but that a right is being distinguished from a chance or a possibility of a right, but it is convenient to use the well-known expressions vested right and conditional or contingent right.

The second judgment of Watermeyer JA to which he referred is that in Durban City Council v Association of Building Societies, in fact, the very extract already quoted.

Another term for a contingent interest is a spes—a hope of acquiring property (although not according to Eloff J in P E Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd 1980 (4) SA 801 (T)).

So who is a ‘beneficiary’ of a trust under the Income Tax Act? Anyone who currently or in future might benefit under the deed.

Words & phrases—‘income’ of a deceased estate

Section 25 of the Income Tax Act:

Any income received by or accrued to or in favour of any person in his capacity as the executor of the estate of a deceased person,

‘Income’—must allow the deemed recipient to qualify for exemptions.

and any amount so received or accrued which would have been income in the hands of the deceased person had it been received by or accrued to or in favour of such deceased person during his lifetime,

‘Income’—must allow for the inclusion of trading stock in ‘taxable income’, proceeds of its sale in ‘gross income’ and a recoupment in ‘income’ and thus (via para (g) of the definition of the term ‘gross income’ in s 1) in ‘gross income’, but it must exclude exempt income.

shall, to the extent to which such income or amount has been derived for the immediate or future benefit of any ascertained heir or legatee of such deceased person,

‘Income’—must allow the deemed recipient to qualify for exemptions.

be deemed to be income received by or accrued to such heir or legatee, and shall, to the extent to which such income or amount is not so derived, be deemed to be income of the estate of such deceased person.

‘Income’—must allow the deemed recipient to qualify for exemptions.

So what does the term ‘income’ mean in this provision? Its defined meaning, as given in s 1?

‘Income’ in the old-fashioned accounting sense? ‘Income’ in the economist’s sense?
Words & phrases: ‘may’ & ‘shall’

Compare these two provisions of the Estate Duty Act:

EDA s 15
Recovery of duty paid in certain cases
15. Any person who has disposed of property in respect of which a liability for duty in accordance with [s 11(2)(ii)], thereafter arises, without having received full consideration therefor, may recover from the person to whom he has disposed of such property the amount of duty payable by him in respect thereof.

EDA s 20
Expenditure incurred by executor
20. Every executor who is required to incur any expenditure in respect of any property which falls under [s 3(2)(b) or (d)] or under [s 3(3)], shall be entitled to recover such expenditure in respect of the person liable, in accordance with [s 11], for the duty payable in respect of such property.

Both provisions form part of the original text of the act and so were written at the same time, although not necessarily by the same person.

Are you one of those who believe that the words ‘may recover’ differ in any substantive way from the words ‘shall be entitled to recover’? Probably not, since you could interchange them in the two provisions without changing the underlying meaning. When I say ‘you may’, I am being permissive. When I say ‘you shall’, I am being prescriptive. But neither the phrase ‘you may recover’ nor the phrase ‘you shall be entitled to recover’ is prescriptive.

In order to be prescriptive, both provisions would have had to say ‘you shall recover’ or, in modern parlance, ‘you must recover’, thus creating a duty under the law, which would have required elaboration by way of enforcement provisions and sanctions. People writing laws are careful about the duties they create, since the law is brought into disrepute when unenforceable duties or unsanctioned defaults abound. In any event, the matters dealt with here are hardly central to the imposition and collection of estate duty by the state.

Thus it is intellectually impermissible to draw any conclusion from the failure of these provisions to be prescriptive. They do not need to be prescriptive. In fact, they would be absurd if they were so. Thus they are not prescriptive. Get over it.

Are they then elective? Obviously, since they both create an entitlement, which you may choose either to enjoy or ignore. But you have no choice about the entitlement itself; it is yours. In both instances you are entitled to recover, you may recover.

Do you have to do anything to win this entitlement? No, it is laid down by law.

You can have no possible basis in law for equating this entitlement to, say, an inheritance under a will, where you first enjoy a personal right against the executor, which itself has no patrimonial value, and acquire property only when you disavow the right explicitly or impliedly (see 80 TSH 2009).

Your rights under these provisions are immediate and are immediately exercisable against the targeted persons and no one else. You do not have a personal right against the state (Ok State, I am going to take what you offer me!) which then somehow becomes a right against the targeted persons (Ok guys, I’ve squared things with the State; now I’m coming for you!).

In short, what you enjoy under these provisions is a form of property—a real right to a sum of money. Should you elect to ignore it, be prepared for the fiscal consequences attendant upon the abandonment of a claim against another.

Why were different wordings used in these two provisions, and is there not a presumption that different words in statutes usually mean different things? In all there are three instances of the phrase ‘shall be entitled to’ in the act, and I would guess that the newfangled ‘may recover’ escaped old-fashioned detection. There is no getting away from the fact that elegant variation does crop up in legislation. The ninety usages of the word ‘may’ are far more interesting. Here are my guesses on what some of them either mean or signify:

must; pleonastic (‘may consider’ = ‘considers’); stock phrase (‘as the case may be’); will; power (‘may estimate’); might; right (‘may object’).

Learning law with your PC: exceptio lis alibi pendens

Once again, the database is that offered by the South African Law Reports, published by Juta’s and including reported cases from 1977 to date.

(I cannot resist describing such publications as being ‘invaluable’ and ‘prized possessions’, since they are incredible treasure troves of knowledge and information, made instantly and profoundly accessible through a few simple keystrokes and even simpler clicks of the mouse.)

The targeted Latin precept or tag this time, which was altogether unknown to me as recently as last month, is lis pendens, or, less commonly, exceptio lis alibi pendens, signifying ‘the claim is pending in another court’.

The database yields a mere fifty-two hits for the string ‘lis pendens’, spread among only forty-eight clicks of the mouse.)
different case reports, the low overall number and high ratio of cases to hits both suggesting that a search for the meaning and significance of this term is not going to involve too much work. By chance, only the first two hits involve SCA decisions, and they are naturally the first to be examined, both yielding pay-dirt.

A search for the string ‘lis alibi pendens’ yields thirty-eight hits, involving about thirty-three cases, including one SCA decision and four Appellate Division decisions.

From one of these AD decisions I learn that the principles of the precept are laid out in *Cook and Others v Muller* 1973 (2) SA 240 (n), the report of which lies outside of the current database. It is very useful but too detailed for present purposes.

From more than one source I also learn that the case to read on the application of the *lis pendens* precept to proceedings in foreign courts is *Wolff NO v Solomon* (1898) 15 SC 297.

The first post-1976 SCA decision is *Makhanya v University Of Zululand* 2010 (1) SA 62 (SCA), a labour-law matter, where Nugent JA delivered the immediately famous judgment of the court. I quote from para 27:

> Naturally a claim that falls within the concurrent jurisdiction of both the High Court and a special court could not be brought in both courts. A litigant who did that would be confronted in one court by either a plea of *lis pendens* (the claim is pending in another court) or by a plea of *res judicata* (the claim has been disposed of by the other court). A claimant who has a claim that is capable of being considered by either of two courts that have concurrent jurisdiction must necessarily choose in which court to pursue the claim and, once having made that election, will not be able to bring the same claim before the other court.

The second is in part cited as *Janse Van Rensburg and Others NNO v Myburgh and Others* 2010 (1) SA 649 (SCA). Heher JA delivered the judgment of the court. I quote from para 35:

> *Lis alibi pendens* is a discretionary remedy. It requires a balance of the interests of the affected parties to achieve a fair result: cf *Van As v Appollus en Andere* 1993 (1) SA 606 (C) at 610D–G.

Talk about pay-dirt! A current SCA decision citing that of a lower court—which simply has to be the leading modern case on the issue. The judgment in the Cape Provincial Division *Van As* case was that of Conradie J. It dealt with the application of the remedy in the context of foreign proceedings but what Heher JA was especially interested in was clearly this passage:

> Voet sê daar [44.2.7] die volgende (Gane se vertaling):

> ‘Exception of *lis pendens* also requires same persons, thing and cause.—The exception that a suit is already pending is quite akin to the exception of *res judicata* inasmuch as, when a suit is pending before another Judge, this exception is granted just so often as, and in all those cases in which after a suit has been ended, there is room for the exception of *res judicata* in terms of what has already been said. Thus the suit must already have started to be mooted before another Judge between the same persons, about the same matter and on the same cause, since the place where a judicial proceeding has once been taken up is also the place where it ought to be given its ending…’

The only other real light thrown upon the subject in the chosen database again involved Nugent JA, although while he was an acting judge of the Appellate Division. The case was *Nestlé (South Africa) (Pty) Ltd v Mars Inc* 2001 (4) SA 542 (SCA) (2001) 4 All SA 315) at 549, where he said that the *exceptio* (objection) could be made only

> where the same dispute, between the same parties, is sought to be placed before the same tribunal (or two tribunals with equal competence to end the dispute authoritatively). In the absence of any of those elements there is no potential for a duplication of actions. In my view, none of those elements is present in this case. Indeed, it is difficult to see how they can exist where the matters in issue have been placed before two quite different tribunals (as in this case)...each having its own peculiar functions, powers and authority.

Not only am I confident that, using elementary search routines, I have put you instantly and concisely in touch with the leading authorities on this issue but I shall add a gloss that most lawyers not actively involved with it have forgotten:

> A point made in several judgments is that to be vulnerable to the *exceptio lis alibi pendens* is to be open, *prima facie*, to a claim that your duplicated proceedings are vexatious.

85 TSH 2010—April 2010

**The law via your PC (& newspaper)—the sub judice rule**

First from a friend practicing as an advocate and then from Paul Hoffman SC, director of the Institute for Accountability in Southern Africa, in a letter to the editor of *Business Day* on 10 March 2010, I learn that the *sub judice* rule is no longer the force that it might once have been. So I decide to add it to the topics I occasionally ‘re-search’, using the Juta’s electronic *South African Law Reports* and the powerful search function (Geddit?) of the ‘Folio Views’ software in which the *SALR* is made available.

The first problem I run into is a dearth of hits, even though I search the entire database from 1947 to date several times. Over that great span of time, seemingly, no judge was interested in explaining in...
detail a rule so clearly known to all. At its most superficial, literal level, I learn from this exercise, the sub judice rule is taken to mean that a matter is before the courts. It is safe to say, even as a fifteen-minute expert on the subject, that, today, this might be the literal meaning of but not the full message of the rule (if it ever was).

In an interesting judgment by Wunsch J, in Romero v Gauteng Newspapers Ltd and Others 2002 (2) SA 431 (W), I find this gloss on this entry-level understanding:

Further, [the correct principle is] that statements may not be published concerning a matter which is sub judice which would affect the administration of justice, ie if the publication could influence the cases. (Maeder v Perm-Us (Pty) Ltd 1939 CPD 208.)

In Kauesa v Minister of Home Affairs and Others 1995 (1) SA 51 (NM), a case before the Namibia High Court, O’linn J, who delivered the judgment of the court, said:

The law relating to contempt of court in itself allows reasonable and bona fide criticism at the appropriate time. When the matter is still under consideration by the court, ie is ‘sub judice’, criticism is not appropriate. In this respect it corresponds to the law in all countries based on the rule of law.

Here is O’linn J again, again in the Namibia High Court, in S v Heita and Another 1992 (3) SA 785 (NM):

Here it should also be remembered...that a criminal trial is sub judice until the time for an application for leave to appeal has elapsed, or until the application in the trial Court as well as the appeal Court has been dismissed or in the case where leave to appeal has been granted, the appeal has been concluded. This is known as the sub judice rule.

A second problem, as already illustrated, is that the rule is usually intimately connected to other legal principles, such as contempt of court. Here is a positive gem illustrating the point, arising in the judgment of the Appellate Division delivered by Steyn CJ in Afrikaanse Pers-Publikasie (Edms) Bpk en Ander v Mbeki 1964 (4) SA (618) (A):

Uit al hierdie sake, en ook uit ander, blyk dit voorts dat stremming van belemmering van die regspleging as minagting van die Hof beskou en sommer beraag en bestraf is, slegs waar die ten laste gelegde gedrag plaasgevind het met betrekking tot ’n aanhangige geding.

In other words, to be in contempt of court on account of defeating or obstructing the course of justice, you have to be acting in relation to a matter that is sub judice.

A third problem—or so I imagine—is that in modern legal circles it is increasingly unfashionable to use Latin tags, for what I believe are entirely mistaken but politically correct reasons. Had it not been for Advocate Hoffman’s letter, my re-search would never have stumbled upon Midi television (Pty) Ltd t/a E–TV v Director of Public Prosecutions (Western Cape) 2007 (5) SA 540 (SCA), in which Nugent J delivered the judgment of the Supreme Court of Appeal, without once mentioning the term sub judice.

Nugent J is such a clever and eloquent man that I should love to quote huge extracts from his judgment, essentially on press freedom. But I choose those paragraphs most germane to the present topic (footnotes and paragraph numbers omitted):

It is an established rule of the common law that the proper administration of justice may not be prejudiced or interfered with and that to do so constitutes the offence of contempt of court. That is now reinforced by the constitutional right of every person to have disputes resolved by a court in a fair hearing and by the constitutional protection that is afforded to a fair criminal trial. It is not contentious in all open and democratic societies—and it was not contentious before us—that the purpose that is served by those principles of law provides a proper basis for limiting the protection of press freedom, and the reason for that is self-evident. The integrity of the judicial process is an essential component of the rule of law. If the rule of law is itself eroded through compromising the integrity of the judicial process then all constitutional rights and freedoms—including the freedom of the press—are also compromised.

The exercise of press freedom has the potential to cause prejudice to the administration of justice in various ways—it is prejudicial to prejudge issues that are under judicial consideration, it is prejudicial if trials are conducted through the media, it is prejudicial to bring improper pressure to bear on witnesses or judicial officers—and it is not possible to describe exhaustively how prejudice might occur. What is more relevant in all cases where there is the potential for prejudice is to determine when the risk of prejudice will be sufficient to constitute an interference with the administration of justice that justifies a corresponding limitation being placed on press freedom. For the administration of justice does not take place in private, completely shielded from public scrutiny and comment, and there is always the potential for some element of prejudice when the media report or comment on judicial proceedings. What must be guarded against, as pointed out by McLachlin J in a concurring opinion in Dagenais v Canadian Broadcasting Corporation...is the facile assumption that if there is any risk of prejudice to a fair trial, however speculative, [a ban on publication] should be ordered.

Advocate Hoffman says that ‘the sub judice rule died in 2007’, as a result of this judgment. Having consulted the rules governing these re-search pieces (which I made up), I can find no prohibition against quoting from his letter:

The remains of the rule consist of a diluted formula that allows fair and accurate reporting of factual content of continuing judicial proceedings, provided that the reportage does not usurp the court’s role by prejudging the case or its legal issues.
The law via your PC—an employer’s vicarious liability

Without discernable effect, I have been nagging a couple of people to write up the legal concept of vicarious liability—ever since I read the curious judgment involving an allegedly defamatory provincial premier, rc 1837 (2009) 71 SATC 177 (79 TSH 2009 and 84 TSH 2010).

In despair, I resorted to the good old ‘find’ routine in the electronic South African Law Reports, 1977 to date, published by Jutas.

To my astonishment, my very first hit, F v Minister of Safety and Security and Another 2010 (1) SA 606 (wcc), tells me, most contemporaneously, that the leading case on the vicarious liability of employers is K v Minister of Safety and Security 2005 (6) SA 419 (cc), a decision, in case you failed to notice, of the Constitutional Court!

The court held [said Bozalek J in F’s case] that the appropriate test to be applied in cases where employees deviate from their normal duty requires two questions to be asked:

‘The first is whether the wrongful acts were done solely for the purposes of the employee. This question requires a subjective consideration of the employee’s state of mind and is a purely factual question. Even if it is answered in the affirmative, however, the employer may nevertheless be liable vicariously if the second question, an objective one, is answered affirmatively. That question is whether, even though the acts done have been done solely for the purpose of the employee, there is nevertheless a sufficiently close link between the employee’s acts for his own interests and the purposes and the business of the employer. This question does not raise purely factual questions, but mixed questions of fact and law. The questions of law it raises relate to what is sufficiently close to give rise to vicarious liability. It is in answering this question that a court should consider the need to give effect to the spirit, purport and objects of the Bill of Rights.’

Fair enough. But what I really want to know is, if the employer is vicariously liable, is the employee off the hook?

The law via your PC: criminal defamation

I happen to be sitting with a senior counsel hugely experienced in criminal law, and decide to use a temporary lull in business to expand my layman’s grasp of the law by asking what ‘criminal defamation’ means. In a flash, he pulls out a textbook from his briefcase and finds a citation of the leading case, together with a very brief commentary.

While I tried for a while to carry around a huge tote-bag containing the latest writings of interest in my own field, today it takes the form of a tiny netbook, loaded with several databases, both private and public. This is what I whip out in response to the intended intimidation by textbook.

I enter the name of the case into the South African Law Reports Archive (Jutastat) search function, and then search, both in the Archive and the Update sections, for other hits for the string ‘criminal defamation’. Within three of four minutes I am
rewarded with a pretty good idea of the limitations of an action for criminal defamation, far surpassing what is on offer in the textbook.

Intimidation stakes: Stand-off. We are able, on a commonly informed basis, to agree that an action for criminal defamation, while it might be hot in Zimbabwe, is no big deal in sunny SA. In appreciation, I decide to upgrade my netbook.

The leading case

The case is *Rex v Fuleza* 1951 (1) SA 519 (A), in which Van Den Heever JA, delivering the principal judgment of the court, gave a fascinating account of the history of the law on criminal defamation (libel, slander or *injuria verbis*), finding that, in Southern Rhodesia, it was still a crime.

Of the two separate judgments, the significance of Fagan JA’s emerges from this extract from *S v Momberg* 1970 (2) SA 68 (C):

> A useful guide mentioned in Fuleza’s case and applied both in *S v S* and *R v Walton* to determine whether an *injuria* is of such a nature as to warrant a criminal prosecution is whether it is ‘likely to have results that may detrimentally affect the interests of the State or the community’.

Fagan JA’s views found support not only in *Momberg* and the cases cited there but in *S v Macdonald* 1953 (1) SA 107 (T), *S v Chipo and Others* 1953 (3) SA 692 (SN), *Sachs v Die Werkerspers Uitgewers Maatskappy Edms Bpk and Others* 1952 (4) SA 419 (T), and *S v Jana* 1981 (1) SA 671 (T). (Both democracy and the law demand respect for a minority judgment!)

In *Sachs De Villiers J summed up the import of Fuleza in the following terms (citations removed):

> That defamation is still a crime in our Common Law appears from the case of *Rex v Fuleza*... That case also indicates however that... the public prosecutor has no right to take proceedings unless the defamation is a serious one affecting the common weal, and that... the practice was not to prosecute in lighter cases.

The second most important case

Next comes *S v Dziva* 1971 (4) SA 185 (R). Yes, it is a Rhodesian case, and the presiding judge was the well-known Beadle CJ:

> ... The distinction between criminal defamation and criminal *injuria* is that in the one case the injury is to the *fama* of the complainant, and in the other to his *dignitas*, but most serious charges of criminal defamation will injure both the *dignitas* and the *fama* of the complainant at one and the same time; for example, to call a woman a prostitute in the presence of many witnesses will undoubtedly injure her dignity but at the same time it will also injure her reputation. In this instance both the crime of criminal *injuria* and criminal defamation would be committed....

There is no doubt that in the circumstances of this case criminal defamation is the more serious offence of the two. To injure a man’s dignity may be a serious offence, but it is not so serious as the offence of defamation. In the case of defamation the injury is published to the world and not only the man’s dignity suffers but also his reputation with his fellow men. In this case if the accused had merely called the complainant, a respectable female teacher, a prostitute and nobody else had heard him say so, the offence of criminal *injuria* would have been committed, but to publish to all her pupils that she was a prostitute is undoubtedly the more serious offence of the two. On these facts I would also consider that the charge of criminal defamation is the more appropriate one, and there is no doubt that the accused’s dominant purpose was to injure the complainant’s reputation in the eyes of her pupils. By any test, therefore, the correct charge in the instant case was criminal defamation, and to this extent the charge sheet is at fault.

The Namibian case of *Kauesa v Minister of Home Affairs and Others* 1995 (1) SA 51 (NM) includes a finding, made on a balance of probabilities, of criminal defamation.

In *S v Gibson NO and Others* 1979 (4) SA 115 (D) the Sunday Express, its editor and a reporter were charged with contempt of court and criminal defamation. In what appears to me to be a brilliant judgment, Milne J discharged the accused. On the charge of criminal defamation, he said:

> In view of the conclusions to which I have come, it is unnecessary (and in view of the length that this judgment has already reached, undesirable) to consider the interesting question as to whether (a) the crime of criminal defamation is restricted to ‘serious’ cases or cases of an aggravated nature and (b) whether this case falls within the category of ‘serious’ defamation.

What of the new South Africa? In *Du Plessis and Other v De Klerk and Another* 1996 (3) SA 850 (CC) there are a couple of hints (certainly nothing close to a finding) that the common-law offence of criminal defamation might be ‘inconsistent with the right of freedom of speech’.

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14—An irreverent newsletter designed to keep you up to date—
‘Any’ as an article

Once you have incorrectly used the word ‘any’ as an article (‘a’, ‘an’ and ‘the’), in fact, as an indefinite article (‘a’ and ‘an’), what do you do when you want to use it in its proper role, as an adjective of number or numeral adjective or, better, a quantifying determiner? In 79 TSH 2009 I showed that the idiot draftsperson, trying to solve this problem in s 4A(2) of the Estate Duty Act, was constrained to use the words ‘any one’:

EDA s 4A(2)
(2) Where a person was the spouse at the time of death of one or more previously deceased persons, the dutiable amount of the estate of that person shall be determined by deducting from the net value of that estate, as determined in accordance with section 4, an amount equal to the amount specified in subsection (1)—
(a) multiplied by two; and
(b) reduced by the amount deducted from the net value of the estate of any one of the previously deceased persons in accordance with this section.

I have now discovered another attempt at a solution, in the definition of an ‘associated institution’ in para 1 of the Seventh Schedule to the Income Tax Act, using the words ‘any single’:

ITA 7th Sch para 1 sv ‘associated institution’
’[A]ssociated institution’, in relation to any single employer, means—

Words & phrases—‘held’, ‘holds’

One of the things that interests me—for reasons that I hope will become apparent—is the meaning of the word ‘held’ in the Income Tax Act. The trouble is that it appears about 270 times, too many to easily analyze. Luckily, the act includes only sixty-five instances of the word ‘holds’, the present tense of the verb ‘held’, and it is hugely unlikely that the two usages would bear different meanings.

In three instances, the word ‘holds’ is used in the sense of the holding of an office (definition of a ‘director’ in s 1; s 75(1)(h); and the definition of the term ‘standard employment’ in para 11B(1) of the Fourth Schedule to the act).

Looking through the list (which you can generate for yourself with the ‘Search’ function of Adobe), my inescapable inclination is to take it as bearing a patrimonial (property) connotation, in the sense that the person who ‘holds’, owns.

In a few instances, ownership is specifically required to be direct, and in others, indirect. In others it is specifically allowed to be one or the other, that is, either direct or indirect. While I should like to investigate the issue one day, for the moment I shall assume that indirect ownership is envisaged only when it is specifically mentioned. On this basis, the default is direct ownership.

Holds an interest & forms of ownership

What might cause me to hesitate from declaring, unequivocally, that ‘holds’ indeed means owns are the two instances in which the word ‘holds’ is used in the context of ‘holds an interest’.

(If I had my way, the word ‘interest’ would be banned from fiscal legislation, on account of its ambiguity; see, for example, 80 TSH 2009 on a ‘contingent interest’. I would demand, instead, the use of the words ‘right’, indicating ownership, and ‘spes’, indicating a hope of possible ownership.)

Both these two instances have to do with the primary residence exclusion in CGT, and both clearly have to do with ownership. But of what? The term ‘an interest’ is defined in para 44 of the Eighth Schedule. (A stupid definition, if ever I saw one. Why use a word with so much baggage of its own as a term of art?)

The definition is not of current concern but does remind me that ownership takes many forms. For example, I might own a fixed property or a right to the income it produces (usufruct), or I might enjoy perhaps even substantial rights under a lease over the property. The various rights I would enjoy under these different circumstances would all constitute ‘property’ under the common law.

Rather ‘a patrimonial right’

Thus, in order to provide for all instances of the word ‘holds’, instead of assuming that it necessarily means owns, suggesting full enjoyment of some property, I shall assume that, at the very least, it means enjoys a patrimonial right to or in property.

The old ownership convention

Running my eye over the list of instances of the ‘holds’ usage in order to test how comfortable this assumption feels, I find a reference to trading stock, which appears in s 45(1)(b)(ii), part of the wretched ‘intra-group’, corporate-reconstruction concession, where the word ‘holds’ clearly means owns. But it reminds me of the ownership convention we used to indulge, in that, for purposes of the Income Tax Act, we would treat the person who buys an asset under a suspensive sale as its owner.

This convention was supposedly eradicated by a number of tedious amendments to the so-called special allowances, as a result of which, many (perhaps all that were intended; who could possibly know?) now include this magical incantation:
[Property] owned by the taxpayer or acquired by the taxpayer as purchaser in terms of an agreement contemplated in paragraph (a) of an ‘installment credit agreement’ as defined in section 1 of the Value-Added Tax Act, 1991 (Act no 89 of 1991).

Installment credit agreements

While I might acquire such property, I certainly do not own it. And, while I am sure that not a single instance of the usage of the word ‘holds’ would for an instant tolerate acquisition bereft of ownership, my present aim is to extrapolate from the word ‘holds’ to the far more common word ‘held’. How can I do that without resolving the problem posed by installment credit agreements (icas)?

The provision that most concerns me is s 22, that dealing with year-end trading stock, which conjures with the hugely significant concept ‘held and not disposed of’. This clearly allows for a meaning for the word ‘held’ other than owns. After all, how can I both hold and dispose of unless the word ‘hold’ in this particular context means have in my possession but not necessarily own?

Making matters infinitely worse is the very much more modern s 23F, on the acquisition and disposal of trading stock, which conjures with the even more radical concept of a taxpayer’s incurring expenditure for the acquisition of trading stock which was neither disposed of by him during such year nor held by him at the end of such year.

At the same time, I cannot for a moment suggest that trading stock I acquire on consignment or under a floor plan (motor industry) is my ‘trading stock’. It simply isn’t!

While I take some time out to ponder this issue, I shall assume that the trading stock provisions are indeed concerned with possession—but only of property at least at some stage owned by the taxpayer.

Trading stock

Nevertheless, I am left with a very strong suspicion that the ownership convention still applies to trading stock, in that property I acquire under an ICA is my trading stock, not the bank’s. The tax system would otherwise fail to work properly.

A stress test & not a bank in sight

It remains to test the list of the usages of the word ‘held’ against this tentative analysis.

- Several instances represent annotations derived from amending acts, which thrive on the concept of property ‘held or acquired’. What can the word ‘held’ mean in such a context other than owned?
- Section 9(2)(a) conjures with the concept of ‘immovable property held by that person or any interest or right of whatever nature of that person or in immovable property’. What clearer illustration could I ask for of the difference between full enjoyment and some other, lesser form of patrimony? (In fact, the term ‘interest in immovable property’ is for this purpose extended even further by the so-called proviso to s 9(2).)
- The words ‘hold’ and ‘held’ are defined in s 41(1) for purposes of the corporate restructuring concession in terms of the definition of a ‘shareholder’ in the same place. And that is decided purely on patrimonial grounds: ‘rights of participation in the profits, income or capital attaching to that equity share’. (This definition differs in a material way from the definition of the same term in s 1! Can you spot the difference?)
- And there are three instances in the Seventh Schedule, on fringe benefits, of the usage ‘property held under a lease’.

Conclusion

I am pretty confident that, throughout the act, the words ‘held’ and ‘holds’ mean, at best, owns, and, at worst enjoys a patrimonial right to or in property. Perhaps only in relation to trading stock might the word ‘held’ include enjoyment under an ICA.

Does the act use the term ‘owns’? Yes, three times. ‘Full ownership’? Eight times. ’Ownership’? About forty-two times. And ‘own’; but purely in a patrimonial sense? Only once.

‘Ownership’ I can understand, but ‘owns’ and ‘own’? Their usage simply has to represent elegant variation on the idiot draftsperson’s part, or else an unfamiliarity with a statistical approach to legal drafting. Not in a million years could these miserable few outliers suggest that the words ‘holds’ and ‘held’ mean something other than ownership.

92 TSH 2010—November 2010

Words & phrases—‘mainly’

The draft sars guide on the disposal of a residence from a company or trust (see the Monthly Listing) is an admirably scholarly work, despite the rubbish law it tries to explain and a point or two with which I disagree.

For example, it records the precedent by which we understand the word ‘mainly’ to indicate ‘more than 50%’.

It comes from the meticulous judgment of Both JA in SBI v Lourens Erasmus (Eiendoms) Bpk 1966 (4) SA 434 (A):

Ek meen dus dat die woord ‘hoofsaaklik’ in die uitsonderingsbepaling by art 51(f) [an obsolete UPT provision] ‘n suwer kwantitatiewe maatstaf van meer as vyftig persent voorskryf, en dat die gebruik daarmee saam van die alternatiewe ‘uitsluitlik’ geen afbreuk daaraan doen nie.
VAT: what is ‘brown wheaten meal’?

The general sales tax (GST) that preceded our current VAT system was very much an engineer’s tax, in that the meaning of a great many of its terms could be ascertained only with the help of experts in various fields, particularly engineers. The VAT law is kinder to those with good memories, which is how tax specialists were identified at a recent dinner party I attended. Nevertheless, the VAT law does occasionally display an ‘engineering’ flavour, and, when it does, not memory but research is what will count if questions such as the one posed here are to be answered.

My very first Google hit in response to the input of ‘brown wheaten meal’ consisted in GN R 577 GG 13074 of 15 March 1991 (see the Monthly Listing), being regulations relating to wheat products under the Marketing Act 59 of 1968. That act has been repealed, having been replaced by the Marketing of Agricultural Products Act 47 of 1996, yet these wheaten regulations are referred to several times in SARS literature, and I can find no replacement for them under the new act.

Can they somehow still be current? Section 27(2)(a) of the new act provides for their continuation, but for a period that has surely long since prescribed. What is more, the editors of Jutastat note that s 27(2) has been deleted by the Marketing of Agricultural Products Amendment Act 52 of 2001, although the deletion still requires proclamation.

(Now what act might that be? It turns out that they meant to refer to the Marketing of Agricultural Products Amendment Act 52 of 2001.)

These regs thus sound pretty dead to me (SARS please note), so I Google ‘R 577 of 15 March 1991’, and hit pay dirt in the form of GN R 186 GG 30782 of 22 February 2008 (see the Monthly Listing). This purports to repeal GN R 577, although in my book the dastardly deed was done by other means.

At last! The meaning of ‘brown wheaten meal’ is at hand. But it isn’t. The words ‘wheaten’ and ‘meal’ just don’t appear in the new regs. What does appear is a definition of ‘brown bread wheat flour’. Could there be a connection?

In the old regs, ‘brown wheaten meal’ is defined as wheaten meal complying with the requirements of regulation 5(1)(a), while regulation 5(2) allows for some tolerance in the application of those requirements. In the new regs, ‘brown bread wheat flour’ is defined as wheat flour complying with the requirements of regulation 4(11).

The requirements of the old and new regs differ in a number of respects, for example, in the way that the need to fortify foodstuffs under the Foodstuffs, Cosmetics and Disinfectants Act is handled. (The old regs define ‘chlorinated wheaten flour’, only never to mention the stuff again.) What I am looking for, though, is a way to equate ‘meal’ (the old) with ‘flour’ (the new), despite the subtle differences between the two terms to be found in dictionaries.

The old regs define the terms ‘wheat flour’ and ‘wheat meal’ as being essentially identical, except that flour is required to be milled, while meal may optionally be milled. In the old regs, ‘brown bread’ is made from meal; in the new, from flour, which is why I eat rye.

The new regs define the term ‘milling’ in the following manner:

‘[M]illing’ is a process through which the components of a wheat kernel (endosperm, bran and germ) are separated and the particle size of the endosperm or starch component is milled or ground down to flour fineness;

So, while not being an engineer or a baker, I feel pretty confident in declaring that I understand Item 17 of para 1 of Part B of Schedule 2 to the Value-Added Tax Act, read with s 11(1)(j) of that act, which zero-rates:

Item 17 Brown wheaten meal, being pure, sound wheaten meal, but excluding separated wheaten bran, wheaten germ and wheaten semolina.

In modern terminology, it means brown bread wheat flour, being wheat flour, but excluding wheat bran, wheat germ and wheat semolina. The VAT law and the new regs thus tie up nicely.

But, I hear you say;

What about whole wheat and whole-wheat brown flour?’

Sigh. There’s no satisfying some people.

The old regs included ‘whole-wheat meal’ as a ‘wheat meal’. But it would have had to be ‘brown’ in order to qualify for the zero-rating. The modern equivalent under the new regs is whole-wheat brown flour, which looks to me as if it may not be milled. (Geddit? Whole wheat.)

Summing up

To sum up: No matter what the VAT law or SARS might say, what are zero-rated today are brown bread wheat flour and whole-wheat brown flour.
Words & phrases—‘grant’

This is the mad way in which the Value-Added Tax Act starts, as, \textit{mutatis mutandis}, do all our fiscal statutes:

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

In other words, words bear their defined meaning, unless they don’t!

Taxes are supposed to be precisely defined, otherwise they are unenforceable, yet they are founded upon such a profound, fundamental uncertainty.

The reason why a definitional reservation of this type is considered necessary is illustrated by the word/term \textit{grant}/‘grant’, as it is used in the Value-Added Tax Act.

The term ‘grant’ is defined in s 1. It represents a recent addition to the VAT lexicon:

\begin{quote}
‘G\textit{rant}’ means any appropriation, grant in aid, subsidy or contribution transferred, granted or paid to a vendor by a public authority, municipality or constitutional institution listed in Schedule 1 to the Public Finance Management Act, 1999 (Act no 1 of 1999), but does not include—
\begin{enumerate}
\item[(a)] a payment made for the supply of any goods or services to that public authority or municipality, including all goods or services supplied to a public authority, municipality or constitutional institution listed in Schedule 1 to the Public Finance Management Act, 1999 (Act no 1 of 1999) in accordance with a procurement process prescribed—
\begin{enumerate}
\item[(i)] in terms of the Regulations issued under section 76(4)(c) of the Public Finance Management Act, 1999 (Act no 1 of 1999); or
\item[(ii)] in terms of Chapter 11 of the Local Government: Municipal Finance Management Act, 2003 (Act no 56 of 2003), or any other similar process; or
\end{enumerate}
\item[(b)] a payment contemplated in section 8(23);
\end{enumerate}
\end{quote}

The defined term is a noun. The definitional reservation allows you to give the transitive verb \textit{grant} its ordinary meaning. This licence must be extended to \textit{grant}, the verbal noun (the act of granting), as used in s 8(11):

\begin{quote}
(11) For the purposes of this Act, a supply of the use or right to use or the \textit{grant} of permission to use any goods (whether with or without a driver, pilot, crew or operator) under any rental agreement, instalment credit agreement, charter party, agreement for charter or any other agreement under which such use or permission to use is granted, shall be deemed to be a supply of goods.
\end{quote}

Here, in s 12(d) (89 TSH 2010), on the other hand, \textit{grant} is used as a noun but clearly not bearing the defined meaning of the term ‘grant’:

\begin{quote}
(d) the supply of leasehold land by way of letting (not being a \textit{grant} or sale of the lease of that land) to the extent that that land is used or is to be used for the principal purpose of accommodation in a dwelling erected or to be erected on that land;
\end{quote}

The \textit{glfnx} principle

In a statute, then, the definitional reservation is necessary because the idiot draftsperson doesn’t know what I call the \textit{glfnx} principle: there is no way you could possibly confuse the defined term ‘\textit{glfnx}’ with any ordinary word.

The bog-ordinary word \textit{grant} ought never to have been selected as a term of art, especially when it had already been used in the statute concerned, under its ordinary meaning, not only in the couple of instances cited here but, as a verb, several times in the sections dealing with dispute resolution.

In a mere contract, resort to the definitional reservation is an effete affectation of the weak, insecure and hidebound draftsperson.

The definitional reservation

Learning law with your PC: redistribution agreements (a true shocker)

In 80 TSH 2009 I dealt with the repudiation of an inheritance, with the intention of elucidating the nature of the interest of what I call a beneficiary under a will. To cut a long story short, such an interest is properly identified as a personal right against the executor to claim a testamentary benefit, should the property concerned survive the administrative process. It is not a patrimonial right—that is, it is not property—but a form of contingent interest or \textit{spes}.

I learnt an awfully long time ago that a \textit{redistribution agreement} is an agreement between the beneficiaries under a will not to exchange property but to rearrange the character of their respective entitlements upon their adiation—the only point at which they acquire property, either directly or in the form of a claim for delivery against the executor.

Today, I would guess that, whether or not their agreement is a valid redistribution agreement, their signatures thereto would of themselves necessitate
and thus evidence their adiation under the will.

But when the buggers play silly buggers and try and rewrite the deceased’s will for (usually) him, usually in an attempt to defraud SARS, what happens in law is that they effectively adiate under the will and acquire property, and then proceed to divvy that property up between themselves, usually to the massive advantage of the surviving spouse (and, more to the point, his or her eventual heirs). Unknowingly, they thus trigger two sets of chargeable events—once out of the estate, and again as between themselves.

Thus a valid redistribution is not in itself a patrimonial event; the beneficiaries benefit exactly as envisaged under the will, albeit not in the specific form so envisaged.

Redistribution agreements are dealt with in the Close Corporations Act, the Deeds Registry Act, the Mining Titles Registration Act and, if you search hard enough, the Income Tax Act and the Transfer Duty Act.

Wanting to flesh out this understanding by reference to the case law, I pulled my usual trick of searching the South African Law Reports published by Jutas, and got the shock of my life. Not only is the reference to the case law, I pulled my usual trick of searching the South African Law Reports published by Jutas, and got the shock of my life. Not only is the Income Tax Act and the Transfer Duty Act.

Wanting to flesh out this understanding by reference to the case law, I pulled my usual trick of searching the South African Law Reports published by Jutas, and got the shock of my life. Not only is the Income Tax Act and the Transfer Duty Act. In my judgment, for the reasons already discussed, it

... What appellant’s counsel did contend was that the oral agreement constituted a redistribution agreement. He relied in particular on a dictum of C Clayden J in Klerck NO v Registrar of Deeds 1950 (1) SA 626 (T) at 629:

‘I agree with the argument on behalf of the appellant that in every redistribution there must be involved sale, exchange, or donation between one heir and another, or between the heir and the surviving spouse.’

Because it was a redistribution agreement, and did not involve a sale or donation, therefore, so the argument proceeded, it must be an exchange.

The short answer is of course that this approach begs the question—the issue is not whether the agreement can be described as a redistribution agreement, but whether it amounted to an exchange. In my judgment, for the reasons already discussed, it did not. Nor do I consider that the appellants can derive any real support from the dictum of Nienaber AJA (as he then was):

But a further shock awaited me. The reason why I have visited this particular topic is that a truly clued-up sometime contributor to this newsletter warned me that he did not believe that Meyerowitz on Administration of Estates supported my view of redistribution agreements. That warning struck me as odd, since what I believe I know about the topic I learnt, mano a mano, from the justly famous Dave Meyerowitz himself.

Yet it is true. At § 12.31 appears a sentence that, believe it or not, reminds me of what Advocate Meyerowitz himself told me, so many years ago and explains why it took me so many years fully to understand what he said:

The basis of a redistribution agreement is that the heirs or legatees who have vested rights are able to deal with these rights.

The citation is to Bydawell v Chapman 1953 3 SA 514 (A).

You are going to have to trust me on this one. Lawyers use the word vested far more incautiously than tax accountants, and what are referred to here, all appearances to the contrary notwithstanding, are not, I repeat, not patrimonial rights.

As for Bydawell—and this point you are free to check for yourself—well, I am sorry to report that it has nothing at all to do with what in law is properly referred to as a redistribution agreement.

So, smartass, you might respond, if there ain’t no case law and the leading textbook is wrong, how on earth could I know what is and what isn’t a redistribution agreement?

Easy-peasy. The qualification of an agreement as a redistribution agreement, as opposed, say, to a so-called family agreement, is mediated by the principle of the testamentary power. usurp that power, and you have a family agreement, chockablock full of patrimonial events, and tax bills (income tax, CGT, VAT, donations tax, transfer duty, estate duty; you name it) that will set your ears ringing and your head spinning. Anything less will be the ware Jakob—a redistribution agreement.

And for the same price I’ll tell you one thing more. In the old days no one understood these principles better than what, with justification, we used to call SARS assessors.

95 TSH 2011—February 2011

Words & phrases—‘their children’

A husband and wife are beneficiaries under a trust, as are ‘their children’. Would the husband’s child from another relationship be included?

Here is what was said in Manjra v Desai and Another 1968 (2) SA 249 (N):

In that context the word ‘their’, although used as a possessive adjective, does not necessarily connote collective possession. (See The Oxford English Dictionary, sv ‘their’, ‘The boys know their Greek
An employer’s vicarious liability (& tax)

First off, why my interest in this topic? There’s a hint in 86 TSH 2010: it goes to an employer’s right to claim an income tax deduction for the costs occasioned by his employee’s delict or crime.

For example, I am driving on my employer’s business. As a result of a cunningly placed camera and entirely unsupervised, unconstitutionally installed road furniture and markings, I am fined for ‘speeding’. (It’s actually a form of direct taxation or extortion.) According to the vicarious liability rules, I am liable but so is my employer. My employer created the risk of causing harm by commanding me to venture upon the public roads and so should be liable when the harm occurs.

Is my employer denied a deduction under s 23(o) of the Income Tax Act? Hell no! It has suffered no ‘fine’ but has discharged a liability imposed by common law.

Can it then actually claim a deduction? Alas No, at least not in the example I have given, since the state is unlikely to raise a claim for a traffic fine against my employer, and thus bring about an incurral for the employer to claim any VAT.

Contractually, the parties can deal with possible delictual claims as suits (as directors are so commonly indemnified), but an agreement to shield a liable party from his wrongful act would, I am sure, be unforeseeable and thus constitute what I would these days call a ‘patrimonial nullity’, since a deduction demands a preceding incurral, resulting in property for one party (a patrimonial claim against the other) and liability for the other.

What about VAT? vr is concerned not with incurrals but ‘supplies’, and any costs incurred personally by an employee in a matter involving his employer’s vicarious liability would involve supplies made to the employee, not the employer, even if the employer is made to pay. For the employer to claim any VAT involved as input tax would itself be a crime; a very serious one (perpetrated every day in analogous circumstances by vendors across the land, and now outrageously mandated by SARS for employers of SAICA members—94 TSH 2011).

The vicarious liability rule

I am thrilled with the success of my ‘learning the law with your PC’ series, which exploits the public and commercial databases with which we are so abundantly blessed, and the astonishing utility even of simple search algorithms. But its limitations were brought home by Nugent JA’s (majority) judgment in Minister of Safety and Security v F (592/09) [2011] ZASCA 3 (22 February 2011) (see the Monthly Listing).

In 86 TSH 2010, I fingered K v Minister of Safety and Security 2005 (6) SA 419 (CC), also involving rape by policemen, as the leading case on vicarious liability. And, indeed, Nugent JA’s judgment opens with a reference to that case.

More leading cases

Yet the case he is most concerned with is Minister of Law and Order v Ngobo 1992 (4) SA 822 (A), ‘with reference to two cases that it [the court in Ngobo] described as “lodestars in this firmament”’ (Mkize v Martens [1914 AD 382] and Estate Van der Byl v Swanepoel [1927 AD 141])’. He refers also to Feldman (Pty) Ltd v Mail 1945 AD 733.

None of these cases is mentioned in my earlier piece, understandably in relation to the lodestars and Feldman, which are represented only and by chance in a physical database in my possession. But my PC approach altogether missed Ngobo.

Ngobo found part of the reasoning in Minister of Police v Rabie 1986 (1) SA 117 (A) to be wrong (the reason for a rule is not the same thing as the rule). Yet the Constitutional Court in K adopted the two-stage enquiry laid down in Rabie (state of employee’s mind; sufficient link between employee’s acts and employer’s business). Nugent JA seems to me to be saying that K wasn’t really a vicarious liability but a state-liability case.

Nevertheless, in K the Constitutional Court made an express finding of vicarious liability, on the basis of a policeman’s personal liability for duties he omits to fulfil. By inference from that case, the state was not vicariously liable for the personal delictual acts of a policeman (while not performing official duties). If the Constitutional Court in K could in such circumstances find that the state would not be vicariously liable, then, a fortiori, Nugent JA would so find.

A raping policeman can hardly be said to be engaged in the affairs of his employer. Even following Ngobo, how could anyone say he was ‘engaged in his master’s affairs’? And an application of Feldman would reveal the errant policeman as going about his own rather than his employer’s affairs. All of the
You to judge the issue from these excerpts from the Cause for dissatisfaction

So lawyerly a judgment and such obeisance to the call, he had to be called back on duty to be on duty.

Object he is writing about. Is a new target being introduced, or have we already been introduced? Only by which I mean the way in which a particular writer keeps track of the person, thing, subject or topic he is writing about, is it a quantifying determiner, which the idiot fiscal draftsperson thinks is an article. The result is that when the sad sap wants to use ‘any’ properly he has to signal his intention by resorting to unidiomatic contortions (79 TSH 2009—‘any one’; 88 TSH 2010—‘any single’).

I am nevertheless unready to claim credit for a miraculous purity in the usage of articles in the income tax Voluntary Disclosure Programme. The joke (well, I find it funny) is that most readers of the relevant law are unable to grasp the considerable significance of that purity; at least not immediately.

Here is the issue: The VDP is about ‘defaults’ (actually, highly qualified defaults, but I am not going down that road today). Must you disclose all your defaults or may you choose which to disclose?

Typically, SARS, in its copious writings on the VDP, fudges the issue, hoping that you will think that a clean breast of all fiscal sins is required, without actually telling you that in so many words.

The proper use of articles is central to clear writing, since it answers the Who am I?—by which I mean the way in which a particular writer keeps track of the person, thing, subject or object he is writing about. Is a new target being introduced, or have we already been introduced? Only when you come across a writer clueless about this issue will you fully understand what I mean, and one day I shall publish some hilarious examples to prove my point, safe from any danger of hurting the feelings of the culprit concerned, on the sure footing that bad writers never read.

Since this is an evidence-based newsletter, I leave you to judge the issue from these excerpts from the Words & phrases: ‘a’ v ‘any’ & the VDP tax VDP. They comprise every reference to a default:

the default in respect of which the person wishes to apply for voluntary disclosure relief

involve a default

involve the potential application of a penalty or additional tax in respect of the default

be in respect of a default which occurred prior to 17 February 2010

which information need not include the identity of any party to the default

the material facts of the default on which the voluntary disclosure relief is based

any further outstanding tax in respect of the relevant default

In the last excerpt, the word ‘relevant’ is almost certainly tautological.

What is also demonstrated here is the power of what I call a statistical approach to the interpretation of statutes and contracts. In this instance, the total population of usages is perfectly consistent, in that a single default is envisaged, and anyone disagreeing with me will be unable to substantiate his position, since, in matters of interpretation, no concessions are made to mere feelings or insupportable theories.

While it is true that the Interpretation Act says that, in the context allows, the singular shall include the plural form, its application merely means that you are free to disclose more than one default. It cannot possibly be applied so as to mean that you must disclose all your defaults.

To argue otherwise is to confuse definitions with substantive law.
the employee’s authority, is not done in the course of employment even if done during such employment. Uncertainty created by later judicial pronouncements as to the content and ambit of the rule was removed by the decision in Minister of Law and Order v Ngobo 1992 (4) SA 822 (A). [95 TSH 2011]

The reason for the rule is often stated to be public policy. See, for example, Salmon and Heuston on the Law of Torts 19 ed at 507. And an underlying reason for that policy has been held in Feldman (Pty) Ltd v Mall 1945 AD at 733, in a passage at 741, to be the consideration that because an employer’s work is done ‘by the hand’ of an employee, the employer creates a risk of harm to others should the employee prove to be negligent, inefficient or untrustworthy. The employer is therefore under a duty to ensure that no injury befalls others as a result of the employee’s improper or negligent conduct ‘in carrying on his work’.

The question is always as Howie JA put it (para 10), ‘were the acts in the case under consideration in fact authorized; were they in fact performed in the course of the employee’s employment?’

96 TSH 2011—March 2011

Learning law with your PC: the in duplum rule

This one is especially easy. All you have to do is read the judgment of Shongwe JA in Margo and Another v Gardner and Another; Gardner and Another v Margo and Another 2010 (6) SA 385 (SCA). It happens to be the first SCA decision to respond to a search for the string “in duplum” in the South African Case Reports published by Jutas, from 1977 to date:

It is trite that the in duplum rule forms part of South African law. It is also axiomatic that the in duplum rule prevents unpaid interest from accruing further once it reaches the unpaid capital amount. However, it must be borne in mind that a creditor is not prevented by the rule from collecting more than double the unpaid capital amount in interest, provided that he at no time allows the unpaid arrear interest to reach the unpaid capital amount. On the facts of this appeal this court is not asked to review the order of the SCA, but to give effect to it as it stands. The order of the SCA is unequivocal and does not provide for any interest ceiling. Therefore the amounts claimed in the second writ are all due and owing by Gardner to Margo on the strength of the SCA judgment. The purpose or basis of the in duplum rule is to protect borrowers from exploitation by lenders who permit interest to accumulate, but essentially also to encourage plaintiffs to issue summons and claim payment of the debt speedily. Delays inherent in litigation cannot be laid at the door of litigants and it would be unfair to penalize a creditor with the application of the in duplum rule while proceedings are pending.

96 TSH 2011—March 2011

‘Exporter’: does a defined noun define the corresponding verb?

Nugent & Lewis JA in Standard General Insurance Company Limited v Commissioner for Customs and Excise Case no 622/02 (I have omitted the footnotes):

… In other words, argues Standard General, although the noun (‘exporter’) is defined, the definition does not extend to the use of the verb.

In support of that contention it was submitted that if the drafter of the legislation had intended to refer to an ‘exporter’ as it is defined in the Act that word would have been used in place of the phrase ‘person who exports’. Moreover, it was pointed out that when defining the noun the drafter of the legislature did not expressly extend its meaning to the use of the verb, as is often done in legislation. For example, when the definition of the word ‘manufacture’ was later inserted in the Act it expressly provided that the noun would bear a corresponding meaning.

In our view some caution is required before attributing an intention to the drafter of legislation by inference. Giving meaning to particular words by drawing upon language that is used elsewhere in a statute is no more than the application of a process of logical reasoning—it is usually reasonable to infer that the compiler of a single document has used language consistently throughout. But where a voluminous and complex statute has been repeatedly amended, probably by various drafters, over a long period of time—as in this case—that inference will not necessarily be sound.

In our view the drafter of s 18A (which was inserted when the definition of ‘exporter’ already existed) might just as well have held the view that because a ‘person who exports’ is the linguistic equivalent of an ‘exporter’ the former phrase would suffice. Naturally the noun might have been used instead but we do not think that a contrary intention was necessarily signified by the choice of words that have an equivalent meaning.

We also think it would be remarkable—simply from a consideration of the intelligibility of language—if the drafter of the definition of the noun were to have intended the verb to be used with a different connotation. It is true that where a noun is defined in legislation the drafter often expressly attributes a corresponding meaning to the verb—and vice versa—but that begs the question whether it is strictly necessary to do so. There are clear examples of tautology in the Act, just as there are examples of particular words being used when others might have sufficed.

Rather than attempting to draw inferences as to the
drafters intension from an uncertain premise we have found greater assistance in reaching our conclusion from considering the extent to which the meaning that is given to the words achieves or defeats the apparent scope and purpose of the legislation. As pointed out by Nienaber JA in De Beers Marine... when dealing with the meaning of ‘export’ for the purpose of s 20(4)—which draws a distinction between export and home consumption—the word must ‘take its colour, like a chameleon, from its setting and surrounds in the Act’.

While the word ‘exporter’ as it is used in subsections (2) and (3) is clearly a reference to the ‘person who exports’ in subsection (1), in our view the person who is referred to in subsection (1) is, by equivalence of language, an exporter, and that word is in turn defined. That construction seems to fit more readily with the apparent purpose and operation of the Act than a construction that gives a narrow meaning to the phrase.

The object of the Act (in so far as it relates to import duty) is to ensure that duty is collected on goods that are imported into this country and its provisions are mainly directed towards that end. It is not surprising that liability for the payment of duty should be imposed upon more than one person, or upon one person in more than one capacity, for the Commissioner cannot be expected to know who has what interest in goods that are landed.

There are various provisions in the Act in which liability for the payment of duty is imposed at different times on a variety of people who might have some interest in the goods and s 44(6)(c) provides an appropriate example. When goods are imported and delivered by a carrier to a customs warehouse duty becomes payable by, amongst others, the ‘importer’ of the goods, defined to include a person who owns the goods, a person who carries the risk in the goods, a person who represents that or acts as if he is the importer or owner of the goods, a person who actually brings the goods into the Republic, a person who is beneficially interested in the goods, and a person who acts on behalf of any of the aforementioned persons. Just as different people might become liable for the payment of duty so one person might incur liability in different capacities. Furthermore the agent of any such person might become liable not only because he is an importer as defined but also by virtue of the liability imposed on agents generally by s 99(2). Duplication of payment is avoided by s 44A which absolves each of the various persons from liability upon payment of the duty by one of them.

Where the net has been cast that widely upon the importation of goods (to include all those who might have an interest in the import) we would expect the net to be cast equally widely (to include all those who might have some interest in the export) when the goods are removed for export before the duty has been paid, rather than that liability would be limited to only a single person—and possibly his agent. For an agent becomes liable in terms of s 99(2) only if he is the agent, or represents himself to be the agent, of a principal who is himself liable for the payment of duty. It cannot be assumed that a clearing agent will necessarily be appointed by, or represent himself to have been appointed by, the person who is in truth the exporter as narrowly defined (the person who actually exports the goods, whoever that person might be). It can also not be assumed that only one person will undertake the process of exporting from beginning to end. It is unlikely that the legislature would have intended that goods should be permitted to leave the warehouse for export (with the inherent potential that the goods might never leave the common customs area) but that the liability for duty would devolve only upon one undefined person. We do not think the legislature could have intended the Commissioner to seek out the true exporter in order to collect the duty from that person, and perhaps from his agent (but only if the agent has been appointed by, or has represented that he has been appointed by, that person).

In our view the legislature must have intended liability to fall upon all the persons who might have an interest in the export (those defined in the definition of an ‘exporter’) just as it imposed liability on all those who have an interest in the import and that a ‘person who exports’ was intended to bear that meaning.

96 TSH 2011—March 2011

Terms v conditions

In Southern Era Resources Ltd v Farrindell No 2010 (4) sa 200 (sca) 927 (27 November 2009), Mpati P said (footnotes removed):

It is not uncommon to find, in an agreement of purchase and sale, a heading or subheading that reads ‘Conditions of Sale’. What follows such headings are, usually, not true conditions which suspend the operation of the agreement, but enforceable terms of the contract, or both. As was said in R v Katz, the word ‘condition’, in relation to a contract, ‘is sometimes used in a wide sense as meaning a provision of the contract, ie an accepted stipulation’, such as includes ‘ordinary arrangements as to time and manner of delivery and of payment of the purchase price’. In the case of a true condition, however, whether suspensive or resolutive, the operation of the whole contract, or part thereof, and its consequences, depends upon an uncertain future event. In other words, the operation of the obligations flowing from the contract is suspended pending the happening, or failure, of the uncertain future event. Fulfillment of a suspensive condition results in the contract being enforceable. And, normally, if the condition fails and the parties have not agreed otherwise, the contract is rendered void.

The difference between a term of a contract (contractual obligation) and a condition is best described by Holmes JA as follows:

(A) contractual obligation can be enforced, but no action will lie to compel the performance of a condition.
Learning the law with your PC: ‘premises’ (& independent contractors)

The word *premises* is used only thirty-one times in the latest version of the Income Tax Act. It is defined only once, in s 74, solely for the purposes of ss 74 to 75, and thirteen of these thirty-one hits are accounted for by this usage:

‘[P]remises’ include any building, premises, aircraft, vehicle, vessel or place;

What this weirdly presented definition means is that the term ‘premises’ for this purpose bears its ordinary meaning (‘premises’ means...premises) but is extended so as also to include a building, an aircraft and a vehicle, vessel or place. Clearly, aircraft, vessels and a place would never ordinarily be considered to be premises; hence their specific inclusion in these provisions having to do with searches for information by SARS. On the other hand, a building would appear to represent a pre-eminent example of ‘premises’; its specific inclusion indicates that a building not constituting premises is intended. For example, a maize silo might in ordinary language be accepted as a building but hardly ever as premises. Under the definition, it would nevertheless be searchable.

In all its eighteen other usages, the word *premises* must bear its ordinary meaning.

What does my favourite dictionary, *Bloomsbury*, say about the word *premises*?

1. Land and buildings a piece of land and the buildings on it
2. Part or all of a building a building or part of a building, especially when used for commercial purposes

What does *Black’s*, the world’s finest legal dictionary, say?

3. A house or building, along with its grounds

*Black’s* includes a historical note on the word, showing that it derives from that part of a title deed denoting its physical subject-matter, and, I would suggest, making it extraordinarily difficult for anyone arguing for a wider meaning to succeed.

What about the case law? At first sight, my usual trick of searching *JutaStat* to find relevant case law appears hopeless, since the word *premises* appears thousands of times. But the string “meaning of premises” amazingly quickly yielded this gem, which simply has to be the leading modern case on the issue, represented by the judgment of Murray J in *Boyers v Standsfield Ratcliffe & Co Ltd* 1951 (3) SA 299 (T):

> There are a number of considerations which have led me to the conclusion that the judgment of the Court *a quo* is correct, and that a vacant stand or erf does not fall within the meaning of ‘premises’ so as to give the lessee thereof the protection of [the Rents] Act 33 of 1942 (as amended).

In the first place there is the general proposition, for which authority is to be found in numerous cases cited by *Craies on Statutes* (4 ed p 151), *Maxwell* (9 ed p 57), *Hailsham* (Vol 31, para 596), that language is generally to be given its natural meaning and words are to be construed in their popular sense. In the present case the popular meaning of the word ‘premises’ appears to connote the existence of buildings or structures, and neither by reason of any express definition nor (in my view) by reason of any implication of legislative policy is any meaning other than the popular one required.

In the second place, if regard be had to the aim and scope of the legislation, as evidenced by its history, it is noteworthy that the control of business premises came into existence considerably later than the control of dwellings.... But it seems that there is substance in the respondent Company’s contention that the amendment in 1946 of Act 33 of 1942 indicates that the Legislature was concerned not with a new type of property (viz entirely vacant land, as compared with built upon land), but with spreading the net so as to include the same type of property, viz a building with any appurtenant land when put to a new user, viz for business as opposed to residential purposes.

Why am I interested in the word? Because I have discovered that the construction industry is scared of it in the context of the definition of a ‘personal service provider’ in para 1 of the Fourth Schedule to the Income Tax Act (PAYE)

> (b) where those duties must be performed mainly at the premises of the client...; or

Why am I interested in the word? Because I have discovered that the construction industry is scared of it in the context of the definition of a ‘personal service provider’ in para 1 of the Fourth Schedule to the Income Tax Act (PAYE)

> (b) where those duties must be performed mainly at the premises of the client...; or

and of the term ‘remuneration’ in the same place (first proviso):

> Provided that for the purposes of this paragraph a person shall not be deemed to carry on a trade independently as aforesaid if the services are required to be performed mainly at the premises of the person by whom such amount is paid or payable or of the person to whom such services were or are to be rendered....

The ‘premises of the client’ are clearly its business premises, that is, the building, standing on a piece of land, in which it conducts its operations. So, too, are the premises of those paying remuneration or enjoying services. Not in a million years could a construction site comprise ‘premises’ for the purposes of these two provisions.

In any event, a construction site is neither owned nor hired by a contractor, and so could never be its
premises. If premises they be (an unlikely possibility), they are the premises of the owner or tenant of the land.

97 TSH 2011—April 2011

Words & phrases—‘subject to’

Nicholas AJA in Sentra-Oes Kööperatief Bpk v CR 1995 (3) SA 197 (A):

The question then is whether the effect of s 28(2)(c) is to confine the deduction available to a short-term insurer to ‘expenditure’ and to exclude a loss. In this connection the opening words of ss (2) of s 28, ‘[s]ubject to the provisions of this Act’, are important. They are to be contrasted with the opening words of ss (1), ‘[n]otwithstanding anything to the contrary contained in this Act’. In the majority judgment in S v C Marwane 1982 (3) SA 717 (A) at 747H–748B, Miller JA explained that the purpose of the phrase ‘subject to’ when used in a legislative provision, is ‘… to establish what is dominant and what subordinate or subservient; that to which a provision is “subject”, is dominant—in case of conflict it prevails over that which is subject to it. Certainly, in the field of legislation, the phrase has this clear and accepted connotation. When the legislator wishes to convey that that which is now being enacted is not to prevail in circumstances where it conflicts, or is inconsistent or incompatible, with a specified other enactment, it very frequently, if not almost invariably, qualifies such enactment by the method of declaring it to be “subject” to the other specified one. As Megarry J observed in C and J Clark v Inland Revenue Commissioners [1973] 2 All ER 513 at 520: “In my judgment, the phrase ‘subject to’ is a simple provision which merely subjects the provisions of the subject subsections to the provisions of the master subsections. When there is no clash, the phrase does nothing: if there is collision, the phrase shows what is to prevail.”

“But when the intention is that that which is now being enacted shall prevail over other laws or provisions which may be in conflict with it, it is almost invariably prefaced by a phrase such as “notwithstanding any contrary provision…” or words to similar effect…”

The effect of the words ‘[s]ubject to the provisions of this Act’ is therefore that, if there is a conflict, inconsistency or incompatibility between them, the gene deduction formula contained in s 11(a) prevails over the specific provision in s 28(2)(c). And no reason suggests itself why the Legislature should have wished to exclude the application to a short-term insurer of the deduction formula which in terms of s 11(a) is applicable to any person carrying on any trade within the Republic.

The wording of s 28 of the Income Tax Act has subsequently been substantially changed but the principle of interpretation stands.

98 TSH 2011—May 2011

‘Gross income’: reading the law, in sets

You have possibly read the definition of the term ‘gross income’ in s 1 of the Income Tax Act a hundred times—yet, have you?

‘[G]ross income’, in relation to any year or period of assessment, means—

(i) in the case of any resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such resident;

(ii) in the case of any person other than a resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such person from a source within or deemed to be within the Republic, during such year or period of assessment, excluding receipts or accruals of a capital nature, but including, without in any way limiting the scope of this definition, such amounts (whether of a capital nature or not) so received or accrued as are described hereunder, namely—

If you ever underwent any formal study of taxation, you would have been told that the famous special inclusions—paragraphs (a) to (n)—in ‘gross income’ following this opening statement are meant specifically to bring within the scope of the definition receipts and accruals of a capital nature, despite the general exclusion of such receipts and accruals. In other words, for ‘residents’, the opening words encompass the full set of worldwide noncapital receipts and accruals, while the special inclusions comprise a list of sets of receipts and accruals of a capital nature.

What tosh. The truth is that the opening statements does not by any measure constitute the full set of noncapital receipts and accruals, for the reason that several of the special inclusions clearly comprise further such sets. And one of the instinctive rules of sets is that you do not include within—that is, add on to—a set items it already includes. It follows that, without benefit of cross-references or ‘subject to’ clauses, what is specifically included after the opening statement must have been omitted from that statement to begin with.

For some of the famed special inclusions, then, the word including actually means excluding the following...
items, which are to be specifically included.
Most conspicuously omitted are receipts and accruals having their origin in services rendered, ostensibly a separate set catered for by para (c) of the definition:

(c) any amount, including any voluntary award, received or accrued in respect of services rendered or to be rendered or any amount (other than an amount referred to in section 8(1)) received or accrued in respect of or by virtue of any employment or the holding of any office: Provided that...;

I don’t know about you but I was never taught that the additional, para (c) set of receipts or accruals springing from services rendered in fact breaks down into two separate sets, one covering the services of independent contractors,

any amount, including any voluntary award, received or accrued in respect of services rendered or to be rendered,

and the other covering what in our tax treaties is referred to as ‘dependent personal services’, that is, employment (in the labour-law sense) and the holding of an office:

or any amount (other than an amount referred to in section 8(1)) received or accrued in respect of or by virtue of any employment or the holding of any office: Provided that...;

The exclusion from the second services set of s 8(1) amounts, that is, of allowances, tells you what ten or more years of study of s 8(1) itself will not conclusively reveal—that s 8(1) applies solely within the context of dependent personal services. After all, instinctively, you cannot exclude from a set items that it does not already include.

The far bigger picture is that the opening statement of what is ‘gross income’ not only excludes service-related receipts or accruals but all allowances, which, to the extent that they are taxable are in fact included in ‘taxable income’ (not gross income) by s 8(1).

It also excludes fringe benefits. The first proviso (it is not really a proviso) to para (c) at first sight comes across as an exclusion from both service-related sets of receipts of accruals (that is, both dependent and independent personal services):

Provided that—

99 TSH 2011—June 2011

Words & phrases: ‘carrying on business’

Here is an extract from the judgment of Beadle CJ in Estate G v COT 1964 (2) SA 701 (SR):

The sole issue in this appeal is whether or not the leasing of these properties in Bulawayo by the deceased constituted ‘carrying on business’ within the meaning of sec 12(1)(d) of the Income Tax Act, 1954, as amended.

The whole issue turns on what is meant by the words ‘carrying on business’, in this context. I do not think any useful purpose is served by examining meanings placed on these words in decided cases, where the words were not used in the same context.

Here, I think the statement of Kuper J in ITC 883 23...
A form of property is a *habitatio*. What follows is an extract from the judgment of Van Rooyen AJ in *Kidson and Another v Jimspeed Enterprises CC and Others* 2009 (5) SA 246 (GNP) (footnotes removed):

[6] *Habitatio* has since time immemorial been recognized as one of the personal servitudes, in addition to usufruct and use. In *Galant v Mahonga* Sampson J summed up the position well:

‘I have already held that her right amounted to *habitatio*. At one time in Roman law it was doubtful whether *habitatio* was a distinct servitude; but Justinian (*Inst* 2.5.2–5) decided to allow it to be classed among personal servitudes, although it seemed to the jurists to stand as a right by itself. See also D 7.8.10, C 3.33. The Roman-Dutch authorities accepted this law. Grotius *Introduction* (2.44.8) treats *habitatio* under *usus*, and recognizes the right to let. Van der Linden, *Institutes* (1.11.6) includes it under personal servitudes, and there never has, I think, been a doubt that it is so regarded in our law to-day. A personal servitude differs from a real servitude because it is attached to a person and not to a dominant tenement; but the right comprises a part of dominium and is for that reason a *jus in re* which founds an *action rei vindicatio*. The plaintiff, therefore, can sue in this action for the recovery of her right against any owner of the land subject to the right.

... Now *habitatio* is treated in the authorities as akin to use, and use was restricted to bare enjoyment, and to what is necessary to enable the free use to be enjoyed. Justinian (*Inst* 2.5.2.) extended to *habitatio* the right to receive a guest in the house (I presume temporarily) and allowed the owner of the servitude to reside in the house with his wife and children, and such persons as might be in his employ, and by a decision allowed the power to let the right of inhabiting to others. Voet *ad Pand* (7.8) does not throw any light on the extent of the right in regard to the question at issue in this case, and indeed the general trend of the Roman-Dutch writers is to leave the matter where Justinian placed it.’

[7] Personal servitudes have been classified, since Roman times, with praedial servitudes, as limited real rights. In spite of the personal servitude’s connection to a particular person (it cannot be transferred or inherited) it is for all other purposes a real right and, as such, legally recognized property which is protected as an asset by private-law remedies. All real rights have a
res as object. A res is of a tangible nature and does not amount to a mere airspace. Air or space can, accordingly, never qualify as an object of a ius in rem. Even in the sectional title legislation the ownership of one of the sections is described with reference to at least the middle of the walls, roof and floor between the sections.

[8] The object of the right to habitatio (right of free residence) is the land which is subject to the limited real right of habitatio. That is why it is registered against the title deed of the land with cadastral precision as to which part of the land is subject to the habitatio.... The object of the limited ius in rem is accordingly not the air which is encircled by the 'four' walls of the farmstead, but the land on which it is located. That is why the rented room in Kain v Khan is not in itself the res, since it is part of the building and, superficies solo cedit. The entitlements of the holder of the right of habitatio may, however, in that case be defined with reference to the particular room as part of the building attached to the land as object of the real right.

[9] When the person who has the right of habitatio abandons the right, it lapses. As a personal servitude it also lapses on the death of the holder of the habitatio. Before that the holder of the right may, of course, reach an agreement with the owner of the burdened property to abandon his limited real right and to accept as a quid pro quo some compensation for this waiving of his limited real right. This does not amount to a 'transfer' of the limited real right to the owner, but will have the consequence that the erstwhile burden encompassed in the limited real right falls away and the entitlements of the owner of the then unburdened ownership will automatically return to the original unburdened position, thanks to the elasticity of the real right of ownership.

103 TSH 2011—October 2011

Essentialia—universal partnerships

Moosa J in Ponelat v Schrepfer (802/10) [2011] ZASCA 167 (see the Monthly Listing):

The essentials of a universal partnership were succinctly summarized in the passages of the judgment of the trial court quoted hereunder:

'The essentials of a special contract of partnership were confirmed in the case of Pezzuto v Dreyer 1992 (3) SA 379 (A) at 390, as follows:

‘Our courts have accepted Pothier’s formulation of such essentials as a correct statement of the law.... The three essentials are (1) that each of the partners bring something into the partnership, whether it be money, labour or skill; (2) that the business should be carried on for the joint benefit of the parties; and (3) that the object should be to make a profit.... A fourth requirement mentioned by Pothier is that the contract should be a legitimate one.”

'The essentialia of the partnership set out above applies equally to a universal partnership.... The contract of partnership may not necessarily be expressed. It could be tacit or implied from the facts, provided they admit of no other conclusion than that the parties intended to create a partnership.... Our courts have recognized that a universal partnership, also known as domestic partnership, can come into existence between spouses and co-habitees where they agree to pool their resources....’

A universal partnership in which the ‘parties agree to put in common all their property, both present and future’, is known as universum bonorum.... In Mühlmann v Mühlmann 1984 (3) SA 102 (A) at 124C–D the approach as to whether a tacit agreement can be held to have been concluded was said to be, ‘whether it was more probable than not that a tacit agreement had been reached’. It was also stated that a court must be careful to ensure that there is an animus contrahendi and that the conduct from which a contract is sought to be inferred is not simply that which reflects what is ordinarily to be expected of a wife in a given situation.

103 TSH 2011—October 2011

Words & phrases: what is a mineral?

A ‘useful test of what is a mineral in the ordinary and popular sense of the word’ was formulated by Fletcher Moulton J in Great Western Railway Co v Carpalla United China Clay Co Ltd [1909] 1 Ch 218 at 231:

If I were rash enough to venture a definition of ‘mineral’ I should say that it is any substance that can be got from within the surface of the earth which possesses a value in use, apart from its mere possession of the bulk and weight which makes it occupy so much of the earth’s crust. I should not think that what in engineering cases is usually known as ‘contractor’s muck’ is a mineral. To dig out ballast and crushed stone and earth, a mere mixture of heterogeneous portions of the earth’s crust, for the purpose of making embankments, where the material goes from one position in the earth’s crust to another without modification or being submitted to any process of manufacture, does not seem to me to be making use of minerals, although no doubt the things that you are handling were originally within the earth’s
crust. Such materials have not a value in use apart from their bulk and weight, and they are only used as being capable of forming a portion of the earth’s crust in a new position. On the other hand, everything that has an individual value in use appears to me to be fairly called a mineral. Limestone may vary from a poor quality that is only worth burning into lime up to the very finest Carrara marble, but all those gradations have a value in use, either for building, or statuary, or for the manufacture of lime. Ironstone for the purpose of obtaining the iron, slate for its numerous uses, to which I need not refer—all these things seem to me to be properly called minerals, because from their properties they have a value in use.’

Cited by Farlam AJA (as he then was) in Minister of Land Affairs v Rand Mines Ltd 1998 (4) SA 303 (SCA).

103 TSH 2011—October 2011

‘Plus valet quod agitur’—substance over form

In Zandberg v van Zyl 1910 AD 302, Innes JA said:

Now as a general rule, the parties to a contract express themselves in language calculated without subterfuge or concealment to embody the agreement at which they have arrived. They intend the contract to be exactly what it purports; and the shape which it assumes is what they meant it should have. Not infrequently, however (either to secure some advantage which otherwise the law would not give, or to escape some disability which otherwise the law would impose), the parties to a transaction endeavour to conceal its real character. They call it by a name, or give it a shape, intended not to express but to disguise its true nature. And when a Court is asked to decide any rights under such an agreement, it can only do so by giving effect to what the transaction really is; not what in form it purports to be. The maxim then applies plus valet quod agitur quam simulate concipitur [greater value is attached to what is done than to what appears to be done]. But the words of the rule indicate its limitations. The Court must be satisfied that there is a real intention, definitely ascertainable, which differs from the simulated intention. For if the parties in fact mean that a contract shall have effect in accordance with its tenor, the circumstances that the same object might have been attained in another way will not necessarily make the arrangement other than it purports to be. The inquiry, therefore, is in each case one of fact, for the right solution of which no general rule can be laid down.

In the same case Solomon JA said:

Prima facie, however, we must assume that the nature of a transaction is such as it purports to be, and the onus is on him, who asserts that it is something different, to prove that fact.’

Quotation taken from the judgment of Ramsbottom J in Dalrymple, Frank and Feinstein v Friedman and Another (2) 1954 (4) SA 649 (W).

104 TSH 2011—November 2011


On the slimmest of evidence, I believe it to be dangerous to explore the case law on this issue earlier than EX-TRTC United Workers Front and Others v Premier, Eastern Cape Province 2010 (2) SA 114 (ECB), on account of the adverse criticism levied by Van Zyl J against earlier decisions conflating an unincorporated association with a universitas or insisting that a universitas has a constitution.

On the substantive issue of the difference between an association and a universitas, here is what he had to say (footnotes removed):

Turning to associations, they are described in The Shorter Oxford English Dictionary as ‘A body of people organized for a common purpose; a society’. Claassen provides the following description: ‘An organized body of persons who have joined together under some contract, statute, regulations or Rules, for the purpose of carrying out some common object.’ A distinction must be drawn between, on the one hand, corporate associations which are by virtue of legislation (statutory associations) or under the common law (universitas personarum) legal entities distinct from their members, and what are referred to as unincorporated associations, on the other. For present purposes it is only necessary to deal with a universitas and an unincorporated association. The distinction between these two entities has been explained as follows in Webb & Co Ltd v Northern Rifles, Hobson & Sons v Northern Rifles:

‘An universitas personarum in Roman-Dutch law is a legal fiction, an aggregation of individuals forming a persona or entity, having the capacity of acquiring rights and incurring obligations to a great extent as a human being. An universitas is distinguished from a mere association of individuals by the fact that it is an entity distinct from the individuals forming it, that its capacity to acquire rights or incur obligations is distinct from that of its members, which are acquired or incurred for the body as a whole, and not for the individual members.’

A universitas is therefore a separate legal entity that has perpetual succession with rights and duties independent from the rights and duties of its members. One of the most important rights of a universitas is the capacity to own property. Being a legal persona, a universitas may sue or be sued in its own name. It derives these characteristics from the common law and
it is not necessary for it to be created by or registered in terms of a statute.

By contrast, an unincorporated association refers to an association which does not have a legal persona separate from its constituent members. 'Corporate' has a correspondingly opposite meaning. An unincorporated association is regarded as merely an aggregation or collection (a body) of natural persons. Accordingly, if the term 'unincorporated association' is used, it refers to nothing more than a collection of individuals who...are bound to one another by contract and who act jointly in pursuit of a common purpose. It has no existence on its own. It consequently cannot own property and has no locus standi to sue or be sued in its own name. In legal proceedings by or against the association, every member must as a result be cited as a plaintiff or a defendant, as the case may be.

Accordingly, the feature that a partnership, a firm and an unincorporated association have in common is that they have no legal personality of their own and do not exist apart from the individuals of whom they are composed.

A more correct statement of the law is that it may be advisable, but not essential, [for a universitas] to have a constitution. This conforms with the manner in which all associations are formed. As the law pertaining to associations is based on a combination of Roman-Dutch law and English law, the prevailing view is that an association is formed on the basis of contract.

'(I)t will come into being if the individuals who propose forming it have the serious intention to associate and are in agreement on the essential characteristics and objectives of the universitas or unincorporated association. The latter aspect is usually manifested by the approval and adoption of a constitution.'

The primary source for determining the characteristics of the association is therefore its constitution. It provides evidence of the intention of the members who contracted to form the association. What the intention of the founding members was is a factual question and, where the constitution is equivocal, or there is no written constitution, it may be determined with reference to other considerations, such as the nature of the association, its object and its activities. For example, in Commissioner for Inland Revenue v Witwatersrand Association of Racing Clubs, the appeal court found that, despite the absence of a written constitution or rules, the respondent association complied with the requisites for a universitas: In arriving at such a conclusion Oglivie Thompson JA had regard to the fact that it acted as a separate entity. This was evidenced by the fact that it had a secretary, kept its funds in a separate banking account, it existed continuously for more than 30 years, the purpose for which it was formed, and the fact that it constantly pursued such purpose....

What then is a body of persons, for example, in fiscal legislation? No different, I say, from an association, and can prove it either by searching through the case reports for the string “body of persons” or, more simply, citing s 1 of the Interpretation Act sv ‘person’:

'[P]erson includes—
(a) any divisional council, municipal council, village management board, or like authority;
(b) any company incorporated or registered as such under any law;
(c) any body of persons corporate or unincorporate;

Hold on. Corporate or unincorporate? How does that gel with Van Zyl J’s decision? Black’s agrees that an unincorporated association is not a legal entity. In what sense would it be a ‘person’?

105 TSH 2011—December 2011

Words & phrases: unincorporated associations & bodies of persons

In 104 TSH 2011 I ended a similarly titled item by claiming that, on the basis of strong evidence, there is no difference between an association and a body of persons. These labels are used interchangeably, both in judgments and statutes.

A far more significant distinction is that between an incorporated association or body of persons, more formally known as a universitas, and an unincorporated association or body of persons. While a universitas is a separate legal entity under the common law, an unincorporated association or body is merely a collection of natural persons bound by contract and pursuing a common purpose.

As I showed in that issue, the distinction is rather brilliantly demonstrated by Van Zyl J in Ex-TRTC United Workers Front and Others v Premier, Eastern Cape Province 2010 (2) SA 114 (ECB). The case involved a particular rule under the Uniform Rules of Court allowing an association to sue or be sued in its own name.

This, said Van Zyl J, did not automatically confer locus standi upon an entity otherwise lacking it. In order to enjoy independent legal status, an association would have to be a universitas.

Why, then, have the rule? Purely for procedural convenience. You can cite the association by name, without the hassle of determining its precise nature—corporate or unincorporate—and, if unincorporate, without naming each of its members individually.

And that line of reasoning, I imagine, also explains why the Interpretation Act includes as a ‘person’ any body of persons corporate or unincorporate.

The idea, I imagine, is to make it convenient, should it be considered necessary, for a lawmaker to...
Learning law with your PC: rights v interests

In 80 TSH 2009 I reproduced extracts from two judgments of Watermeyer JA. In Jewish Colonial Trust Ltd v Estate Nathan 1940 AD 163 at 175–6 he said:

Unfortunately the word ‘vest’ bears different meanings according to its context. When it is said that a right is vested in a person, what is usually meant is that such person is the owner of that right—that he has all rights of ownership in such right including the right of enjoyment. If the word ‘vested’ were used always in that sense, then to say that a man owned a vested right would mean no more than that a man owned a right. But the word is also used in another sense, to draw a distinction between what is certain and what is conditional; a vested right as distinguished from a contingent or conditional right. When the word ‘vested’ is used in this sense Austin (Jurisprudence, vol 2, lect 53), points out that in reality a right of one class is not being distinguished from a right of another class but that a right is being distinguished from a chance or a possibility of a right, but it is convenient to use the well-known expressions vested right and conditional or contingent right.

In Durban City Council v Association of Building Societies 1942 AD 27 at 33 he said:

In the large and vague sense any right to which anybody may become entitled is contingent so far as that person is concerned, because events may occur which create the right and which may vest it in that person; but the word ‘contingent’ is also used in a narrow sense, ‘contingent’ as opposed to ‘vested’, and then it is used to describe the conditional nature of someone’s title to the right. For example, if the word ‘contingent’ be used in the narrow sense, it cannot be said that I have a contingent interest in my neighbour’s house merely because my neighbour may give or bequeath it to me; but my relationship to my neighbour, or the terms of a will or contract, may create a title in me, imperfect at the time, but capable of becoming perfect on the happening of some event, whereby the ownership of the house may pass from him to me. In those circumstances I have a contingent right in the house.

Thus a ‘vested right’ is a pleonasm for a ‘right’ in property but is used to distinguish between vested and contingent rights, with a ‘contingent right’ signifying a formal capability but not an immediate right of acquiring property, also known as a spes.

An elegant variation for a ‘right’ is an ‘interest’, thus the concepts ‘vested interests’ and ‘contingent interests’. There is no reason whatsoever to suppose that an ‘interest’ means anything other than a right, whether vested or contingent.

Stupidly, the Income Tax Act uses the words ‘vested right’ four times (all in the attribution rules), without signifying anything different from a ‘right’, which is used about fifty times. The words ‘an interest’ are used about forty-eight times, and the words ‘vested interest’ seven times. It ought to come as no surprise that, in every instance, the idiot draftsperson has used the word ‘interest’ as an elegant variation of the word ‘right’.

What, for example, can a ‘vested interest in any assets of a trust’ mean?

☐ The right of a beneficiary in a bewind to the full enjoyment of the bewind’s (trust’s) property, saving only control, which vests in the trustees. A bewind is a curious institution, under which the usual nudum praeceptum rule (78 TSH 2009) is presumably rendered ancillary to the terms of the deed (contract). Another way of saying the same thing is to say that the beneficiary owns the patrimonial (property) object itself, subject to the clog of control.

☐ The right of a beneficiary awaiting a distribution of property made under the deed by the trustees to demand delivery of the patrimonial object.

☐ The right of a legally capable major beneficiary from whom the deed purports to withhold full enjoyment of property—for example, under an age qualification or some other time clause—in violation of the nudum praeceptum rule to demand, at the very least, delivery of the patrimonial object. I prefer to argue that such a beneficiary actually owns the patrimonial object itself, and woe betide the trustees.

☐ The full ownership of the patrimonial object by the ‘beneficiary’ of a ‘trust’ for fiscal purposes that is invalid under the common law or of a valid trust that has terminated or has made some other automatic distribution while the trustees sleep.

By contrast, the spes enjoyed by a discretionary beneficiary of a trust is not property under the common law and so is neither a ‘right’ nor an ‘interest’. That is why the definition of a ‘beneficiary’ in s 1 of the Income Tax Act allows for both a vested and a contingent interest. In fact, this is the only reference to a ‘contingent interest’ in the entire act. Yet there are two references to a ‘contingent right’, without any intention whatsoever being evident to identify a different meaning.

To ‘hold’ means fully to own or to enjoy some lesser form of patrimonial right in or to property (90 TSH 2010; 100 TSH 2011). The act includes these
phrases: ‘holds a right’ (thrice); ‘holds an interest’ (twice); and ‘held an interest’ (once).

Perhaps the nuttiest usage of the words ‘an interest’ appears in the terms ‘an interest’ and ‘residence’ as defined for purposes of Part VII of the Eighth Schedule, which is misleadingly entitled ‘Primary residence exclusion’ but has in recent years been made to include the CGT relief available upon the transfer of a residence from a company or trust under paras 51 (81 TSH 2009, 82 TSH 2010) and 51A (89 TSH 2010, 90 TSH 2010, 91 TSH 2010; 94 TSH 2011; 96 TSH 2011), a provision to which other related reliefs are linked.

In the first place, rather than giving the loaded and ambiguous words ‘an interest’ a special meaning, the idiot draftsperson would have been better advised to work with the concept of a ‘qualifying residence’. The unwary reader will not expect such a commonplace term to be a term of art.

Secondly, these two defined terms are not only used separately but in conjunction—no fewer than eleven times, the most flagrant instances reading ‘an interest in a residence as contemplated in paragraph 51’ and ‘an interest in a residence as contemplated in paragraph 51A’. Would any reader expect that two separate definitions are required to be consulted in order to figure out the cross-reference? On my first encounter with para 51A, I certainly didn’t so expect (96 TSH 2011).

Next, in para 44, while a ‘residence’ is what you might expect it to be,

‘[R]esidence’ means any structure, including a boat, caravan or mobile home, which is used as a place of residence by a natural person, together with any appurtenance belonging thereto and enjoyed therewith, you would never guess what ‘an interest’ might be.

First, it is a ‘real or statutory right’, the suggestion being, madly, that the envisaged statutory rights are not real rights. Secondly, it is a share in a share block company

or a share or interest in a similar entity which is not a resident.

This is a real right; why is it separately listed?

Thirdly, it is a right of use or occupation, which is a personal right, the suggestion being that personal rights cannot be real rights.

Excluded is a right under a mortgage bond, which is a real right. Also excluded is

a right or interest of whatever nature in a trust or an asset of a trust, other than a right of a lessee who is not a connected person in relation to that trust.

The implication is that ‘rights’ differ from ‘interests’, and the exclusion extends even to a bewind in which a beneficiary actually owns a residence! Yet an unconnected tenant of a trust enjoys ‘an interest’.

No one could possibly internalize such a curious array of rights, especially not under the rubric ‘an interest’.

More generally, the impression I get is that the idiot draftsperson is largely unfamiliar with the act—far too unfamiliar to be allowed to amend it—and gets his special insights into tricky parts of the common law not from his own knowledge, experience and hard work but from isolated, condensed comments from more experienced reviewers not too keen on the exercise.

Perhaps the young dolts at the Treasury are compelled to seek advice from hardened SARS officials. If so, those officials ought to seek redress under the rubric ‘unfair labour practice’.

105 TSH 2011—December 2011

Words & phrases—‘reside’ (Tax Administration Bill)

Amendments proposed in the Tax Administration Bill, 2011 to the definition of a ‘representative employer’ for PAYE purposes and the VAT identification of persons acting in a representative capacity ditch the defined term ‘resident’ for the word resides, for reasons not given and unknown.

What might the word reside mean?

Barrie No v Ferris and Another 1987 (2) SA 709 (C) dealt with the construction of a will granting a beneficiary the conditional usufruct (not a usus or habitatio; see 102 TSH 2011) over a property in the following terms:

I leave and bequeath the usufruct thereof to my friend…, for the rest of his natural life, or for as long as he may elect to reside there.

Baker J said (references removed):

‘Reside’ means that a person has his home at the place mentioned. It is his place of abode, the place where he sleeps after the work of the day is done…. It does not include one’s weekend cottage unless one is residing there…. The essence of the word is the notion of ‘permanent home’.

How did I find such a minor case? It was cited in Kiepersol Poultry Farm (Pty) Ltd v Phasiya 2010 (3) SA 152 (SCA), a case about land reform.

How did I find that case? By searching for the string “meaning of reside”, which yields very few hits in The South African Law Reports (1947 to date) (Jutas).

In fact, the only other significant case thus identified is Cleeve v The Minister Of The Interior 1956 (2) SA 223 (T), a case on the concept of ‘domicile’ under the Immigration Act, which relies to an extent on the word resides. Ludorf J said:

Consequently I can look at other examples in other pieces of legislation where the Courts have endeavoured to define the meaning of the word ‘residence’ in the ordinary sense of the word. A number

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of cases have been cited and they all follow much the same reasoning. In Cowie v Pretoria Municipality 1911 TPO 628, Wessels J said:

‘But in ordinary language a person is said to live in a place even though he may be temporarily absent on certain occasions and for certain short periods.’

That dictum was quoted with approval by Centlivres JA in Ex parte Minister of Native Affairs 1941 AD 53 at 59. He also said this:

‘Thirdly it is inherent in the decision of Solomon v Wolff 15 SC 152, that a person cannot be said to reside at a place which he is temporarily visiting.’

Difficulties sometimes arise where a person resides in two places. Also there is the question when there are temporary absences as to where to draw the line. This was considered by the full Bench in Cowie’s case, supra. But these are all questions relating to the facts of a particular case. It may well be that a man absents himself so often or so long from what he claims to be his place of residence that on the facts it is found that he no longer resides there.

On the basis of this admittedly tiny sampling of the law, the questions I want to ask the idiot draftsperson are:

- In the light of the fact that the courts appear to treat the expressions reside, residence and ordinarily resident as being synonymous, what did you hope to achieve by departing from the defined term ‘resident’?
- Do you really believe that society can afford to spend time on such arcane points of law?
- How do feel about banking your salary cheque?

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**An employer’s vicarious liability (& tax)**

When an employer is successfully sued on the basis of its vicarious liability for its employee’s wrongdoing, it incurs, at the very least, a loss, if not an expenditure. In 86 TSH 2010 and 95 TSH 2011, I have already suggested that the ordinary fiscal rules would determine whether such a loss is deductible.

But what I have yet to express explicitly is the principle that, for an employer engaged in a taxable trade, the risk of suffering such a loss is an ‘inevitable concomitant’ of its business and would, on that account, be regarded as having been incurred ‘in the production of the income’. Other tests (such as ‘capital/revenue’, ‘prohibited deductions’) would then be applied so as to reach a final decision on deductibility.

What upset me most about the shocking events that have now culminated in F v Minister of Safety and Security and Another (CCT 30/11) [2011] ZACC 37 (15 December 2011; see the Monthly Listing) was that counsel for the victim, in seeking redress on her behalf in her founding case, failed to raise alternative grounds: (1) the minister’s vicarious liability—Yes, of course—but also (2) his direct liability, for example, for regularly hiring convicted criminals as policemen. As a result, she lost her case in Minister of Safety and Another (592/09) [2011] ZASCA 3 (95 TSH 2011), in which the SCA found the minister not to be vicariously liable, essentially because the policeman concerned had no police duty in relation to the rape; nor did he purport to act as an instrument of the state.

It is gratifying that the Constitutional Court has now expressed itself on both issues and in a manner that perhaps most people would consider to be just.

First, the Chief Justice, Mogoeng J, writing for the majority, found the minister indeed to be vicariously liable in this ‘typical deviation case’ (the ‘wrongdoing takes place outside the course and scope of employment’).

The ‘pivotal common law authority’ on such cases, he said, was Feldman (Pty) Ltd v Mall 1945 AD 733, while the post-constitutional authority is K v Minister of Safety and Security 2005 (6) SA 419 (CC). And he saw Minister of Police v Rabie 1986 (1) SA 117 (A) as an important part of the deviation canon, even though it was not followed in several cases (pre-eminently, Minister of Law and Order v Ngobo 1992 (4) SA 822 (A)). He thus settled the discussion about authority in this line of law appearing in 95 TSH 2011.

One of two tests determines the issue of vicarious liability. A subjective test—Were the wrongful acts done solely for the employee’s purposes?—and an objective test—Is there a sufficiently close link between the employee’s acts and the employer’s purposes and business?

The objective test Mogoeng J characterized as the ‘K test’, and found that it showed ‘the state’s vicarious liability in this matter’. (Yet when he dealt with the populace’s trust in the police, he seemed to me to be talking more about the state’s direct rather than vicarious liability. And it was mostly on the basis of trust that he refused to attach any importance to the question whether the policeman was on or off duty.) This he did by establishing the critical link by reference to the facts.

Secondly, in a concurring but separate judgment, Froneman J all but found the minister to be directly rather than vicariously liable, even though direct liability was not an issue in the case (thanks to aforesaid counsel). If you are ever involved in a matter concerning ‘state delictual liability’, I recommend that you read this judgment, which is full of interesting ideas, as even the minority intimated.

If you are a citizen relying upon the police, all you need to read is the following passage from Froneman J’s judgment (footnotes suppressed):

[The detective’s] omission to protect the applicant was deliberate, but also, obviously, negligent. There is no evidence that the state took other reasonable measures to prevent him from acting in the way he did. Despite knowledge of his previous convictions he was allowed to continue service. Harm was foreseeable. No
When a string such as “misrepresentation” scores 983 hits in The South African Law Reports (Jutas) (1947 to date) you have no choice but to click through as fast as possible, watching out for those judgments in which a very obvious effort is made to explain the concept. It’s hardly a foolproof approach, depending largely upon chance.

Even so, while incurring serious muscle fatigue in my index finger, I did notice that a separate, complex category of the subject deals with misrepresentation in contracts, intentional and unintentional. Fortunately, my interest lies more with the fraud and misrepresentation referred to in fiscal legislation, such as the Tax Administration Bill, 2011.

To my astonishment, the very first hit turned out to be the best. Here is an extract from the judgment of Blieden J in Company Unique Finance (Pty) Ltd and Another v Johannesburg Northern Metropolitan Local Council and Another 2011 (1) SA 440 (GSJ):

**Fraud and misrepresentation**

In order to establish that there has been an actionable fraudulent misrepresentation or fraud the following must be shown: (a) a representation; (b) which the representer knows (or foresees or reconciles to the possibility) is false and which he intends the representee to act upon (or foresees and is reconciled to the possibility that the representee will act upon it); (c) the representation must induce the representee to act, causing patrimonial loss. (Ex parte Lebowa Development Corporation Ltd 1989 (3) SA 71 (T)....) As was stated by De Villiers CJ in Dickson & Co v Levy (1894) 11 SC 33 at 36:

> If the plaintiffs honestly believed his representation to be true, it cannot be relied upon as a fraudulent representation giving rise to action for damages.... If made recklessly without regard to its truth or falsehood, it would be fraudulent, but the defendant’s honest belief in the truth of his statement is sufficient to negative fraud on his part.

Generally speaking, nondisclosure of a material fact will only constitute fraudulent misrepresentation when there is a duty to disclose which has been consciously breached, ie not only must such a duty be shown to have existed, but it must also be proved that the representor ‘was aware of and appreciated its existence, and yet deliberately refrained from the disclosure in order to deceive...’. (Per Trollip J in S v Heller and Another (2) 1964 (1) SA 524 (W) at 537.)

In other words, there must be a designed or purposeful concealment....

In the absence of a satisfactory explanation for material nondisclosure in a case in which there was a duty to disclose, an inference of conscious deceit will generally be justified on the probabilities.
Finally, it is always hard to resist anything said by the great Corbett JA (as he then was); this from his judgment in s v Macdonald 1982 (3) SA 220 (A):

Joubert The Law of South Africa vol 6 para 330 gives the following definition of the crime of fraud:
Fraud is the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another.
The misrepresentation necessary to constitute criminal

''[M]onth'' means a calendar month;

That’s how I know that, for example, a VAT ‘month’ is not a calendar month. Had calendar months been intended, no definition would have been required, since the Interpretation Act would have supplied the definition. Yet the Interpretation Act is not peremptory since the Interpretation Act would have supplied the definition if it were intended, no definition would have been required, if I am right about ‘months’, such an initiative might not be sufficient to curb the alleged abuse.

Beyond these narrow confines, the meaning of the word month has to be sought in the Interpretation Act, which, in s 1, includes this entry:

\[ \text{month} \]

the following words and expressions shall, unless the context otherwise requires or unless in the case of any law it is otherwise provided therein, have the meanings hereby assigned to them respectively, namely—

I have always thought that I knew what a calendar month is, until I glanced over the draft of what is now Issue 4 of Interpretation Note 20, on the additional fraud need not be made in express words: it may be made by conduct alone. And in certain circumstances silence or nondisclosure or concealment of the facts may amount to a fraudulent misrepresentation…. In a particular case it may be a matter of some difficulty to determine whether the correct legal niche into which the accused should be placed is a false representation by conduct or a fraudulent nondisclosure or concealment of the facts....

108 TSW 2012—March 2012

Learning law with your PC: ‘month’
The term ‘month’ is defined for purposes of the (obsolescent) STC, PWE, provisional tax, fringe benefits taxation and VAT as

any of the twelve portions into which any calendar year is divided

(s 64B(7)(ii) of the Income Tax Act; para 1 of the Fourth Schedule to the act; para 1 of the Seventh Schedule; s 1 of the Value-Added Tax Act).

All you can be sure of is that calendar months are not intended. My abiding guess is that the intention is to allow you to select artificial months that will fit in with the needs of your particular information system. Yet the problem that has always concerned me is that no machinery exists to govern your selection; a gap exists in the Interpretation Act 33 of 1957. The following definition of the crime of fraud:
Fraud is the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another.
The misrepresentation necessary to constitute criminal
deduction for learnership deductions. Here is a somewhat fuller extract from the case from which it quotes, Subbulutchmi v Minister of Police and Another 1980 (3) SA 396 (D):

According to the Interpretation Act 33 of 1957 a month means a calendar month. In the absence of any clear indication to the contrary to be found in the words used in any particular legislation a calendar month running from an arbitrary date expires with the day in the preceding month immediately preceding the day corresponding to the date upon which the period starts. Thus, if a calendar month commences on the 10th of one month it will expire at the end of the 9th day of the succeeding month.

The latest “Tax Proposals—Budget 2011” (94 TSW 2011) announce an intention to curb equally willful month-end changes designed to save VAT but those are changes of an entirely different nature. If I am right about ‘months’, such an initiative might not be sufficient to curb the alleged abuse.

Beyond these narrow confines, the meaning of the word month has to be sought in the Interpretation Act, which, in s 1, includes this entry:

\[ \text{month} \]

This is in accordance with the ordinary civilian method of calculating periods of time in which the first day is excluded and the last day included…. If the civilian method of calculation applies in the present case then it is, I think, quite evident that the notice given by the plaintiff complied with the section. It is, therefore, necessary to decide whether the wording of the section makes it necessary to adopt some other method of calculating the time.

A even better treatment of the subject is to be found in the later case of S v Mogale 1989 (4) SA 591 (W). It was perhaps not used in the SARS document because the judgment of Strydom J was given in Afrikaans:

‘Maand’ beteken ‘kalendermaand’ tensy dit uit die samehang anders blyk of tensy dit in die geval van ‘n Wet, verordening, reël, regulasie of voorskrif anders daarin bepaal word (art 2 gelees met art 1 van die Interpretasiewet 33 van 1957). Die onderhawige Reël bevat geen bepaling tot die teendeel nie.

‘n ‘Kalendermaand’ strek vanaf enige willekeurige dag van ‘n maand tot op die dag voor die ooreenstemmende dag van die daaropvolgende maand…. Waar ‘n kalendermaand derhalwe op byvoorbeeld die 20ste dag van een maand ‘n aanvang neem, verstryk daardie kalendermaand op die 19de dag van die daaropvolgende maand.

Hierdie wyse van berekening van ‘n kalendermaand stem ooreen met die siviele berekening (computatio civilis) van tydeerke waarby die eerste dag van berekening ingesluit en die laaste dag uitgesluit word....
Words & phrases: ‘may’

The three greatest inventions of mankind are fire, the wheel, and CONTROL F. With two simple keystrokes, I can meaningfully access lifetimes of information, and, as long as I realize the limitations of the procedure, comment upon an issue alongside the experts without necessarily consulting their textbooks.

Imagine teaching students with the aid of nothing more than CONTROL F and some decent databases! They would learn to fend for themselves, make up their own minds, and sort the wheat from the chaff. A whole line of publishing—of crap textbooks inflicted by nonentities upon their disinterested student-victims (sorry, learner-victims)—would collapse and, since their vanity is seldom assuaged by mere electronic publication, save swathes of forest.

In the field of law, CONTROL F is particularly powerful, since it gives you access to the brilliant and disciplined minds of our many, fine judges, both of the past and the present. And, thanks (a) to the opportunities for appeal, (b) the tradition (pace Zuma) of multiple judgments, and (c) the principle of stare decisis, judicial decisions are, over time, peer-reviewed!

Since I have enjoyed the pleasure, only recently, of meeting him once again, allow me to make an immediate exception to the anti-textbook stance I am reviewing!

The other side to the CONTROL F coin is less elevating. Every now and again I get some pig-headed official—or even colleague who insists upon pontificating about an issue without the benefit of a little key-stroking, and, sometimes even a very senior official—or even a colleague who insists upon pontificating about an issue without the benefit of a little key-stroking, and, never more so than over the word *may*.

Puleeze! At least investigate a little before trotting out the little you remember from high school grammar. (Like the accountant who once indignantly told me: But you can’t start a sentence with *but*!) If you believe you are past learning anything new, it’s time to emigrate or commit suicide.

**Stare decisis** adhere to, abide by, decided cases remain authoritative

The general principle applicable to the use of the word *may* was laid down by Jervis CJ in *MacDougall v Patterson* (1851) 11 CB 755 at 766 as follows:

The word ‘may’ is merely used to confer the authority: and the authority must be exercised, if the circumstances are such as to call for its exercise. (See *Stroud Riley & Co Ltd v Sir 1974 (4) SA 534 (6) at 540A per Cloete J.)*

The word ‘may’ in the proclamation [under review] does not merely confer a jurisdiction but a power coupled with a duty to apply the provisions of the section in suitable cases (see *South African Mutual Life Assurance Society v Uys 1970 (4) SA 489 (6) at 490D). The many cases in our Courts in which the meaning of the word ‘may’ have been considered are, unfortunately, of little assistance. They relate to different statutes, differently worded and serving different purposes. In *S v Mpetha 1985 (3) SA 702 (6) at 718E-G*, Galgut JA stated the following:

The ordinary significance of the word ‘may’ is permissive. Words which are susceptible of a permissive meaning should not in the first instance be construed as imperative. No universal rule can be laid down. In each case the intention of the Legislature must be ascertained by looking at the whole scope of this statute: see in this regard *Halsbury Laws of England* 4th ed vol 44 at para 933.

That ‘may’ is permissible was also stressed in *Gunn and Another NNO v Barclays Bank DCO 1962 (3) SA 678 (6) at 685A per Steyn CJ. Trollip JA in Amalgamated Packaging Industries Ltd v Hutt and Another 1975 (4) SA 943 (6) at 950H stated: Indeed the use of ‘may’...is indicative of a consistent intention that the Registrar should have a discretion....

According to Lord Halsbury in *Sharp v Wakefield and Others* [1891] AC 173 (HL) at 179, ‘...’discretion’ means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion;...according to law and not honour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself.

... Parliament can never be taken to have intended to give an official or an administrative body the power to act in bad faith or the power to abuse his or its powers. Such powers are conferred on an official or administrative body to promote the policy and/or objects of the Act. When the Court says it will intervene if a particular body acted in bad faith it is but another way of saying that such power was not being exercised.

Dealing with the discretionary powers conferred on an administrative official or body, \textit{Wade (op cit)} states as follows:

...[W]here Parliament confers power upon some Minister or other authority to be used in discretion, it is obvious that the discretion ought to be that of the designated authority and not that of the Court. Whether the discretion is exercised prudently or imprudently, the authority’s word is to be law and the remedy is to be political only. On the other hand, Parliament cannot be supposed to have intended that the power should be open to serious abuse. It must have assumed that the designated authority would act properly and responsibly...with a view to doing what was best in the public interests and most consistent with the policy of the statute. It is from this presumption that the Courts take their warrant to impose legal bounds on even the most extensive discretion.

**Stroud Riley case**

Many students of tax will remember at least the name of the \textit{Stroud Riley} case. It was about the period within which a claim for a refund under s 102(1) of the Income Tax Act may be made. At that time the provision stated that the Secretary [today, the Commissioner] \textit{may authorize a refund.}

Cloete J said:

It seems to me that in dealing with a matter of this nature the respondent is required firstly to enquire into the facts. If after such enquiry he is satisfied that the amount paid is in excess of the amount properly chargeable under the Income Tax Act, he is bound, as a matter of duty, to authorize the refund to the taxpayer. This seems to be the clear effect of the decisions quoted above. In the latter respect he has no discretion in the matter in spite of the use of the word ‘may’ in the section which authorizes him to make a refund.

Today s 102(1) uses the word \textit{shall} in place of the word \textit{may.}

In \textit{Vacation Exchanges International (Pty) Ltd v CSARS} (2009) 71 SATC 249, Davis J said:

In this connection, the use of the word ‘may’ in paragraph 3(2) of the Seventh Schedule [to the Income Tax Act] which was the subject of such considerable emphasis by respondent can only be assessed by an examination of the language of the statute, its general scope, purpose and objects. \textit{South African Railways v New Silverton Estate Ltd} 1946 AD 830 at 842. In my view, the word ‘may’ does not advance the case of respondent that the Commissioner has a choice of remedy. The wording of paragraph 3(2) which includes the word ‘may’ supports the existence of an obligation on the Commissioner, if he sees fit, to use the permissive power granted to him if the employer’s determination appears to him to be incorrect. This is because all else flows from such a determination. In this context, such a redetermination can be seen as a pre-existing requirement to any further action which the respondent may wish to take to recover taxes he considers are due. In other words, paragraph 3(2) does not confer a discretion on the Commissioner in the sense that he can elect to collect the tax he considers to be outstanding otherwise than by way of making a re-determination in terms of paragraph 3(2) of the Seventh Schedule of an assessment of the employee.

I may, Deo volente, return to this subject.

112 TSH 2012—July 2012

**Words & phrases: donatio mortis causa**

After years of relying entirely on high school Latin (a gift in contemplation of death) followed by a spot of \textit{Wille & Millin}, I have finally got around to a serious investigation of what this expression means under our law. In a flash, straight after starting a search of SALR (Jutas) for the string “mortis causa”, I was at the leading case, \textit{Jordaan and Others NNO v De Villiers 1991 (4) SA 396 (C)}, where Berman J said:

I turn lastly to Mr Murray’s third submission, viz that, even if the donation was one mortis causa, it required no formality as it fell within the ambit of s 5 of the General Law Amendment Act 50 of 1956...the provisions of which read as follows:

5. Formalities in respect of donations.—No donation concluded after the commencement of this Act shall be invalid merely by reason of the fact that it is not registered or notarially executed: Provided that no executory contract of donation entered into after the commencement of this Act shall be valid unless the terms thereof are embodied in a written document signed by the donor or by a person acting on his written authority granted by him in the presence of two witnesses.

It is unquestionable that prior to the passing of the Act a donation mortis causa, in order that it be valid and enforceable, had to comply with the formalities required for a will (see \textit{Meyer and Others v Rudolph’s Executors 1918 AD 70}). It was Mr Murray’s contention that with the passing of the Act there was no longer any need for any special formalities to be observed in order to render a donation mortis causa valid, effective and enforceable, for the Act draws no distinction between donations inter vivos and donations mortis causa. Once the donation had been perfected by delivery (as he submitted this particular donation had been), its validity could not be impeached. I am unable to uphold this contention. I have already disposed of the submission that this donation had been executed (and thus was unaffected by the statutory proviso), but it seems to me that in any event the provisions of the Act apply to donations inter vivos only and not to
Andere v Reek En Snideman, NNO en Another (2006), by Moseneke DCJ (footnotes suppressed): and Another Van der Merwe v Road Accident Fund (30 March 2006) [2006] ZACC 4 (30 March 2006), by Moseneke DCJ (footnotes suppressed):

Learning the law with your PC: patrimonial v non-patrimonial loss

Section 18 of the Matrimonial Property Act makes a distinction between patrimonial and non-patrimonial losses. Not having the faintest idea myself how to understand the difference, I was glad to find this exposition in Van der Merwe v Road Accident Fund and Another (CC48/05) [2006] ZACC 4 (30 March 2006), by Moseneke DCJ (footnotes suppressed):

Thus patrimonial damages, which in practice are also called special damages, aim to redress, to the extent that money can, the actual or probable reduction of a person's patrimony as a result of the delict or breach of contract. In this sense patrimonial damages are said to be a 'true equivalent' of the loss. Ordinarily they are calculable in money. Well-settled examples in bodily injury claims are past and future medical expenses, past and future loss of income, loss of earning capacity, and loss of support.

On the other hand non-patrimonial damages, which also bear the name of general damages, are utilized to redress the deterioration of a highly personal legal interests that attach to the body and personality of the claimant. However, ordinarily the breach of a personal legal interest does not reduce the individual's estate and does not have a readily determinable or direct monetary value. Therefore, general damages are, so to speak, illiquid and are not instantly sounding in money. They are not susceptible to exact or immediate calculation in monetary terms. In other words, there is no real relationship between the money and the loss. In bodily injury claims, well-established variants of general damages include 'pain and suffering', 'disfigurement', and 'loss of amenities of life'.

Besides bodily integrity, our law recognizes and protects other personality interests such as dignity, mental integrity, bodily freedom, reputation, and identity. A wrongful reduction of the quality of these personality interests or rights entitles the victim to non-patrimonial damages.

Words & phrases: res ipsa loquitur (1)

What you are about to experience is a free tax newsletter entering a famous legal debate that has been raging for almost ninety years, and concluding that many commentators waste an awful lot of time, mainly because, awfully learnedly, they quote each other instead of going back to original sources.

Even more remarkably, so great has been my personal dedication to this exercise that I even forced myself to glance over an entire chapter of a textbook—in truth, a barely warmed-over university thesis transformed into dead trees. (One day it will be recognized as a crime against humanity to waste natural resources on such futile pursuits.)

How to proceed, on the assumption, certainly accurate as far as I am concerned, that the investigator has no prior knowledge of the subject?

The database

First, map out the database, taken, as usual, from SALR (Jutas, 1947 to the present). Try a search,
The leading cases
Secondly, in order to discover the leading cases, use the flynotes-search and look for AD and SCA cases. Go to the end of the list and then search backwards in time, to find the earliest judgment of a superior court containing an introduction to the subject.

There is no need to read each judgment; simply look for the italicized expression res ipsa loquitur (the facts speak for themselves) and read the passages relevant to it. But do be partial to famous judges. Shun anything to do with a foreign legal system, unless you are seeking a Masters or even a Doctorate from some shitty university, under the ‘supervision’ (quote me and my pathetic utterances as often as possible) of some mediocrity.

Bezuidenhout and Mieny
The first case meeting these criteria is Arthur v Bezuidenhout and Mieny 1962 (2) SA 566 (A), where the brilliant Ogilvie Thompson JA (as he then was) delivered the judgment of an illustrious bench.

Proof by a plaintiff of an event properly falling within the maxim—that is to say, proof of an event which, in the absence of anything to the contrary, tells its own story—may justify an inference of negligence against the defendant. But, that inference may...be displaced by the remainder of the story: if the remainder of the story does not do so, then the inference remains—res ipsa loquitur. But...the Court is not called upon to decide the issue of negligence until all the evidence is heard...until it has heard all the story which it is to hear....

...The maxim res ipsa loquitur, where applicable, gives rise to an inference rather than to a presumption. Nor is the Court, or jury, necessarily compelled to draw the inference....

...As...is reflected in any specific statement of the res ipsa loquitur maxim, once the plaintiff proves the occurrence giving rise to the inference of negligence on the part of the defendant, the latter must adduce evidence to the contrary. He must tell the remainder of the story, or take the risk of judgment being given against him....

Groenewald
In Groenewald v Conradie; Groenewald en Andere v Auto Protection Insurance Co Ltd 1965 (1) SA 184 (A), Rumpff JA added this important rider:

Ten slotte is dit wenslik om te beklemtoon dat die gebruik van die uitskruppings res ipsa loquitur, streng gesproke, alleen dan van pas is wanneer dit nodig is om enkel en alleen na die betrokke gebeurtenis te kyk sonder die hulp van enige ander verduidelikegende getuienis. Alleen as die gebeurtenis op sigself en in sy eie lig beskou word, behoort die uitskruppings geheg te word omdat anders die beperkte betekenis daarvan vertroebel mag word....

Sardi
If your Afrikaans isn’t up to scratch, no matter; Holmes JA repeated the point in Sardi and Others v Standard and General Insurance Co Ltd 1977 (3) SA 776 (A):

In this Court, in seeking to establish negligence of the driver of the insured vehicle, counsel for the appellant referred to the fact that he swerved across the road. Wherefore counsel relied on the maxim res ipsa loquitur (the thing speaks for itself). He submitted that it was for the respondent to adduce sufficient evidence to overcome the prima facie effect of the evidence that Coxon drove on to the incorrect side of the road. The maxim has no bearing on the incidence of the onus of proof on the pleadings. It is invoked where the only known facts, relating to negligence, consist of the occurrence itself.... The occurrence may be of such a nature as to warrant an inference of negligence.... It is perhaps better to leave the question in the realm of inference than to become enmeshed in the evolved mystique of the maxim. The person, against whom the inference of negligence is so sought to be drawn, may give or adduce evidence seeking to explain that the occurrence was unrelated to any negligence on his part. The Court will test the explanation by considerations such as probability and credibility.... At the end of the case, the Court has to decide whether, on all of the evidence and the probabilities and the inferences, the plaintiff has discharged the onus of proof on the pleadings on a preponderance of probability, just as the Court would do in any other case concerning negligence. In this final analysis, the Court does not adopt the piecemeal approach of (a), first drawing the inference of negligence from the occurrence itself, and regarding this as a prima facie case; and then (b), deciding whether this has been rebutted by the defendant's explanation....

That’s all, folks!
Okay. That’s it. These are the leading cases since 1947, and, if you have read these quotations, you know not only as much as you need to about the maxim but as much as anyone might know. Anything else would be paraphrase or fantasy.
Words & phrases: *res ipsa loquitur* (2)

The type of case involved

One last fact needs to be drawn from the database mapped out in 119 *TSH* 2013—the type of case in which the maxim *res ipsa loquitur* (the thing speaks for itself) was considered, if not necessarily applied.

The list comprises: motor accidents, product liability, a burst water pipe, motor accidents, a floor-spillage, negligent performance, motor accidents, running taps, a collapsed bridge, motor accidents, a defective repair, a fallen chandelier and motor accidents. And, yes, motor accidents.

But when you search headnotes, rather than flynotes, you uncover a few more, namely, damage to goods carried, a product’s attributes, a child’s drowning in a pool, a ship’s collision with a buoy, and plenty more motor accidents.

The roster of relevant cases

The cases in which the maxim was held to apply comprise:

- Macleod *v* Rens 1997 (3) SA 1039 (G);
- Stacey *v* Kent 1995 (3) SA 344 (I); *v* Mudoti 1986 (4) SA 278 (ZS);
- Osborne Panama *v* Shell & BP South African Petroleum Refineries (Pty) Ltd and Others 1982 (4) SA 890 (A);
- Goode *v* SA Mutual Fire & General Insurance Co Ltd 1979 (4) SA 301 (W);
- Dalion Materials (Pty) Ltd *v* Cintrust (Pty) Ltd 1978 (3) SA 599 (W);
- Roos *v* AA Mutual Insurance Association Ltd 1974 (4) SA 295 (C);
- Rautenbach *v* de Bruin 1970 (1) SA 383 (T);
- Card *v* Cagnacci; Card *v* Auto Protection Insurance Co Ltd 1964 (3) SA 652 (W);
- Arthur *v* Bezuidenhout and Mieny 1962 (2) SA 566 (A);
- Stanley Motors Ltd and Others *v* Administrator, Natal 1959 (1) SA 624 (N);
- Jensen *v* Williams, Hunt & Clymer Ltd 1959 (3) SA 975 (O);
- Jensen *v* Williams, Hunt & Clymer Ltd 1959 (4) SA 583 (O);
- Sauermann *v* Barnard 1958 (4) SA 149 (O);
- Paola *v* Hughes (Pty) Ltd and Another 1956 (2) SA 587 (N); and
- Watt *v* Van der Walt 1947 (2) SA 1216 (W).

All of the cases concerned are notable for being old and largely lower-court proceedings.

**Watt v Van der Walt**

Perhaps the most famous case in the trade in which the maxim was applied was *Watt v Van der Walt*, which, as it happens, figured critically in the story I entitled ‘Murder, a kombi on the roof, a golf-cart crash & a steep Camps Bay hill’ (**104 TSH** 2010, 88 *TSH* 2010).

**Pringle v Administrator, Transvaal**

Deliberately, in the list of circumstances in which the application of the maxim has been considered, I have so far left out a supposed *cause célèbre*, *Pringle v Administrator, Transvaal* 1990 (2) SA 379 (W), a medical-negligence case, heard by a single, acting judge, Blum JA, responsible for only one other judgment in *SALR* and long since no longer in practice, even as counsel.

The only point I am making here is that the case is so often written about by academics mainly because it is the only case in *SALR* in which you will find the concept medical negligence and the maxim *res ipsa loquitur* in juxtaposition.

As far as other judges are concerned, as opposed to academics, I can find only one judgment—of a single judge in the Cape Provincial Division—in which it has been cited, and then merely in passing and decidedly not in the context of the maxim.

**What Blum JA actually said**

Worse still is what Blum JA actually said about the maxim. Here it is, in its totality:

> Secondly, there is no room for the application of the maxim *res ipsa loquitur*... The maxim could only be invoked where the negligence alleged depends on absolutes. In the instant case the initial problem was caused by the perforation of the superior vena cava. If the evidence showed that by the mere fact of such perforation negligence had to be present, then the maxim would have application. No such evidence, however, emerged before me, and since the question of whether negligence was present or not depends upon all the surrounding circumstances, this makes the application of the maxim totally inapplicable in cases such as the present.

**What the maxim means**

What is required by the maxim is that:

> What Holmes JA said in *Sardi* of the maxim was that:

> It is invoked where the only known facts, relating to negligence, consist of the occurrence itself.

—*Sardi and Others v Standard and General Insurance Co Ltd* 1977 (3) SA 776 (A)

If there is evidence of negligence—as opposed to the surrounding circumstances—there is no need for the...
Words & phrases: res ipsa loquitur (3)

Looking for intimations of mortality? Open a—whatchamacallit?—book, especially a once-prized possession, that you remember for its pristine, shiny-white pages, which have now positively yellowed. This is the price of my second (94 TSH 2011) foray in perhaps fifteen years into my collection of case reports of the Appellate Division.

The case I can find only there is celebrated in the medico-legal community, although not necessarily read by many of its denizens. It is Van Wyk v Lewis 1924 SA 438. It was heard by three illustrious judges, each of whom gave a judgment in favour of Lewis, a surgeon, and against Van Wyk, who emerged from the operating theatre with a swab forgotten inside her body.

Why the fuss? It beats me, since it is clear even to a rank outsider (like me) that Van Wyk’s case, like her operation, was mishandled from the start, inasmuch as the theatre sister—or, better, under the concept of vicarious liability (106 TSH 2012, 96 TSH 2011, 95 TSH 2011, 86 TSH 2010), her employer—was not joined in the action. It was her duty to count the movement of swabs into and out of Van Wyk’s body, and, if anyone was negligent, it was she.

In the tax field, we are far more impatient, having to cope with regular avalanches of case and, especially, statutory law. We would promptly forget about such a case, as having gone off on its particular facts and thus unlikely to yield any useful, lasting principles.

But not these medico-legal types, starved of decent case law, overfed on a nutritionless diet of textbooks written by academics, and hugely reluctant ever to look anything up themselves, especially if it is a statute. (Attorneys, I am fond of saying, are trained to derive legislation from first principles, and will defend to the death their mental constructs against all intrusions by harsh, textual reality.)

The principal judgment was delivered by Innes CJ. It went something like this:

He who asserts must prove. You rely on negligence? You must prove it. Even if the evidence of negligence is evenly balanced on either side, you must lose. The maxim res ipsa loquitur applies only when, as it says, the thing (occurrence) speaks for itself—that is, there is no direct evidence. If it does so speak, it raises nothing more than an inference, which might or might not persuade a judge or jury to conclude that negligence was responsible for the occurrence. The onus of proof resting upon the assessor is not shifted. There was a mass of evidence available, and the circumstances surrounding the occurrence could not be appreciated without consideration of that evidence. There was another, important party present, the theatre sister, who might have been negligent. Nor was it the surgeon’s duty to double-check her work in counting swabs and the like.

Wessels JA (as he then was) delivered an even longer judgment (perhaps I should say that it is the principal judgment). I’ll admit that it does represent an early, authoritative and, as far as was possible at the time, well-researched statement of the application of the principles of the Lex Aquila to surgeons and physicians in relation to their patients.

But it’s no more than an even more learned restatement of what Innes CJ said. The two judgments, I would argue, are altogether consistent.

Why, then, the controversy? I wonder if it does not spring from a misunderstanding of this passage:

This bring us to the question of the burden of proof in such cases. Does the fact that a surgeon leaves a swab in the body after an abdominal operation performed in a hospital and with qualified nurses in attendance, throw throughout the case upon him the burden of showing that he was not negligent or does the burden of proving negligence rest upon the plaintiff to the very end of the trial? If the surgeon is only liable for reasonable skill and care and if the question of whether he acted reasonably or not depends upon all the accompanying circumstances it seems to me that in as much as the term ‘reasonable’ is relative, the onus of proof must necessarily lie upon the plaintiff all the time. The maxim res ipsa loquitur cannot apply where negligence or no negligence depends upon something not absolute but relative. As soon as all the surrounding circumstances are to be taken into consideration there is no room for the maxim. The plaintiff asserts negligence and bases his claim upon it and this can only be determined by an examination of all the circumstances.

Clearly, in Pringle (120 TSH 2013), Blum JA was paraphrasing this passage. And it is equally clear that, by referring to circumstances, Wessels JA was writing about evidence. So what was he really saying? That the maxim does not displace the onus, and that it has no room to operate when the facts do not speak for themselves, in the sense that there is evidence to consider other than the bald fact of harm.

But the real message emerging is that the maxim is useless when there is more than one person who might have been negligently responsible for the harm!

To say, on the basis of this passage, that the maxim does not apply to medical-negligence matters is the same as saying that it can never be applied. And to say that is to say that, since this case, an awful lot of judges have made fools of themselves.

Finally, if the maxim has been considered in relation to collapsing bridges and multi-vehicle pileups, why should it be rejected in relation to medical negligence?

At this point it is necessary to leave SALR.

[To be continued.]
Words & phrases: ‘includes’

Counsel for the appellant submitted in the heads of argument that s 8 [of the Local Government: Municipal Property Rates Act], properly interpreted, affords the appellant a discretion to determine categories of rateable property. Counsel argued that although s 8(1) refers to certain factors that may be considered in determining categories of rateable property, it is not a *numerus clausus* [closed number], and does not restrict or limit the appellant’s discretion in any manner. The use of the word ‘include’ in conjunction with ‘may’ in the section, he argued, signifies that the legislature intended to enlarge or extend the specific guidelines and that the categories of properties referred to in s 8(2) are merely guidelines. Counsel pointed out that even if only the factors referred to in s 8(1) must be considered, it is clear from the context in which the word ‘include’ is used that non-permitted use was intended to be included in such categories. In advancing these arguments reliance was placed on the following *dictum* in *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, & others*:

> The correct sense of ‘includes’ in a statute must be ascertained from the context in which it is used. *Debele* [1956 (4) SA 570 (A)] provides useful guidelines for this determination. If the primary meaning of the term is well known and not in need of definition and the items in the list introduced by ‘includes’ go beyond that primary meaning, the purpose of that list is then usually taken to be to add to the primary meaning so that ‘includes’ is non-exhaustive. If, as in this case, the primary meaning already encompasses all the items in the list, then the purpose of the list is to make the definition more precise. In such a case ‘includes’ is used exhaustively. Between these two situations there is a third, where the drafters have for convenience grouped together several things in the definition of one term, whose primary meaning—if it is a word in ordinary, non-legal usage—fits some of them better than others. Such a list may also be intended as exhaustive, if only to avoid what was referred to in *Debele* as ‘*n moeras van onsekerheid*’ (a quagmire of uncertainty) in the application of the term.

... Turning to the present matter, in my view the court *a quo* correctly held that the list of categories of rateable property is not exhaustive and that it is competent for the appellant to add categories to that list. The use of the word ‘include’ in s 8(2) signifies that the list extends the meaning of categories of rateable property that may be determined in terms of s 8(1). (*De Reuck supra; Ndlovu v Ngeobo; Bekker & another v Jika*). This means that other grounds of differentiation besides those mentioned in s 8(1) may be used.

*City of Tshwane v Blom* 433/2012 [433/12] 88 ZASCA (31 May 2013) per Zondi AJA (footnotes suppressed)

Learning the law with your PC: family arrangements

The purpose of the use of Latin tags and maxims in the common law is to save time by having a universally recognized shorthand for sometimes complex principles of law. Agreement on the meaning of such tags and maxims is strong, and often crosses international borders. You can Google almost any one of them and quickly gain a reliable introduction to the legal principle involved.

There also exist English-language equivalents, which are harmless when they simply translate the Latin original and are recognized as translations intended for the use of a dumbed-down, enervated generation, But what can cause confusion are unique English-language tags.

Redistribution agreements...

The expression *redistribution* agreement is just such a unique tag, as is its antithesis, *family arrangement*. You cannot understand the one unless you understand the other. (*A redistribution order*, on the other hand, is something exclusive to divorces.)

... *versus* family arrangements

So, in satisfaction of a long-held curiosity, and under considerable pressure from colleagues to support my own, patrimonial interpretation of the laws of inheritance, on which important fiscal issues depend, I made a search of *SALR* (Jutas) for the strings “family arrangement”, “family arrangements” and “family agreement”, coming up with only a handful of relevant cases from 1947 to the present.

I was already aware of the leading case on the topic, *Bydawell v Chapman, NO and Others* 1953 (3) SA 514 (A) (93 *TSH*2010).

What I didn’t know was that it is also the earliest case on the topic in this particular database. What the family arrangement there considered set out to achieve is concisely revealed in this extract form the judgment of Van Den Heever MA:

> It follows that the family agreement purports to effect substantial deviations from the testator’s dispositions. He, we must assume, deliberately withheld the administration of his estate from his daughters; the agreement purports to give one daughter the unfettered administration thereof. The testator directed that the *corpus* of his estate shall be finally distributed only after the death of the survivor of his daughters;
the agreement seeks to anticipate this date and to provide for the final distribution upon Mrs Bydawell's death, thereby jeopardizing the potential rights of heirs ab intestato.

Rights of beneficiaries under will

In his comments on a much earlier case, referred to again below, he set out, clearly, the rights of what I call beneficiaries under a will. Give it a careful read; it is important:

It seems obvious to me that the learned [Dove-Wilson JP] meant no more than that beneficiaries of full capacity may freely renounce, waive or dispose of their rights under a will, and if the executor or administrator acts in terms of the agreement, every party who so waived or disposed of his rights cannot complain. But it must be plain that any rights acquired under the agreement are contractual and cannot affect the devolution of the testator's estate; in other words they may contract to render to each other the fruits of the devolution, if and when they mature or accrue, but cannot alter the devolution by contract.

In other words, first there is devolution under the will, for the first time placing the deceased's property in the hands of beneficiaries, and then a transfer of what is now their property inter se under their contractual (family) arrangement.

The only other important lesson to be drawn from this case is the judgment handed down. By means of their agreement, family members purported to change the will of the deceased, under which they were included as beneficiaries. The court struck it down, as being invalid.

And here is the reason why:

Roman-Dutch law recognizes as a matter of public interest, transcending the private interests of beneficiaries under a will, that effect should be given to the wishes of a testator, D 29.3.5, or, as Voet states the proposition, 35.1.12, the 'interests' of the testator and the public interest demand that effect should be given to a testator's last wishes....

By coincidence, the abbreviated report of the next oldest case, Weiner, NO v The Master and Others NNO 1974 (4) SA 351 (T), effectively explains the difference between the two situations thus juxtaposed in Bydawell: Before adiation and devolution, the beneficiaries are bound by the will. After adiation and devolution, the property is theirs, and they may do with it as they please. (This decision was confirmed in Weiner, NO v The Master and Others, NNO (2) 1976 (2) SA 843 (T).)

Next is Ex Parte Watling and Others 1982 (1) SA 936 (C), where Tebbutt J (a brilliant man, sadly not much represented in the case reports) said:

It is now, I think, settled law that the terms of a will cannot be changed by family agreements and that the Courts have no power to sanction such agreements (see Bydawell v Chapman NO and Others 1953 (3) SA 514 (A)....some useful citations here). As stated by Smuts J in Ex parte Marais (supra at 362):

Dit is...duidelik dat die Hof geen inherente diskresie besit om die ervolging wat deur ‘n testateur beplan is, te wyis slegs op grond van die toestemming van alle belanghebbendes nie.

There is, of course, nothing to preclude a beneficiary of full capacity, once his right under the will has vested in him from renouncing, waiving or disposing of that right by agreement....

Then comes Starkey and Others v Mcelligott and Others NNO 1984 (4) SA 120 (O), where Nienaber J (as he then was) said:

A family arrangement...is one whereby 'the contracting parties agree to alter the administration of an estate or the devolution in terms of the will'. Clearly if the renunciation is not effective in law the proposed scheme, if sanctioned, would have just that effect. That is what prompted this application, to alter the administration of the estate. But since all the potential beneficiaries have not yet been determined and consequently could not consent thereto, the arrangement cannot be sanctioned....

Because the proposed renunciation in this case is not legally competent, it follows that the proposed arrangement constitutes an unenforceable family arrangement. As such I fear it must fail.

Schichten en deelen

In the next case, Hoeksma and Another v Hoeksma 1990 (2) SA 893 (A), the will was unclear about the division of fixed property between siblings. They tried to remove the confusion in what they referred to as an 'oral redistribution agreement'. The question to be decided was whether the Alienation of Land Act required the agreement to be in writing. Here is what Nienaber AJA (as he then was) said:

Counsel for the appellants rightly did not contend that the oral agreement amounted to a 'family arrangement' which, on the authority of Bydawell..., was assailable as an attempt to alter the devolution in terms of the will. Here, all the rights (to claim transfer) had vested in the beneficiaries, none of them minors....although the nature and extent of those rights admittedly remained in contention—so that it was legitimate for the beneficiaries to seek to rearrange the assets of the estate to suit themselves.

In Ex parte Grant the parties to the agreement, all of full capacity, disposed of their vested rights. The parties did not purport to alter or modify the provisions of the will; they compromised on the assets coming to each in the process of 'schichten en deelen', as they have been competent to do according to Roman-Dutch law for centuries. (Per Van den Heever JA in Bydawell's case....) What appellant’s counsel did contend was that the oral agreement constituted a redistribution agreement....

Because it was a redistribution agreement, and did not involve a sale or donation, therefore, so the argument proceeded, it must be an exchange.

The short answer is of course that this approach begs the question—the issue is not whether the agreement can be described as a redistribution agreement, but whether it amounted to an exchange.
In my judgment, for the reasons already discussed, it did not...

For these interrelated reasons—because the parties contemplated change and not exchange; because the assets to be 'exchanged' were uncertain; and because the oral agreement was essentially a settlement to resolve these uncertainties—I believe the Court a quo to have been right in holding that the agreement concluded on 20 November 1986 and recorded on the 26th was not an 'exchange' and accordingly was not invalidated by the provisions of the Alienation of Land Act 68 of 1981.

A famous textbook queers the pitch

The last and most recent case is Levin and Another v Gutkin, Fisher And Schneider and Others 1997 (3) SA 267 (W), in which Zulman J effectively confirmed that Bydawell has been followed in later cases, for example, in Starkey.

Why he chose in addition to cite a (famous) textbook and so confuse himself and the world at large is beyond me.

123 TSH 2013—June 2013

Learning the law with your PC: common-law & executory donations

While investigating the topic of family arrangements, I came across the immensely useful judgment of Van Zyl J in CSARS v Marx no 2006 (4) SA 195 (c), a case involving a donation by a father to his children of substantial amounts, payable upon his death. Anyone other than s 46(1)(d) of the Income Tax Act:

56. (1) Donations tax shall not be payable in respect of the value of any property which is disposed of under a donation—

(d) in terms of which the donee will not obtain any benefit thereunder until the death of the donor;

But not SARS. It had to lose both in the Cape Income Tax Special Court and the High Court before yielding, to the accompaniment, I am glad to report, of costs awarded against it. Here is some of what Van Zyl J said (footnotes suppressed). The headings are mine.

Common-law donation

It must be borne in mind that a donation made during the lifetime of the donor (donatio inter vivos) becomes contractually and legally binding from the moment the donee accepts the donation. It creates rights and obligations just like any other consensual contract....

The donor's intention to make a donation (animus donandi) must arise from generosity (liberalitas) or liberality (munificentia) and be expressed as a promise (offer) to donate, which promise (offer) must be accepted by the donee before a binding contract of donation comes into existence. Once this happens the donation is perfected and it may be revoked only under certain circumstances. The resultant contract is not sufficient, however, for purposes of transferring the donated asset into the ownership (dominium) of the donee. Performance of the obligation arising from the donation, in the form of delivery (traditio) of the asset donated, first has to take place, as appears from the following dictum of Jansen JA in Mankowitz v Loewenthal:

At the outset it must be remembered that a contract of donation and the performance thereof, viz the delivery of the article donated, are two separate juristic acts: the one directed at creating an obligation and the other at transferring possession (and dominium).'

In patrimonial terms, the perfected donation creates property in the donee's hands, in the form of a personal right against the donor (the patrimonial object is the performance due by the donor). Upon delivery in discharge of the donor's obligation, the donee acquires the actual property (patrimonial object) promised.

Executory donations

An executory donation is so called because it still requires to be effected or perfected, in the sense that something is required to be done before it can be regarded as completely performed. In the present case Traverso DJP held that the donation was executory because delivery thereof would take place at some future time, namely when the donor died. As such, it was valid and enforceable in terms of s 5 of the General Law Amendment Act 50 of 1956....

....

If the donation takes the form of a cession of rights, the donation is completed simultaneously with the cession and there is hence no question of an executory contract, as explained by Botha J in the Weiner case:

I agree with counsel for the respondents that the family arrangement arrived at was an agreement whereby a cession was effected of the rights of Julius and the third respondent to their inheritances in Nathari's estate, in favour of Rose. They divested themselves of their rights and Rose acquired those rights from them. Counsel for the applicant did not attack the legality of an agreement of this nature, and I am unable to think of any reason for doubting its validity. Matters such as the liability for donations tax and transfer duty do not affect the validity of the agreement. No doubt the cession of rights constituted a donation by Julius and the third respondent to Rose, but since a transfer of rights takes place by the mere agreement of cession, this was not an executory donation requiring writing for its validity in terms of the proviso of s 5 of Act 50 of 1956; in any event, the actual delivery of the assets in Nathari's estate to Rose would have precluded any reliance being placed on the statutory provision mentioned.

It is clear from these authorities that the contract of
Others

Oudekraal Estates (Pty) Ltd v City of Cape Town & Others

As noted in the Monthly Listing, the leading case is Oudekraal Estates (Pty) Ltd v City of Cape Town & Others (41/2003) [2004] ZASCA 48, in which Howie P and Nugent JA said:

The kind of case to which it would apply seems to be those in which the donor contracts to donate irrevocably property to a beneficiary, or to a trustee for the benefit of a beneficiary, in terms of which its whole operation is suspended until his death or thereafter; that is, no delivery or transfer of the property or of any pecuniary advantage, profit or gain therefrom is to take place until then. As stated above, the mere contractual right thereby vested in the 'donee' is not a 'benefit obtained by the donee thereunder' so as to preclude the exemption from operating, and the donation would not be a donatio mortis causa, because it would not be revocable, which are both essential characteristics of the latter kind of donation (Meyer and Others v Rudolph's Executors 1918 AD 70 at 83 and 88).

There is hence no merit in Mr Van Rooyen's argument that the reference in the deed of donation to a 'vested right' in the donation evinced the intention of the immediate transfer of ownership. In certain circumstances this may be the case, but not so in the present case. On my reading of the deed, such transfer has been unequivocally postponed to the occurrence of a future event, namely, the death of the donor.

The word vested is very dangerous, especially when used by lawyers, as opposed to tax accountants.

Had the donations tax been based on a simple patrimonial event—the creation of a personal right against the donor—donations tax would have been payable by the donor in this matter. It is based, rather, on a perfected donation, and were that to have been the basis of the donations tax, the donor would have again been liable. But you cannot ignore the exemption in s 56(1)(d)—it has to be given gestalt. It clearly envisages a perfected donation, but does not tax it.

You could argue that the donee's personal right, which is property, against the donor is a benefit (as in will not obtain any benefit thereunder until the death of the donor) but, then, what on earth would be the purpose of the exemption?

On a donatio mortis causa, see 112 TSH 2012.

123 TSH 2013—June 2013

Words & phrases: functus officio

It appears that I have long misunderstood what functus officio means.

Oudekraal Estates

As noted in the Monthly Listing, the leading case is Oudekraal Estates (Pty) Ltd v City of Cape Town & Others (41/2003) [2004] ZASCA 48, in which Howie P and Nugent JA said:

For those reasons it is clear, in our view, that the Administrator's permission was unlawful and invalid at the outset. Whether he thereafter also exceeded his powers in granting extensions for the lodgment of the general plan thus takes the matter no further. But the question that arises is what consequences follow from the conclusion that the Administrator acted unlawfully. Is the permission that was granted by the Administrator simply to be disregarded as if it had never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator's approval and all its consequences merely because it believed that they were invalid provided that its belief was correct? In our view, it was not. Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognized that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.

Kirland Investments

In Member of the Executive Council for Health, Eastern Cape Province v Kirland Investments (473/12) [2013] ZASCA 58 (16 May 2013) (see the Monthly Listing) Plasket AJA said:

... It would be intolerable and lead to great uncertainty if an administrator could simply ignore a decision he or she had taken because he or she took the subsequent view that the decision was invalid, whether rightly or wrongly, whether for noble or ignoble reasons. The detriment that would be caused to the person in whose favour the initial decision had been granted is obvious....

Retail Motor Industry Organization

By coincidence, the Monthly Listing includes another case on the doctrine, Retail Motor Industry Organization v Minister of Water & Environmental Affairs (145/13) [2013] ZASCA 70. Again, it was
Plasket AJA who delivered the judgment (footnotes suppressed):

In explaining what the *functus officio* principle means, Daniel Malan Pretorius ['The Origins of the *Functus Officio* Doctrine, with Specific Reference to its Application in Administrative Law'] (2005) 122 SALJ 832 at 832 says the following:

The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The result is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.’

The *functus officio* principle is also intended to foster certainty and fairness in the administrative process. It is not absolute in the sense that it does not apply to every type of administrative action. Certainty and fairness have to be balanced against the equally important practical consideration that requires the reassessment of decisions from time to time in order to achieve efficient and effective public administration in the public interest. Lawrence Baxter [*Administrative Law* (1984) at 372] deals with these competing factors when he explains the purpose of the principle:

Indeed, effective daily administration is inconceivable without the continuous exercise and re-exercise of statutory powers and the reversal of decisions previously made. On the other hand, where the interests of private individuals are affected we are entitled to rely upon decisions of public authorities and intolerable uncertainty would result if these could be reversed at any moment. Thus when an administrative official has made a decision which bears directly upon an individual’s interests, it is said that the decision-maker has discharged his office or is *functus officio*.

It is not necessary in this judgment to define the exact boundaries of the *functus officio* principle, save to say the following: first, the principle applies only to final decisions; secondly, it usually applies where rights or benefits have been granted—and thus when it would be unfair to deprive a person of an entitlement that has already vested; thirdly, an administrative decision-maker may vary or revoke even such a decision if the empowering legislation authorizes him or her to do so (although such a decision would be subject to procedural fairness having been observed and any other conditions); fourthly, the *functus officio* principle does not apply to the amendment or repeal of subordinate legislation.

The principle does not apply to subordinate legislation for two reasons. First, in terms of the common law, legislation may be amended by the body empowered to make it. Secondly, the Interpretation Act 33 of 1957 provides expressly for a deviation from the principle in the case of subordinate legislation. Section 10(3) states:

Where a law confers a power to make rules, regulations or by-laws, the power shall, unless the contrary intention appears, be construed as including a power exercisable in like manner and subject to the like consent and conditions (if any) to rescind, revoke, amend or vary the rules, regulations or by-laws.

124 TSH 2013—July 2013

**Words & phrases: ‘deemed’**

This citation comes from the minority judgment of Dendy Young J in *Taxpayer v COT, Botswana* 43 SATC 118, 1980 (bca) (see elsewhere in this issue):

... In *St Aubyn (LM) v Attorney-General* [1951] 2 All ER 473 (ha), Lord Radcliffe said at 498F:

The word ‘deemed’ is used a great deal in modern legislation. Sometimes it is used to impose for the purposes of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible.

124 TSH 2013—July 2013

**Interpretation: more on what is a proviso**

I am sticking to my guns in arguing that it is a waste of time to try and define exactly what a proviso might be. The point is to acknowledge, rather, all the forms that the idiot draftsperson classifies as provisos, by using wording such as ‘provided that’.

And these, I say, comprise:

- Stand-alone stipulations.
- Excepting stipulations.
- Qualifying stipulations.
- Conditional stipulations.
- Additional stipulations.

The first two possibilities are widely recognized. I dealt with them in 104 TSH 2011 (*Thulo v Road Accident Fund*) and 116 TSH 2012 (*Strydom v Engen Petroleum Limited*).

You cannot—it is a fallacy of interpretation—treat the first two, pukka types as constituting independent enacting clauses (116 TSH 2012, 118 TSH 2013).
Now hear this:

Whilst the regulation on which the Fund relies in advancing its claim takes the form of a proviso and it is convenient to use that term to describe it, in truth it is not a proviso properly so-called. A proviso would serve to qualify and limit the scope of the definition to which it was appended [Mphosi v Central Board for Co-operative Insurance Limited 1974 (4) SA 633 (A) at 645C–F] but this is an independent provision dealing with the power of the committee of the Superannuation Fund to direct a local authority to pay an adjusted contribution.

Tick off the last item in my list! The provision referred to, which started off so learnedly with the words 'provided further that...' was, said Wallis JA, in Natal Joint Municipal Pension Fund v Endumeni Municipality (920/2010) [2012] ZASCA 13 (15 March 2012) (114 TSH 2012, 122 TSH 2013, 123 TSH 2013), 'an independent provision'.

124 TSH 2013—July 2013

More on the functus officio principle

In Frederick Coenrad Daniel v President of the Republic of South Africa and Another CCT 34/12 [2013] ZACC 24 the Constitutional Court said:

The general principle is that once a court has duly pronounced a final order, it becomes functus officio and has no power to alter the order. However, Rule 42 of the Uniform Rules creates exceptions to this principle. The Rule empowers courts to rescind or vary orders in certain defined circumstances. In this case the applicant relies on only one of the grounds listed in Rule 42. He contended that the order 'was made in error'. This falls under the first ground listed in Rule 42. It authorizes rescission of an order erroneously granted in the absence of a party affected by it.

124 TSH 2013—July 2013

Words & phrases: res ipsa loquitur—the facts speak for themselves

One of the purposes of my reckless venture into the case law on this doctrine in 119, 120 and 121 TSH 2013 was to show that the locus classicus (the leading judgment), Van Wyk v Lewis 1924 AD 438, on the issue is usually horribly misunderstood, even in leading textbooks.

Buthelezi v Ndaba

Little was I to know that the misunderstanding was to be celebrated by the SCA in Buthelezi v Ndaba (575/2012) [2013] ZASCA 72 (see the Monthly Listing).

Ntsele v MEC for Health, GPG

Or that I would stumble upon that decision so soon after learning of the remarkable decision of Mokgoatlheng J in Ntsele v MEC for Health, Gauteng Provincial Government (2009/52394) [2012] ZAPLHC 208; [2013] 2 (24 October 2012) (again, see the Monthly Listing).

What happened in Ntsele

The facts of Ntsele are extraordinary. The alleged incident of medical negligence occurred fifteen years and five months earlier. Altogether unsurprisingly, the plaintiff’s evidence was imprecise, and several facts were unproven. All the clinic and hospital files were missing (a not uncommon occurrence, I am led to believe).

Thus there was not evidence of but the probability of negligence, obliging the defendant to disprove that probability.

An important case on this topic cited by Mokgoatlheng J is Naude NO v Transvaal Boot and Shoe Manufacturing Co 1938 AD [15]. His judgment is also useful for its citations on the duties of an expert witness.

Mokgoatlheng J on res ipsa

But here is the portion that interested me most (the headings in bold type are mine):

THE APPLICATION OF THE DOCTRINE OF RES IPSA LOQUITUR

In the alternative, the circumstantial matrix encapsulates the occurrence of an eventuality which carries a high probability of negligence regarding the defendant’s employees’ conduct which justifies the invocation of the doctrine of res ipsa loquitur.

No prohibition in Van Wyk

Since the seminal case of Van Wyk v Lewis 1924 AD 438 it has been generally assumed that the maxim res ipsa loquitur is generally not applicable in medical negligence cases, because ‘A doctor is not held negligent simply because something goes wrong. It is not right to invoke against him the maxim of res ipsa loquitur save in extreme cases. (my emphasis) per Lord Denning in Huck v Cole 1993 4 MED LR 393.

However, a careful consideration of the ratio enunciated in the abovementioned judgment shows that the Appellate Division (as it then was) did not totally prohibit the application of the maxim in cases like the present where there are exceptional circumstances justifying such application.

In Van Wyk v Lewis (supra) at p 445 [Innes] CJ held: ‘No doubt it is sometimes said that in cases where the maxim applies the happening of the occurrence is in
itself *prima facie* evidence of negligence...there has been no shifting of onus.’

*Van Wyk–Kotze JA*

Kotze JA at page 452 in a dissenting judgment also aligned himself with the same notion when he remarked: ‘not infrequently a plaintiff may produce evidence of certain facts which, unless rebutted, reasonably if not necessarily indicate negligence, and in such cases the maxim *res ipsa loquitur* is often held to apply.’

*Van Wyk–Wessels JA*

Wessels JA at page 464 echoed the same sentiment in when he remarked ‘...it seems to me that the maxim *res ipsa loquitur* has no application in cases of this kind.... The onus therefore of proving negligence in a case of this kind is on the plaintiff from the beginning of the trial to the very end.’

‘The doctrine must be invoked with caution and only where the defendant’s employees were in absolute control over the patient, the treatment and all the instruments used, and where the injury results in a complete discord with the recognized therapeutic, objective treatment and technique involved, and suggests no other explanation possible.... The doctrine, constitutes nothing more than a particular species of circumstantial evidence. What is sought to be proved is negligence and the evidence of the occurrence itself because it carries a high degree of probability of negligence, it provides its own circumstantial evidence as to the exigency of the negligence in question and the facts upon which the inference is to be drawn and derived from.’

The application of the doctrine does not shift the plaintiff’s *prima facie* factual inference that does not shift the burden of disproving negligence, but may call for some degree of proof in rebuttal of that inference.

**The constitutional imperative**

On the ‘constitutional imperative’, Mokgoatlheng J said:

Consequently, because the knowledge of the treatment accorded to the plaintiff on the 7 September 1996 is peculiarly within the knowledge of the defendant’s employees, and the defendant has not adduced any direct cogent evidence to discharge the evidential rebuttal burden of probable negligence, the invocation of the maxim *res ipsa loquitur* in this kind of exceptional case given the critical missing clinic and hospital records pertaining to the plaintiff’s treatment on 7 September 1996, is legally justifiable having regard to the Section 27 of the [Constitution].

Because the defendant has failed to discharge the evidential burden disproving a causal connection between the negligence of his employees and A’s cerebral palsy, the summation that the eventuality speaks for itself is unanswered.

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125 TSH 2013—August 2013

**TAA—words & phrases: ‘otherwise’**

What follows is the text of s 158 of the Tax Administration Act. What do you suppose the word *otherwise* signifies in the context?

**Responsible third party**

158. In this Act, responsible third party means a person who becomes otherwise liable for the tax liability of another person, other than as a representative taxpayer or as a withholding agent, whether in a personal or representative capacity.

At a recent seminar, an attorney who enjoyed a decent legal education remembered that there is case law on the meaning of the word. So I searched SALR for the string “meaning of otherwise” not really expecting much but came up with two hits, one of which lead me to a judgment delivered by Van Winsen J in *R v Bono* 1953 (3) SA 506 (C):

... The law reports contain many examples, some of which were quoted to us, where, despite the presence of general words following upon particular words, the Courts, regard being had to the scope and object of the legislation or contract sought to be interpreted, have refused to limit the generality of the latter words. The word ‘otherwise’, denoting something contrary to or different from the concept to which it relates, is the very antithesis of such concept and to that extent conveys a far wider meaning than does the concept itself. The word ‘otherwise’ is a word of wide generality, and unless good reason is advanced for cutting down that wide meaning I do not think that this Court should do so.

But that case dealt with the application, or, well, otherwise, of the *ejusdem generis* rule (of the same kind) in the interpretation of a regulation reading in part as follows:

No person shall organize, hold, assist or be concerned in any collection of money in the public streets whether for charitable objects or otherwise unless....

It seems that Solomon CJ, in *R v Nolte* 1928 AD 377, has made the definitive comment on the *ejusdem generis* rule, saying that it is one that has to be applied with care, and is not of general application.

Okay, I’ll accept that the rule is inapplicable to s 158 and am ready to read *otherwise* as being the very antithesis of the concept to which it relates. That concept can only be tax *liability of another person*. Its antithesis must be the liability of the responsible third party (RTP). But is there really any difference between

- □ who becomes otherwise liable, and
- □ who becomes liable?
I think not. The word *otherwise* appears to be surplus to requirements.

Next, how do you suppose an RTP becomes *otherwise liable in a representative capacity?* I don’t think it is possible. Read s 159:

**Personal liability of responsible third party**

159. A responsible third party is personally liable to the extent described in Part D [Collection of tax debt from third parties] of Chapter 11 [Recovery of tax].

Part D of Chapter 11 imposes personal liability upon third-party appointees (s 179), financial management (s 180), shareholders (s 181), transferees (s 182) and dissipaters (s 183). RTPs are personally liable, and appear to be incapable of being liable in a representative capacity.

In any event, what does it mean to be liable in a representative capacity? A representative taxpayer is primarily liable in that capacity (s 155). A public officer is seen as acting in that capacity (s 246(6)).

There is only one other reference to that capacity, to be found in s 160(1)(b), which purports to enable RTPs (b) to retain out of money or assets in that person’s possession or that may come to that person in that representative capacity, an amount equal to the amount so paid.

But third-party appointees, financial management, shareholders, transferees and dissipaters simply do not act in the capacity of agents or fiduciaries and so appear unlikely to act in a representative capacity. Perhaps someone else can make sense of s 158. I cannot.

Learning the law with your PC: donation v ‘donation’

**Ovenstone**

In the famous case of *Ovenstone v Sir 1980 (2) SA 721 (A)*, Trollip JA said:

In a donation the donor disposes of the property gratuitously out of liberality or generosity, the donee being thereby enriched and the donor correspondingly impoverished, so much so that, if the donee gives any consideration at all therefor, it is not a donation (see *The Master v Thompson’s Estate 1961 (2) SA 20 (FC)* at 24F–26C, 48F–49C, where all the authorities are collected). It can therefore be regarded as a unilateral contract in the sense that the donor is the only party upon whom any obligation lies.

A donation is not truly a unilateral contract (which is in any event a contradiction in terms), since it is subject to acceptance (or, in an immediate, as opposed to an executory donation—123 TSH 2013—at least receipt) by the donee.

**Welch’s Estate**

Much more recently, in *Welch’s Estate v CSARS 2005 (4) SA 173 (SCA)*, Marais JA said:

The test to be applied at common law to determine whether the disposition of an asset amounts to a donation properly so called (as opposed to a remuneratory donation) is so well-settled that it hardly needs repetition. The test is of course that the disposition must have been motivated by ‘pure liberality’ or ‘disinterested benevolence’. As it was put in *De Jager v Grunder*, ‘Was die dryfveer iets anders as suiwier vyweygewigheid en wewillendheid jeens die eiser, was dit geen skenking nie.’ Furthermore, there is a presumption against donations in our law.

What is a remuneratory donation? Watermeyer ACJ (as he then was) once said of such donations, in the case leading to *The Master v Thompson’s Estate 1961 (2) SA 20 (FC)*, that they are not inspired solely by a disinterested benevolence but are, as a rule, made in recognition of, or in recompense for benefits or services received, and therefore are akin to an exchange or discharge of a moral obligation. Whether or not a donation is remuneratory must, of course, depend principally on the motive inspiring the gift.

Yet, having made this distinction between common-law donations proper and remuneratory donations, in *Welch’s Estate*, Marais JA went on, at some length, to equate a common-law donation with a ‘donation’ for donations tax purposes (s 55 of the Income Tax Act):

> ‘[D]onation’ means any gratuitous disposal of property including any gratuitous waiver or renunciation of a right;

The gravamen of his carefully reasoned argument is contained in the following passage:

In my opinion the Legislature has not eliminated from the statutory definition the element which the common law regards as essential to a donation, namely, that the disposition be motivated by pure liberality or disinterested benevolence and not by self-interest or the expectation of a *quid pro quo* of some kind from whatever source it may come.

**What about intent?**

I have never agreed with this view (66 TSH 2008), since I do not see the statutory definition as including the same quality of intent as its common-law predecessor. In any event, some reason has surely to be found why the legislature saw fit to define a word with such a widely accepted common-law meaning. The implication is surely that something other than a common-law donation was intended.

**Verseput**
In Avis v Verseput 1943 AD 331, Tindall JA said:

I have given reasons for holding that it was not a remuneratory donation. But from this conclusion it does not follow that the promise was a genuine donation. It is true that it was gratuitous but the mere fact that the promisor Avis did not stipulate for any *quid pro quo* does not make the promise a donation;....

In the present case the motive of Avis is the test; the promise having been made for business reasons closely connected with the dissolution, it was not a genuine donation.... A promise of such a nature does not seem to me to have been contemplated by the authorities in their discussion of the meaning of *donatio*.

**Thompson’s Estate**

Yet, in Thompson’s Estate, Clayden ACJ (as he then was) did not appear to support Tindall JA’s view:

…it seems to me that these authorities show that the existence of other motives for the making of a donation do not alter its character. They show that where something is received in return, where there is some consideration, the transaction is not a donation; that is the basis of the decision in *Avis v Verseput*. They show that the intention which is paid regard to is an intention to enrich.

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**Words & phrases: precarium**

In Malan v Nabygelegen Estates Watermeyer CJ defined a *precarium* as ‘the legal relationship which exists between parties when one party has the use and occupation of property belonging to the other on sufferance, by the leave and licence of the other’.

The leaned Chief Justice proceeded to say that ‘[i]ts essential characteristic is that the permission to use or occupy is revocable at the will of the person granting it’. In *Adamson v Boshoff and others*, Van Winsen AJP held that in the case of a *precarium* ‘it is a tacit condition, a *conditio juris*, of the grant thereof that it can be withdrawn by the grantor at will’. As to the notice that must be given, he held:

I have been unable to find authority amongst the old writers as to the period of notice required where the circumstances were such that it was open to the grantor to withdraw his concession whenever he chose. I think, however, that in the light of the South African case law it can be said that the grantor withdrawing the concession to the holder of the *precarium* must give him reasonable notice of his decision to do so. What length of notice is reasonable must be determined in relation to the nature of the concession and the circumstances of the case.


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**Words & phrases: ‘without prejudice’**

To get a handle on this topic, I searched *SALR* headnotes for the string “without prejudice”, encountering a mere thirty hits, only one of which involved a superior court.

The case is *Naidoo v Marine & Trade Insurance Co Ltd* 1978 (3) SA 666 (A), with Trollip JA delivering the judgment of the court, who made extensive reference to an academic article from New Zealand by David Vaver.

Since 1950 the use of these words as a protective formula has been greatly extended creating new problems concerning their scope and effect (Vaver at 91), especially the precise extent of the protection afforded by them. For instance, they are not infrequently now used on a written communication or other document, not in order to settle any prospective or pending litigation or dispute, but for some other purpose, such as trying to reserve the writer’s rights. For reasons that will presently emerge we need not consider the legal effect of such use of the words, for the question does not arise in the present case. It suffices to say that such use does not render the communication or document inadmissible in evidence.
for public policy does not require it to be so protected; it is admissible, but the legal effect, if any, of the words will have to be decided by the Court in the light of all the circumstances (cf Vaver at 164). Again, the parties to a dispute or their representatives may sometimes expressly agree that their verbal or written negotiations for settling it shall be ‘without prejudice’. And Courts have also sometimes held that a tacit agreement to that effect may be inferred from the failure of one party to bilateral settlement correspondence to object to the other party’s marking his letters ‘without prejudice’ (see Vaver at 98). Whether such an inference is warranted in the present case, or, if it is, whether an agreement of that kind is another reason, additional or alternative to that of public policy, for rendering the evidence of the negotiations inadmissible, or whether it affords wider protection for the negotiations than would otherwise apply, need not be decided here either.

The only other decision cogently addressing the issue is Lynn & Main Inc v Naidoo and Another 2006 (1) SA 59 (N), in which Tshabalala JP said:

Now, as a general rule negotiations between parties, whether oral or written, which are undertaken with a view to a settlement of their disputes or differences, are privileged from disclosure. This is so whether there are express stipulations that they shall be without prejudice or not. (See Millward v Glaser 1950 (3) SA 547 (W).) Indeed, in Jili v South African Eagle Insurance Co Ltd 1995 (3) SA 269 (N) at 275B, it was decided that: No conclusive legal significance attaches to the phrase ‘without prejudice’. The mere fact that a communication carries that phrase does not per se confer upon it the privilege against disclosure, for example where there exists no dispute between the parties or it does not form part of a genuine attempt at settlement…nor is a communication unadorned by that phrase always admissible in evidence, for it will be protected from disclosure if it forms part of settlement negotiations.’

As with all general rules, there are exceptions whereby an offer made without prejudice, adorned with the words ‘without prejudice’ can be admissible in evidence as an act of insolvency.

Words & phrases: universitas

I hate it when people refer me to textbooks, like the colleague who recently alleged that a universitas is not incorporated, since you can only be incorporated in terms of legislation. That was in response to what I had written in 104, 105 in terms of legislation. That was in response to what I

The only other decision cogently addressing the issue is Lynn & Main Inc v Naidoo and Another 2006 (1) SA 59 (N), in which Tshabalala JP said:

... A distinction must be drawn between, on the one hand, corporate associations which are by virtue of legislation (statutory associations) or under the common law (universitas personarum) legal entities distinct from their members, and what are referred to as unincorporated associations, on the other. For present purposes it is only necessary to deal with a universitas and an unincorporated association. The distinction between these two entities has been explained as follows in Webb & Co Ltd v Northern Rifles; Hobson & Sons v Northern Rifles:

An universitas personarum in Roman-Dutch law is a legal fiction, an aggregation of individuals forming a persona or entity, having the capacity of acquiring rights and incurring obligations to a great extent as a human being. An universitas is distinguished from a mere association of individuals by the fact that it is an entity distinct from the individuals forming it, that its capacity to acquire rights or incur obligations is distinct from that of its members, which are acquired or incurred for the body as a whole, and not for the individual members. One of the most important rights of a universitas is the capacity to own property. Being a legal persona, a universitas may sue or be sued in its own name. It derives these characteristics from the common law and it is not necessary for it to be created by or registered in terms of a statute.

A universitas is therefore a separate legal entity that has perpetual succession with rights and duties independent from the rights and duties of its members....

In Ahmadiyya Anjuman Ishaati-Islam Lahore (South Africa) and Another v Muslim Judicial Council (Cape) and Others 1983 (4) SA 855 (C) the following was said:

First plaintiff is a voluntary association. A voluntary association can either be an incorporated voluntary association or an unincorporated voluntary association, ie it can either be a corporate body (universitas) or a non-corporate body. The characteristics of a corporation or universitas are that it should have perpetual succession and be capable of owning property apart from its members....

And in Cir v Witwatersrand Association of Racing Clubs 1960 (3) SA 291 (A) Ogilvie Thompson JA, as he then was said:

... The first question for decision, therefore, is whether respondent is a ‘person’ within the meaning of this section. Sec 3 of the Interpretation Act, 5 of 1910, provides that, unless the context otherwise requires or unless the statute provides otherwise, the word ‘person’, when used in a statute, includes, inter alia ‘(b) any company incorporated or registered under any law, or (c) any body of persons corporate or unincorporate.’ In the Dutch version (c) above is rendered as ‘een lichaam van personen, hetzij ingelifijf of niet’. In an
The expropriation order is available even against the police where they have seized goods unlawfully. The central question is: does section 68(6)(b) and 89(1) of the Traffic Act in seizing a person’s goods is unlawful. This unlawfulness, plus the other requirement for a spoliation order (namely, having been in possession immediately prior to being despoiled) satisfy the requisites for the order. All that the despoiled person need prove is that—

(a) she was in possession of the object; and
(b) she was deprived of possession unlawfully.

The obvious conclusion is that the *mandament van spolie* is available even against the police where they have seized goods unlawfully. The principle of legality requires the police purported to act under colour of the law, statutory or otherwise, the real issue is whether it is properly acting within the law. After all, the principle of legality requires of state organs always to act in terms of the law. Surely then, it should make no difference that, in disregarding an individual of an object unlawfully, the police purported to act under colour of the search and seizure powers contained in the Criminal Procedure Act. Non-compliance with the provisions of the Criminal Procedure Act in seizing a person’s goods is unlawful. This unlawfulness, plus the other requirement for a spoliation order (namely, having been in possession immediately prior to being despoiled) satisfy the requisites for the order. All that the despoiled person need prove is that—

(a) she was in possession of the object; and
(b) she was deprived of possession unlawfully.

The obvious conclusion is that the *mandament van spolie* is available even against the police where they have seized goods unlawfully. The central question is: are sections 68(6)(b) and 89(1) of the Traffic Act to be read in a manner that alters this position? Do they stand in the way of restoration of possession of the vehicle in terms of a spoliation order in this matter? I think not.

With this in mind, I take the view that sections 68(6)(b) and 89(1) of the Traffic Act must, as far as possible, be read in a manner that is harmonious with the *mandament van spolie*. This is in accordance with the principle that, to the extent possible, statutes must be read in conformity with the common law. Of course, where a harmonious reading is not possible, statutes must trump the common law.

**Warrantless search**

The failure of the police to obtain a search and seizure warrant established the unlawfulness of their action in this matter.

The principle of legality was mentioned in [133 TSH 2014](#), where Affordable Medicines Trust and Others v...
Minister of Health and Others [2005] ZACC 3; 2006 (3) SA 247 (CC) at para 49 was also cited.

A further citation made in the present matter is Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others [1998] ZACC 17; 1999 (1) SA 374 (CC) at para 56.

134 TSH 2014—May 2014

Specific performance v exceptio non adimpleti contractus

In 82 TSH 2010 and 127 TSH 2013, I covered the maxim exceptio non adimpleti contractus—essentially, the ability of a party to a qualifying contract to plead the exception of unfulfilled contract. It applies only when a contract displays the necessary degree of reciprocity, essentially (although not exclusively), one requiring simultaneous performance by both parties (such as a lease).

What interests me about the maxim is its impact, if any, upon fiscal issues, such as accrual, incurral and supply.

Maxim ordinarily inapplicable

Ordinarily, however, the maxim is inapplicable, owing to the nonreciprocal nature of the contract concerned or, perhaps better, the insufficiency of its reciprocity.

The more mundane position then obtaining is that (a) there is a contract in existence; (b) one of the parties has failed to perform as required; and (c) the contract is enforceable upon tender of performance by the nonperforming party. The exceptio is neither relevant nor necessary.

Clearly, all contracts involve a degree of reciprocity but not, I have learned to think, of the degree and kind demanded by the exceptio.

Botha v Rich

In Botha and Another v Rich NO and Others [2014] ZACC 11 this distinction has been blurred, or else the underlying principles have been confused. Perhaps because the outcome was seen as being correct, no one on the bench bothered to express an opinion on the issue.

In any event, the case records an incredible effort mounted by the purchaser of fixed property from a trust (haven’t I always said never, ever, to deal with a trust!) to get a fair shake. It took the Constitutional Court finally to decide that, if she paid what she owed, the trust had to register transfer. I would advise anyone transacting with a Ms Lorraine Sophie Botha to take great care lest she be the same person as the applicant in this case. She is not to be crossed.

Having paid more than half under an instalment sale and despite being in arrears, she relied on section 27(1) of the Alienation of Land Act:

Rights of purchaser who has partially paid the purchase price of land

27. (1) Any purchaser who in terms of a deed of alienation has undertaken to pay the purchase price of land in specified instalments over a period in the future and who has paid to the seller in such instalments not less than 50 per cent of the purchase price, shall, if the land is registrable, be entitled to demand from the seller transfer of the land on condition that simultaneously with the registration of the transfer there shall be registered in favour of the seller a first mortgage bond over the land to secure the balance of the purchase price and interest in terms of the deed of alienation.

What follow are extracts from the judgment of Nkabinde J (footnotes suppressed):

The Constitution is located in a history which involves the transition from a society based on injustice and exclusion from the democratic process to one founded on the supremacy of the Constitution, the rule of law and the values of human dignity and equality. The guidance provided by section 39(2) of the Constitution to statutory interpretation under our constitutional order means that all statutes must be interpreted through the prism of the Bill of Rights. Section 39(2) reads:

When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. It follows that when we interpret section 27(1) of the Act we must promote the spirit, purport and objects of the Bill of Rights.

Section 27(1) should not be read in isolation. An examination of section 27(3) reveals that it provides a further protection to a purchaser. The word ‘may’ in section 27(3) is used to give a purchaser power. This view is fortified by the words ‘shall’ and ‘may’, the use of which in the same section is not insignificant. It needs to be stressed however that courts may, in appropriate circumstances, construe the word ‘may’ as mandatory even though it is permissive on the face of the section.

It is thus correct that the purchaser is entitled to cancel the deed of alienation in terms of section 27(3) and in terms of section 28(1) to recover from the seller, among other things, that which she has paid plus interest on any payment made, as in Dongwe. But the argument advanced by the Trustees, relying on Dongwe and academic authority, is that the purchaser’s only remedy if the seller refuses to honour her demand for transfer is cancellation. This, they said, follows from the fact that the section only mentions cancellation. It does not mention specific performance. But specific performance is what Ms Botha sought in her counter-application. Essentially, she sought an order compelling the Trustees to register the property and sign all documents necessary for transferring the property into her name.

The Trustees’ argument cannot be sustained. The starting point is that at common law a contracting party demands specific performance in terms of the contract. If the contract is unfulfilled, specific performance is the primary remedy, and if it cannot be done, the court will then consider whether a different remedy is required. Where the contract is reciprocal it is necessary to interpret the contract to provide for reciprocal performance. Where the contract is unfulfilled, specific performance is always available. It will be available, as it is unfulfilled. The court will then consider whether specific performance is sufficient or whether an additional remedy such as damages is required. When the contract is unfulfilled, damages are always available. The only question is whether specific performance is sufficient or whether damages are required.
Contingent interests—terminology

For the third time in this newsletter, I reproduce two famous extracts from judgments of Watermeyer JA, as I prefer to call them, focusing especially on the Administration of Estates Act, the Insolvency Act and the Trust Property Control Act. Since most of the difficulty in understanding this important subject stems from terminological imprecision, this first instalment in what might well turn out to be a lengthy series lays down some ground rules.

Contingent interests v contingent rights

Our statutes use the expressions contingent interests and contingent rights interchangeably, and the case reports show the same equivalence, although, in my view, contingent right, although venerable, is an unwise elegant variation of contingent interest, since, strictly, a right displays no contingent features whatsoever, while a contingent interest indicates something of a more hopeful nature.

Vested right v contingent right

On the meaning of vest, this is what Watermeyer JA said in Jewish Colonial Trust Ltd v Estate Nathan 1940 AD 163:

...
Unfortunately the word ‘vest’ bears different meanings according to its context. When it is said that a right is vested in a person, what is usually meant is that such person is the owner of that right—that he has all rights of ownership in such right including the right of enjoyment. If the word ‘vested’ were used always in that sense, then to say that a man owned a vested right would mean no more than that a man owned a right. But the word is also used in another sense, to draw a distinction between what is certain and what is conditional; a vested right as distinguished from a contingent or conditional right. When the word ‘vested’ is used in this sense Austin (Jurisprudence, vol 2, lect 53), points out that in reality a right of one class is not being distinguished from a right of another class but that a right is being distinguished from a chance or a possibility of a right, but it is convenient to use the well-known expressions vested right and conditional or contingent right.

Contingent in narrow sense (contingent v vested)
The second quotation, from his judgment in Durban City Council v Association of Building Societies 1942 no 27, not only proves my point about the expressions contingent interests and contingent rights being interchangeable but explains the difference between a vesting and a mere contingency:

In the large and vague sense any right to which anybody may become entitled is contingent so far as that person is concerned, because events may occur which create the right and which may vest it in that person; but the word ‘contingent’ is also used in a narrow sense, ‘contingent’ as opposed to ‘vested’, and then it is used to describe the conditional nature of someone’s title to the right. For example, if the word ‘contingent’ be used in the narrow sense, it cannot be said that I have a contingent interest in my neighbour’s house merely because my neighbour may give or bequeath it to me; but my relationship to my neighbour, or the terms of a will or contract, may create a title in me, imperfect at the time, but capable of becoming perfect on the happening of some event, whereby the ownership of the house may pass from him to me. In those circumstances I have a contingent right in the house.

Contingent interest v spes
To me it is self-evident that a contingent interest and a spes (literally, a hope), in its legal sense, are equivalent, although I can point you to three judgments saying otherwise: S v Buffalo Range (Pty) Ltd and Another 1970 (2) SA 569 (RA); PE Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd 1980 (4) SA 801 (T) and First National Bank of SA Ltd v Lynn no and Others (405/94) [1995] zasac 158 (29 November 1995).

In the last of these, a distinction was made by Joubert JA between a conditional right and ‘a mere spes (expectation) of a right as yet non-existent’, on the basis, as far as I can make out, and springing from truly ancient texts, that a conditional right is the expectation of a future action comprised in conditional stipulations or agreements.

Yet, in the important case of Wasserman v Sackstein no 1980 (2) SA 536 (o), a spes is effectively defined as an ‘expectation of a future action’. Not only my point exactly but the very words used in Lynn to describe what was not a spes!

On the other hand, the only positive support I can find for the equivalence of a contingent interest and a spes is Leach and Others v Champion Estates Ltd 1956 (3) SA 674 (o), where a very clear distinction was made between the ownership rights vesting in the respondent and the ‘spes as contingent fideicommissaries’ of some of the applicants.

(The supposed distinction between the two terms is also mentioned in Erasmus v Michael James (Pty) Ltd etc 1994 (2) SA 528 (c).)

Interests & rights of a discretionary beneficiary
Say you are the beneficiary of a valid, discretionary, ordinary trust. Apart from your personal fortune, you own zip. You can take no decisions about the trust’s property. You cannot manage it. You cannot possibly turn it to account, for example, by disposing of it.

All you have is a contingent interest in the trust’s property, should the trustees validly exercise their discretion in your favour. At that point, you will own property—in the form of a claim against the trustees to deliver the distribution made in your favour, whether in money or money’s worth. And, when they deliver, your claim will be converted into a different form of property, such as cash, a claim against a bank, or, say, a fixed property registered in your name.

So what you conditionally stand to gain is property that will vest in you, outright.

In our law, property consists in real rights (rights to a thing), personal rights (rights of performance), immaterial property, limited rights to these patrimonial objects, statutory rights of performance, and statutory rights against the state. (In a jam, I always fall back on PJ Badenhorst et al The Law of Property 5 ed 2006 at 23–4 and 67, practically the only textbook you’ll ever see me cite.)

Even as a discretionary beneficiary, you do own a form of property—a personal right against the trustees. This right may also be said to vest in you: vest indicates ownership of some form of property. Under this right, you may, for example, demand to see the trust deed or to be presented with an accounting by the trustees of their administration of the trust since its inception. Most critically, it is this personal right that entitles you to demand delivery of a distribution made in your favour.

Equivalence of contingent interest & spes
It is on the basis of this patrimonial approach that I arrive at a working hypothesis on the question whether a contingent interest and a spes, in a legal sense, are in fact equivalent. They are equivalent, I say, as long as they are both meant to point to a personal right. After all, a naked hope or expectation not founded in any personal right is of no interest in law.

In fact, neither a contingent interest nor a spes, however you might define it, would be of any such interest unless someone else is currently enjoying a right that might, in one form or another, pass to a
hopeful new owner.

But I’m not proud. I’m prepared to ditch spes in favour of contingent interest, at least for purposes of this series.

Contingent interests are property

Encouraged by reading the two quotations cited here, I am wont, flamboyantly, to declare that, while a right (or vested right) is property, a contingent interest (or contingent right) is not of itself property. As an attention-grabber, it is great.

But, pace Watermeyer JA, it is wrong, and stubbornly difficult to fix.

The beneficiary under a contingent interest does own a particular form of property—a personal right against (to put it widely) the administrator of the property in which the interest vests, to demand recognition of the beneficiary’s interest and its conversion into a fuller form of property should the administered contingency eventuate.

While certainly not what you would ordinarily consider to be property, in law, that is what it is.

Words & phrases: pending

GW Van Der Merwe and Others v CSARS and Others (1984/14) [2014] ZAWCHC (17 February 2014) (131 TSH 2014) recorded an unsuccessful attempt to stop a court-ordered inquiry under Part C of Chapter 5 of the Tax Administration Act, in a matter in which criminal and civil proceedings were also under way.

Veldhuizen J had the following to say about the word pending in s 58 (inquiry not suspended by civil or criminal proceedings):

It was argued that the word ‘pending’ used in s 58 should be interpreted to mean ‘about to happen’ and does not include proceedings which have in fact commenced. According to The Shorter Oxford English Dictionary the primary meaning of pending means: ‘Remaining undecided, awaiting settlement; orig. of a lawsuit.’ The secondary meaning is: ‘Impending, imminent.’ This is the meaning given in all the other dictionaries that I was able to consult. One cannot, of course, view the word in isolation; it should be given a meaning having regard to the section as a whole. Also in legal parlance pending means: proceedings having begun but not yet concluded. In my view pending in s 58 means that an inquiry must continue even during civil or criminal proceedings unless a court orders otherwise. It follows that the fact that civil or criminal proceedings involving anyone of the applicants have commenced do not lead to the exclusion of such an applicant from the ambit of s 58 of the TAA. There is, in my view, no reasonable prospect of the applicants’ contention being upheld.

Contingent interests—meaning of ‘includes’

The story so far, as maths

The beneficiary under a contingent interest owns a particular form of property—a personal right against (to put it widely) the administrator of the property in which the interest vests, to demand recognition of the beneficiary’s interest and its conversion into a fuller form of property should the administered contingency eventuate.

In other words, the set property includes the element contingent interest. Or, to put it another way:

Property = Contingent interest + Other elements

When you say (as I often do) ‘A contingent interest is not property’ you are making the following idiotically self-evident statement:

Contingent interest ≠ Property − Contingent interest

Self-evident though it might be, such a statement, although confusing, remains true. The same may not necessarily be said for the following statement:

‘[P]roperty’ includes any contingent interest in property;

If it is meant to be prescriptive, it is adding to a set an element it already contains!

Property = (Other elements + Contingent interest) + Contingent interest = Rubbish

But if it is purely descriptive, it is stating the blindingly obvious:

Property = Other elements + Contingent interest

The statutory inclusion of contingent interests

And so arises the opportunity for me definitively to analyze what includes means when used in statutory definitions.

Here is an extract from the Administration of Estates Act:

AEA s 1 sv ‘property’

‘[P]roperty’ includes any contingent interest in property;

An extract from the Insolvency Act:

IA s 1 sv ‘property’

‘[P]roperty’ means movable or immovable property wherever situate within the Republic, and includes contingent interests in property other than the
contingent interests of a fidei commissary/heir or legatee;

And an extract from the Trust Property Control Act:

TPCA s 1 sv ‘trust property’ or ‘property’

‘[T]rust property’ or ‘property’ means movable or immovable property, and includes contingent interests in property, which in accordance with the provisions of a trust instrument are to be administered or disposed of by a trustee.

All three acts contain the usual disclaimer, to the effect that words bear their defined meaning unless the context otherwise indicates.

(The Transfer Duty Act treats a particular type of contingent right as a form of ‘property’ but that act is not of present concern.)

Words & phrases: ‘includes’

In 122 TSH 2013, I showed that the go-to case on the meaning of includes is De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, & others 2004 (1) SA 406 (CC) (that’s right, it is a Constitutional Court case, in fact, on child pornography, of all things), and that case endorses the much-cited judgment of Fagan JA in R v Debele 1956 (4) SA 570 (A), who listed the possible roles played by includes in statutes:

The traditional three possibilities

- It is not generally a term of exhaustive definition but it can be used in an exhaustive sense.
- As a general rule, it is a term of extension. It is often used to enlarge the meaning of a word or phrase beyond its ordinary meaning. If the primary meaning is well known, what is included adds to that meaning.
- It can also be used to indicate a generic class of concepts.

But, even over the decades, everyone has forgotten a fourth possibility, pointed out by the celebrated Schreiner JA in a separate judgment in Debele:

The forgotten fourth

- Includes is sometimes simply equivalent to means.

Yet, here’s the thing: Not one of these learned possibilities explains the use of includes in the Administration of Estates Act!

The primary meaning of property already encompasses contingent interests, so why are they seemingly included a second time?

Permit me, then, even in such exalted company, to add a fifth possibility to the list:

The condescending fifth

- Includes sometimes indicates a reminder—a little lesson in law—inserted in a definition by a thoughtful (or condescending) draftsman so as to highlight a significant element of the ordinary meaning of a defined word.

In the other two definitions reproduced here, something entirely different is going on, in that, effectively, they establish an exhaustive category of contingent interests to be regarded as property. In so doing, they are subtracting from property the excluded elements.

Clearly, a sixth possibility has to be added to the list:

The surprising sixth

- Includes sometimes means excludes!

The definitions as maths

Here is what each definition appears to mean in terms of sets:

AEA s 1 sv ‘property’

‘[P]roperty’ includes any contingent interest in property;

\[ \text{Property} = \text{Other elements} + \text{Contingent interest} \]

IA s 1 sv ‘property’

‘[P]roperty’ means movable or immovable property wherever situate within the Republic, and includes contingent interests in property other than the contingent interests of a fidei commissary/heir or legatee;

\[ \text{Property} = \text{Property} - \text{Contingent interest of fideicommissary} \]

TPCA s 1 sv ‘trust property’ or ‘property’

‘[T]rust property’ or ‘property’ means movable or immovable property, and includes contingent interests in property, which in accordance with the provisions of a trust instrument are to be administered or disposed of by a trustee.

\[ \text{Property} = \text{Property} - \text{Contingent interests not administered or disposed of by trustee} \]

Is this bad drafting, or what?

Perhaps the greatest rule of good legal drafting is never to use as a term of art a word already steeped in meaning in law.

The poor user is inescapably going to forget that ‘property’ (defined sense) is not necessarily the same thing as property (ordinary meaning).

Thus, if it is accepted that these various riders (in one instance, a mere non sequitur) are best positioned in s 1, the user ought to have been warned of their existence. Estate property ought to have been the term of art of choice in the Administration of Estates Act and the Insolvency Act, while ‘trust property’ ought to have been the exclusive term of art used in the Trust Property Control Act.

More, much more, to follow, DV.
Learning the law with your PC: criminal defamation—II

In my line of work, and given my gentle worldview, I am interested whether state institutions may be defamed and whether the option of a prosecution for criminal defamation is open to them.

Thus, ever since 101 TSH 2011, which followed upon an item in 87 TSH 2010, I have been itching to return to the present topic.

Fuleza
In 2010, the leading case, at least, according to my own computer-aided search, was Rex v Fuleza 1951 (1) SA 519 (A), a Southern Rhodesian case, in which it was affirmed, in the principal judgment, that criminal defamation (libel, slander or injuria verbis) was still a crime. As recorded in 87 TSH 2010, the minority judgment enjoyed a considerable degree of support in our own High Courts, although in ancient judgments. But the Constitutional Court seemed to think that the common-law offence of criminal defamation might be ‘inconsistent with the right of freedom of speech’ (Du Plessis and Other v De Klerk and Another 1996 (3) SA 850 (CC)).

Hoho
What I discovered only in 2011 was that the actual leading case was in fact Hoho v The State (493/05) [2008] ZASCA (17 September 2008), which, astonishingly, still to this day is not reported in SALR, which is why I missed it in 2010 (it is to be found in SAFLII, a resource unknown even to some well-known, even famous lawyers).

The first thing to emerge from this case, also previously unknown to me, is the existence of s 107 of the Criminal Procedure Act, which, at least to my mind, makes implicit reference to a common-law offence of ‘unlawful publication of defamatory matter’.

Perfectly, for present purposes, Hoho concerns just two issues: (1) Is the crime of defamation still extant? (2) Is it ‘consonant with the Constitution’?

In a beautiful, generous and wise writing, Streicher JA explained, first, why ‘it cannot be said that criminal defamation has been repealed as a crime by silent consent of the whole community’. Next (to my personal satisfaction—my search-methods cannot be too bad), he paid significant attention to Fuleza, especially on the issue whether the crime is prosecuted only in ‘serious and aggravated cases’, coming to this interim conclusion:

I, therefore, conclude that the crime of defamation consists of the unlawful and intentional publication of matter concerning another which tends to injure his reputation.

Next, on the issue of unlawfulness, he said:

In regard to the element of unlawfulness it has long been recognized that if defamatory matter is true and published for the public benefit, or constitutes fair comment or is published on a privileged occasion, the publication is not unlawful.

But, he continued, these are not the only the circumstances in which the publication of defamatory matter would be lawful, citing Media Ltd and others v Bogoshi 1998 (4) SA 1196 (SCA). Here is his second interim conclusion (footnotes suppressed):

It follows that the state must prove the unlawful and intentional publication of defamatory matter. Intentional publication also requires proof that the accused knew that he was acting unlawfully or that he knew that he might possibly be acting unlawfully. As in any other criminal case the degree of proof required is proof beyond reasonable doubt. It does not follow that the state has to negative merely hypothetical possible defences. It would be necessary, for example, for an accused, whose defence is that the alleged defamatory allegations were true and made for the public benefit, to plead that defence as is required by s 107 of the Act. Precisely what circumstances would require the state to negative other defences will depend on the particular circumstances and will be left for decision when the need to do so arises.

The final issue was the application of the Constitution, especially s 16, on the right to freedom of expression. This is how he concluded:

For these reasons I am of the view that our crime of defamation is not inconsistent with the Constitution.

A tiny personal disappointment: no mention was made of Du Plessis, a Constitutional Court case. But that is nothing compared with what I imagine was the disappointment of the brave appellant, whose appeal was dismissed.

Footnote
Appearing as amici curiae on behalf of the state was the very same distinguished duo cited by SARS as blessing, at a very early stage, the constitutionality of a version of the Tax Administration Act (115 TSH 2012).

Their names? In this context? When I think they were egregiously wrong? Do you think I am mad?
Learning the law with your PC: criminal defamation—III


Can a trading corporation be defamed?
The majority judgment covered an issue lying very close to my own particular sphere of interest (whether an organ of state might be defamed), namely, whether the law of defamation may be extended to trading corporations. Brand JA said:

In the light of this historical development it will be anomalous if the corporations’ right to reputation which, through inferential reasoning, gave rise to the acknowledgement of its right to privacy, would be held not to enjoy the same constitutional protection as its right to privacy. In the present context, I can see no conceptual difference between the corporations’ right to privacy, on the one hand, and its right to reputation, on the other. Both privacy and reputation fall outside the ambit of the narrow meaning of ‘human dignity’ which a corporation cannot have. At the same time, they are both included in the wider meaning of ‘dignity’, protected by s 10 of the Constitution.

But even if the reputation of a corporation is not protected by the Constitution, it by no means follows that its reputation is not protected by the law of defamation. Though freedom of expression is fundamental to our democratic society, it is not of paramount value…. Nor does it enjoy superior status in our law…. Accordingly, limitations of the right to freedom of expression has been admitted in the past for purposes not grounded on fundamental rights….

For the reasons I have given, I believe that the reputation of a corporation is worthy of protection. Moreover, I believe that the common law rule protecting that reputation is in turn recognized by s 39(3) of the Constitution. In *Khumalo v Holomisa* 2002 (5) SA 401 (CC) the Constitutional Court considered our common law of defamation and concluded that it strikes a proper balance between the protection of the right to freedom of expression, on the one hand, and the right to reputation, on the other. As I see it this also applies to the reputation of corporations.

Yes, it has a claim
Here is his final conclusion:

Despite the arguments to the contrary I can therefore find no legitimate reason why we should deviate from the rule of our common law, which had been endorsed by our courts for nearly a century, that a corporation has a claim for general damages in defamation. To that extent, the court *a quo* was therefore right in its dismissal of the appellants’ special plea.

Contrary to what, after this ominous build-up, you might expect, the appellant was successful.

Taking the issue a step further
Which brings me to the minority judgment of Nugent JA (one of the majority also delivered a minority judgment), who agreed with the order of the majority but wanted to ‘take it a step further’.

I wish I could reproduce the whole of his brilliant judgment but the following extract will serve to give you an appreciation of what he said (footnotes suppressed):

But I need to reiterate that a trading corporation is entitled to a remedy to vindicate the interest that it has in its reputation….. I have also pointed out that there are alternative remedies available for that purpose. I am not sure why it should be thought to be uncertain what those remedies are. Leaving aside the availability of an interdict against anticipated future conduct, I have already said that a trading corporation—indeed, any plaintiff in an action for defamation—is entitled to a declaration of falsity in respect of defamation that has already occurred. If it is warranted by the occasion, in my view a plaintiff is also entitled to an order directing publication of a correction, or publication of a retraction, with or without an apology, or an order directing that the judgment or a summary be published, or directing publication of the correct facts…..

It is true that an order of that kind will not serve to punish, and that the prospect of such an order being granted will have a lesser deterrent effect than an award of damages. But if it is punishment and deterrence that is really wanted then civil proceedings are not the place to exact them. Unlawful defamation constitutes a criminal offence—as this court recently affirmed in *Hoho v S*—and it is the criminal process that must be looked to for punishment and deterrence, as in the case of any act that constitutes both a criminal offence and a civil wrong. Indeed, in my view it would be unconscionable if a plaintiff were to be permitted to abuse its criminal remedy in favour of exacting punishment and deterrence through the medium of the civil law.

Well, I’ve got what I wanted from this short series. Institutions, even state institutions, may be defamed; there is no need to investigate the issue further.

And, whether because they are unlikely to win large civil awards or because they sympathize with Nugent JA’s enlightened approach, they are free, under our common law, to pursue a criminal prosecution.
Words & phrases: implied v tacit terms

To my mind, judgments are usually far better than any textbook. So when I came across this issue in Van Aardt v Galway (923/10) [2011] ZASCA 201, I had reasonable cause to believe that the citations given were to the leading cases (South African Maritime Safety Authority and Alfred McAlpine & Son).

And so it turned out, yet I have no recollection by what chance I simultaneously picked up a third, right-up-to-date authority (Ashcor Secunda).

South African Maritime Safety Authority

First, here is Wallis AJA, as he then was, in South African Maritime Safety Authority v McKenzie 2010 (3) SA 601 (SCA) (footnotes suppressed):

In the alternative it is alleged that the term arises either by way of an implied term or as a tacit term. Corbett AJA explained the difference between the two in Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration [1974 (3) SA 506 (A)]. An implied term properly so called is a term that is introduced into the contract as a matter of course by operation of law, either the common law, trade usage or custom, or statute, as an invariable feature of such a contract, subject only to the parties’ entitlement in certain, but not all, instances to vary it by agreement. Where reliance is placed on such a term the intention of the parties will not come into the picture and the issue is the purely legal one, of whether in those circumstances in relation to a contract of that particular type the law imposes such a term on the parties as part of their contract. A tacit term is a term that arises from the actual or imputed intention of the parties as representing what they intended should be the contractual position in a particular situation or, where they did not address their minds to that situation, what it is inferred they would have intended had they applied their minds to the question.

In our law as it stands at present the usual test for the existence of a tacit term is that of the interfering bystander who asks what is to happen in the particular situation and receives the answer: ‘Of course X will be the position. It is too obvious for us to say so.’

Ashcor Secunda

And here is Ponnan JA in Ashcor Secunda (Pty) Ltd v Sasol Synthetic Fuels (Pty) Ltd (624/10) [2011] ZASCA 158 (28 September 2011):

... In Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration...Corbett JA pointed out that the significance of the distinction between implied and tacit terms is not merely academic. Corbett JA expatiated:

The implied term...is essentially a standardized one, amounting to a rule of law which the Court will apply unless validly excluded by the contract itself. While it may have originated partly in the contractual intention, often other factors, such as legal policy, will have contributed to its creation. The tacit term, on the other hand, is a provision which must be found, if it is to be found at all, in the unexpressed intention of the parties. Factors which might fail to exclude an implied term might nevertheless negative the inference of a tacit term... The Court does not readily import a tacit term. It cannot make contracts for people; nor can it supplement the agreement of the parties merely because it might be reasonable to do so. Before it can imply a tacit term the Court must be satisfied, upon a consideration in a reasonable and businesslike manner of the terms of the contract and the admissible evidence of surrounding circumstances, that an implication necessarily arises that the parties intended to contract on the basis of the suggested term.

That we could only be dealing with a tacit term in this case is evident from the following dictum of Brand JA in South African Forestry Co Ltd v York Timbers Ltd 2005 (3) SA 323 (SCA)...:

Unlike tacit terms, which are based on the inferred intention of the parties, implied terms are imported into contracts by law from without. Although a number of implied terms have evolved in the course of development of our contract law, there is no numerus clausus of implied terms and the courts have the inherent power to develop new implied terms. Our courts' approach in deciding whether a particular term should be implied provides an illustration of the creative and informative function performed by abstract values such as good faith and fairness in our law of contract. Indeed, our courts have recognized explicitly that their powers of complementing or restricting the obligations of parties to a contract by implying terms should be exercised in accordance with the requirements of justice, reasonableness, fairness and good faith.... Once an implied term has been recognized, however, it is incorporated into all contracts, if it is of general application, or into contracts of a specific class, unless it is specifically excluded by the parties....

It follows, in my view, that a term cannot be implied merely because it is reasonable or to promote fairness and justice between the parties in a particular case. It can be implied only if it is considered to be good law in general. The particular parties and set of facts can serve only as catalysts in the process of legal development.

Given the express terms of the agreement there plainly can be no room for importing the alleged tacit term asserted by Ashcor. For, as Tengrove JA put it in Robin v Guarantee Life Assurance Ltd 1984 (4) SA 558 (A)...:

A tacit term cannot be imported into a contract in respect of any matter to which the parties have applied their minds and for which they have made express provision in the contract. As was said by Van Winsen JA in SA Mutual Aid Society v Cape Town...
Words & phrases: exceptional circumstances—I

The expression exceptional circumstances appears eight times in the current Value-Added Tax Act, once in the current Income Tax Act and twelve times in the current Tax Administration Act.

Seemingly, sars has for years treated such circumstances as being those in which the taxpayer has had reasonable cause for its action or inaction. In some quarters (for example, Black’s) reasonable cause is equated directly with probable cause, which I would see as another thing altogether. In my view, though, reasonable cause looks, as a lawyer of my acquaintance puts it, to the nexus between the action or inaction and its consequences. There is no intent or animus, just blind fate, qualifying a person to enjoy some condonation or an official to proceed with some punitive measure.

The dog ate my homework, I should like to believe, is a valid defence under our Constitution—as long as it is true. How can you possibly expect me to produce my homework if it is on its way to turdom? Perhaps I looks, as a lawyer of my acquaintance puts it, to the nexus between the action or inaction and its consequences. There is no intent or animus, just blind fate, qualifying a person to enjoy some condonation or an official to proceed with some punitive measure.

I carry out my long-outstanding threat in 111 TSH 2012 to return this topic by including this quotation from the (majority) judgment of Watermeyer CJ in CIR v AH King: CIR v AH King 1947 (2) SA 196 (A):

The tax is imposed by Parliament, not by the Commissioner; and if a transaction is covered by the terms of the section its provisions come into operation, if it is not then its provisions cannot be applied. It is true that the section says that:

Whenever the Commissioner is satisfied...any liability for any such tax, and the amount thereof, may be determined, and the payment of the tax chargeable may be required and enforced as if the transaction or operation had not been entered into or carried out.

And it is true also that the word ‘may’ confers a power but in some cases the power given is of such a nature that the person to whom that power is given is under a duty to use it. Whether this is so must be ascertained from a consideration of a number of factors, which are set out in a passage from the judgment of LORD CAIRNS in the leading case of Julius v The Bishop of Oxford (5 AC 214) which was cited with approval in this Court by INNES CJ in Noble & Barbour v SA Railways (1922 AD 527, at p 540); see also per LORD BLACKBURN at p 241, and cf per WESSELS JA in Lynch v Union Government (Minister of Justice) (1929 AD 281 at p 283). It was said in the case of SA Railways and Harbours v New Silverton Estates Ltd (1946 AD, not yet reported) that permissive terms in a statute are more readily construed as creating an obligation when the statute authorizes the course of action in question for the public good. If that statement could be regarded as a rule of construction applicable to a case like this it would be of assistance because the Commissioner, in performing his functions under the Act, is acting in the public interest. But attention should be directed to the judgments in the case of Julius v The Bishop of Oxford and more particularly to the remarks of LORD BLACKBURN at pp 244 and 245, in which the view is expressed that empowering words are more readily construed as imposing a duty when private interests are concerned. I prefer, therefore, to draw no inference from the fact that the Commissioner, in exercising his power under sec 90, is acting in the public interest.

Having regard, however, to the factors mentioned in the Julius case, it seems that all considerations of justice and expediency require us to say that in sec 90 the word ‘may’ also imports a duty to exercise the power given to the Commissioner. It could surely not be the intention of the Legislature that the Commissioner should be given a discretion, when he has been satisfied that the transaction falls within sec 90, in one case to say ‘I will use my powers under the section’ and yet in respect of another possibly identical transaction he should be able to say ‘I will not use these powers’. To allow this would be to make it possible for discrimination to be exercised between different persons. I am aware that in many sections of the Act the Commissioner is given a wide discretion, but nowhere have I been able to find that he is given a discretion, when once he has satisfied himself that a tax should be charged, in effect to remit it. For that is what he would be doing if he were satisfied that liability to tax had in fact been avoided or reduced and yet refused to put the provisions of sec 90 into operation.

Words & phrases: ‘may’ (2)

The expression ‘may’ appears 137 times in the current Value-Added Tax Act, once in the current Income Tax Act and twelve times in the current Tax Administration Act.

In the current Value-Added Tax Act, once in the current Income Tax Act and twelve times in the current Tax Administration Act.

Reasonable cause appears 137 times in the current Value-Added Tax Act, once in the current Income Tax Act and twelve times in the current Tax Administration Act.

Words & phrases: exceptional circumstances—II

The expression exceptional circumstances appears eight times in the current Value-Added Tax Act, once in the current Income Tax Act and twelve times in the current Tax Administration Act.

Seemingly, sars has for years treated such circumstances as being those in which the taxpayer has had reasonable cause for its action or inaction. In some quarters (for example, Black’s) reasonable cause is equated directly with probable cause, which I would see as another thing altogether. In my view, though, reasonable cause looks, as a lawyer of my acquaintance puts it, to the nexus between the action or inaction and its consequences. There is no intent or animus, just blind fate, qualifying a person to enjoy some condonation or an official to proceed with some punitive measure.

The dog ate my homework, I should like to believe, is a valid defence under our Constitution—as long as it is true. How can you possibly expect me to produce my homework if it is on its way to turdom? Perhaps I
such as the Tax Administration Act, read, if at all, by largely untrained, predatory officials, is evocative of some higher standard, tested by means of the thumb screw and the rack.

What help is to be found in the case law, my database, as usual, being Juta’s SALII?

What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue.

This, according to Mokgoro J in Koyabe and Others v Minister for Home Affairs and Others (Lawyers for Human rights as Amicus Curiae) 2010 (4) SA 327 (CC), citing Nichol and Another v Registrar of Pension Funds and Others 2008 (1) SA 383 (SCA).

The locus classicus, I reckon, just has to be this passage from the judgment of Kriegler J, in S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat 1999 (4) SA 623 (CC) (footnotes suppressed):

In my view the contrary is true. Inasmuch as we are not dealing with the obstacle itself but with ways of bypassing it, the wider the avenue, the more advantageous it is to freedom. A related objection that the requirement is constitutionally bad for vagueness fails to be rejected for basically the same reason. In any event, one can hardly expect the lawgiver to circumscribe that which is inherently incapable of delineation. If something can be imagined and outlined in advance, it is probably because it is not exceptional.

Likewise I do not agree that, because of the wide variety of ‘ordinary circumstances’ enumerated in ss (4)–(9), it is virtually impossible to imagine what would constitute ‘exceptional circumstances’ and that the prospects of their existing are negligible. In requiring that the circumstances proved be exceptional, the subsection does not say they must be circumstances above and beyond and generically different from those enumerated. Under the subsection, for instance, an accused charged with a Schedule 6 offence could establish the requirement by proving that there are exceptional circumstances relating to his or her emotional condition that render it in the interests of justice that release on bail be ordered notwithstanding the gravity of the case. Other examples are readily to hand in the small body of case law that has already been established in the short period since the 1997 amendment came into operation on 1 August 1998. Thus an otherwise dependable man charged with consensual sexual intercourse with a fifteen-year-old girl, and who has a minor previous conviction dating back many years, would technically fall within the ambit of ss (11)(a). Yet a prudent judicial officer could find those circumstances sufficiently exceptional to warrant bail provided there were no other factors adverse to the grant. Schietekat on the other hand also falls under Schedule 6 and ss (11)(a) (indecent assault on a child under 16 and previous convictions for the same offence), but in his case the test for exceptional circumstances produced the opposite answer. In the final analysis, the evaluation is to be done judicially, which means that one looks at substance, not form.

In conclusion, therefore, I am of the view that, although the inclusion of the requirement of ‘exceptional circumstances’ in s 60(1)(a) [of the Criminal Procedure Act] limits the right enshrined in s 35(1)(f), it is a limitation which is reasonable and justifiable in terms of s 36 of the Constitution in our current circumstances.

In this regard I am not persuaded that there is any validity in the complaint raised in argument that the term ‘exceptional circumstances’ is so vague that an applicant for bail does not know what it is that has to be established. An applicant is given broad scope to establish the requisite circumstances, whether they relate to the nature of the crime, the personal circumstances of the applicant or anything else that is particularly cogent. The contention was moreover that, if one adds that those circumstances must ‘in the interests of justice permit...release’, the subsection becomes an insurmountable obstacle in the way of bail. In my view the contrary is true. Inasmuch as we are not dealing with the obstacle itself but with ways of bypassing it, the wider the avenue, the more advantageous it is to freedom. A related objection that the requirement is constitutionally bad for vagueness fails to be rejected for basically the same reason. In any event, one can hardly expect the lawgiver to circumscribe that which is inherently incapable of delineation. If something can be imagined and outlined in advance, it is probably because it is not exceptional.

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My take on these two hits, which, thanks to a lucky break, I managed to winnow out of a total population of 1 170, is that exceptional circumstances are those not particularized by and, indeed, unforeseeable by the legislature, in which justice would be served by a bending of otherwise inflexible rules.

This Constitutional Court decision is referred to, although not by name, in the SARS publications ‘Short guide to the Tax Administration Act, 2011 (”TAA”)’ and ‘Dispute resolution guide’ (first issue).


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Words & phrases: exceptional circumstances—II

The SARS publication ‘Dispute resolution guide’ (first issue) in this context specifically cites a passage from mv Als Mamas Seatrans Maritime v Owners, mv Als Mamas & Another 2002 6 SA 150 (C), which turns out to be an extract from the judgment of Thring J. Here, in full, is what he said on the topic (the headings and typographical adaptations are my own):

No precise definition
Our Courts have been understandably reluctant to define precisely the phrase ‘exceptional circumstances’ as it is used in various statutory contexts. Nor is this phrase defined in the [Admiralty Jurisdiction] Act. With one exception, to which I shall presently refer, I am not aware of any decision in which the words ‘in exceptional circumstances’ where they are used in s 5(5)(a)(iv) of the Act have been discussed. The exception is the judgment of Jones J in The Insurers and Owners of the Cargo Laden on Board the mv Askania Nova v The mv Askania Nova, her Owners,
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**Master and Crew, and any Party Interested in Her; SECLD case No 2028/97, 15 August 1997 (unreported).**

**Dictionary definitions**

The dictionary definitions of ‘exceptional’ and ‘exception’ must be the starting point for the enquiry. In *The Shorter Oxford English Dictionary* ‘exceptional’ is defined as:

- Of the nature of or forming an exception; unusual.

‘Exception’ is defined, *inter alia*, as:

- Something that is excepted; a person, thing or case to which the general rule is not applicable.

In *Webster’s International Dictionary* ‘exceptional’ is defined, *inter alia*:

- Forming an exception; being out of the ordinary; uncommon, rare.

‘Exception’ is defined, *inter alia*:

- One that is excepted or taken out from others.

In the (signed) Afrikaans text of the Act the corresponding phrase is ‘in buitengewone omstandighede’. The *Groot Woordeboek van die Afrikaanse Taal* defines ‘buitengewoon’ as:

- Wat van die gewone afwyk; besonder; seldsaam; wat bo die middelmatig uitsteek.

In the *Verklarende Handwoordeboek van die Afrikaanse Taal* (=HAT) it is defined as:

- Ongewoon, in hoë mate; uitstekend.

In Labuschagne & Eksteen’s *Verklarende Afrikaanse Woordeboek* the definition is:

- Meer as gewoon, besonder, seldsaam.

**S v Mohammed**

In *S v Mohammed* 1999 (2) SACR 507 (C) Comrie J, after examining these and other definitions (save the last one quoted above) in the context of applications for bail in criminal proceedings, said at 515b–c:

What appears from these definitions in my opinion is that ‘exceptional’ (‘buitengewoon’) was (sic has?) two shades or degrees of meaning. The primary meaning is simply: unusual or different. The secondary meaning is: markedly unusual or specially different (as eg in a musician blessed with exceptional talent).

I respectfully agree.

**Norwich Union Life Insurance Society**

The words ‘exceptional circumstances’ have been considered, albeit only briefly, in several earlier decisions. The earliest, I think, is *Norwich Union Life Insurance Society v Dobbs* 1912 AD 395 where, in the context of their use in s 16 of the Administration of Justice Act 27 of 1912, Innes ACJ, as he then was, said at 399:

- The question at once arises, what are ‘exceptional circumstances’? Now it is undesirable to attempt to lay down any general rule. Each case must be considered upon its own facts. But the language of the clause shows that the exceptional circumstances must arise out of, or be incidental to, the particular action; there was no intention to exempt whole classes of cases from the operation of the general rule. Moreover, when a statute directs that a fixed rule shall only be departed from under exceptional circumstances, the Court, one would think, will best give effect to the intention of the Legislature by taking a strict rather than a liberal view of applications for exemption, and by carefully examining any special circumstances relied upon.

**Prins v Carstens**

Then, in the context of s 21(1) of the Rents Act 43 of 1950 Watermeyer AJ, as he then was, said in *Prins v Carstens* 1953 (4) SA 107 (C) at 111A:

- In my opinion forgetfulness is not an exceptional circumstance within the meaning of s 21(1) of the Rents Act, as amended. The Act contemplates something out of the ordinary and of an unusual nature.

This *dictum* was quoted with approval by Holmes J, as he then was, in *Estate Doocrat v Isaacs* 1956 (2) SA 35 (N) at 38G and by Milne J, as he then was, in *IA Essack Family Trust v Kathree; IA Essack Family Trust v Soni* 1974 (2) SA 300 (O) at 304B.

**Die Suid-Afrikaanse Naturlletrust v Kitchener en Andere**

In *Die Suid-Afrikaanse Naturlletrust v Kitchener en Andere* 1964 (3) SA 417 (A) the Court had to deal, *inter alia*, with the phrase ‘besondere omstandighede’ where it appeared in s 13(5) of the Native Trust and Land Act 18 of 1936. At 421C Steyn CJ said of the intention of the Legislature in enacting this provision:

- Die uitoefening van ‘n goeddunke het hy beperk tot die geval waarin daar besondere omstandighede aanwesig is, en die bestaan van sulke omstandighede is nie aan die goeddunke van die Hof oorgelaat nie. Die omstandighede moet werklank van besondere aard wees, eie aan die geval.

**Exceptional danger**

In two reported cases the phrase ‘exceptional danger’ has been interpreted in the context of exclusion clauses in accident insurance policies. In *Poole No v Currie and Partners* 1966 (2) SA 693 (A) Beadle CJ said at 696H:

- The words ‘exceptional danger’ also require some consideration. The danger, as Mr Margo pointed out, must be such that exposure to it is likely to result not necessarily in death but in some form of disablement, as ‘disablement’ is defined in the policy. The word ‘exceptional’ here presents no difficulty; it must mean ‘unusual’ or ‘out of the ordinary’, which is the accepted meaning of the word.

In *Cloete v Shield Versekeringsmaatskappy Bpk* 1978 (1) SA 357 (C) Vivier J, as he then was, said at 361 in fine—362A:

- Die woord ‘buitengewone’ wat ook gebruik word in die woorde ‘buitengewone gevaar’ in klousule 5, beteken in die algemene spreektaal ook ‘besondere’ of ‘seldsame’ (*Groot Afrikaanse Woordeboek*) of ‘uitsonderlike’.

**Mohammed’ on Schietekat**

It is clear that it is neither desirable nor, indeed, possible to attempt to lay down precise rules as to what circumstances are to be regarded as exceptional
and what are not. Each case must depend on its own facts. And so, as Comrie J said in Mohammed’s case supra at 513j–514b à propos the judgment of the Constitutional Court in S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat 1999 (4) SA 623 (CC) (1999 (2) SACC 51; 1999 (7) BCLR 771):

... [The Constitutional Court, per Kriegler J,] declined to essay a definition of ‘exceptional circumstances’, for that was thought to be attempting to define the indefinable. On the other hand, the expression was not so vague as to be void. (Paragraphs [74] to [76].) It is at least clear, however, that this statutory criterion, formidable though it may conceivably be, is flexible and subject to judicial control on a case-by-case basis. (Paragraph [74].) Furthermore, circumstances which may be regarded as ‘ordinary’ in one case, may be treated as ‘exceptional’ in another. (Paragraph [76].)

The five principles
What does emerge from an examination of the authorities, however, seems to me to be the following:

1. What is ordinarily contemplated by the words ‘exceptional circumstances’ is something out of the ordinary and of an unusual nature; something which is excepted in the sense that the general rule does not apply to it; something uncommon, rare or different; ‘besonder’, ‘seldsaam’, ‘uitsonderlik’, or ‘in hoë mate ongewoon’.

2. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.

3. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the Court must decide accordingly.

4. Depending on the context in which it is used, the word ‘exceptional’ has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.

5. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional.

Applying the principles
To return to the context of s 5(5)(a)(iv) of the Act: in The Askania Nova, (supra, Jones J said at pp 2–3 of the typescript of his judgment:

It seems to me that the purpose of requiring exceptional circumstances where the proceedings may take place in a different jurisdiction from our own is to ensure that no inroads are made in the rules of practice and procedure of some other jurisdiction, and for that reason the Court should be slow and indeed very careful to order an inspection and survey in the circumstances of this case in the absence of exceptional circumstances. I respectfully agree. I think that, for the purposes of s 5(5)(a)(iv) the phrase ‘exceptional circumstances’ must, both for the specific reason mentioned by Jones J and by reason of the more general consideration adumbrated by Innes ACJ in Norwich Union Life Insurance Society v Dobbs, (supra, loc cit), be given a narrow rather than a wide interpretation. I conclude, to use the phraseology of Comrie J in S v Mohammed (supra, loc cit), that, to be exceptional within the meaning of the subparagraph, the circumstances must be ‘markedly unusual or specially different’; and that, in applying that test, the circumstances must be carefully examined.

Full marks to SARS, except that...
In extracting mv Ais Mamas Seatrans Maritime from a huge database and publicizing it, SARS is to be commended, since, in my view, the judgment presents a softer approach than that adopted by SARS in in 15. Even so, I believe that ‘exceptional circumstances’ is too vague, and ought to go.

142 TSH 2015—January 2015

Words & phrases: per incuriam v stare decisis
At long last, I keep a promise made in 2012 TSH 2014 to publish an extract on this issue from International Trade Administration Commission and Others v Aranda Textiles Mills (Pty) Limited and Others (24038/10) [2012] ZACCPRHC (10 May 2012), Per Raulinga J;

The per incuriam principle means a decision which a subsequent court finds to be a mistake, therefore not binding precedent. This may occur through ignorance of a relevant authority in a case on a point of law or legislation. The principles of per incuriam can be applied where a court omits to consider a binding precedent of the same or the Superior court rendered on the same issue or where a court omits to consider any statute while deciding the issue.... However, it has been recognized that the doctrine of binding precedent has the merit of promoting certainty and consistency in judicial decisions, and enables an organic development of the law. This question has been expounded extensively by our courts and authors. The detail of the final conclusion lies in the facts on each case. There appears to be agreement that per incuriam applies, although with some caution. Nugent JA recently confirmed this approach in Malakalmi v MEC for Education Eastern Cape 2008 (5) SA 449 (SCA).

a lower court should not depart from higher court conclusions for flimsy reasons because the decision was given per incuriam.

... Decisions of the Supreme Court of Appeal itself are
binding on the High Court and the magistrate’s courts. The question that begs an answer is whether the per incuriam principle [judicial cockup] prevails over the stare decisis [precedent prevails] rule or vice-versa. One should accept that this is a principle of English law origin. The English themselves are reluctant to apply it and so should we. It is clear from the discussion above that precedent prevails over the per incuriam rule. The application of the per incuriam rule is circumscribed. It cannot be applied willy-nilly. While I agree that the High Court may not follow a decision of its own if it is rendered per incuriam; the decisions of the SCA and the Constitutional Court are binding on the High Courts.

In Jones v Secretary of State for Social Services [1977] 4 AC 944 Lord Reid stated:

It is notorious that where an existing decision is disapproved but cannot be overruled courts tend to distinguish it on inadequate grounds. I do not think they act wrongly in so doing, they are adopting the less bad of the only alternatives open to them. But this is bound to lead to uncertainty...

...I have already expressed my support for the decision of Gyanda J in the court a quo in Progress Office Machines case, that the operative date of the anti-dumping duties was the 19th May 1999 when the notice was published in the Gazette. I have also decided that stare decisis rule should prevail over the per incuriam principle. Despite my disagreement with the decision of the SCA in Progress Office Machines case, I have ruled that the said decision is binding on this court and myself.

In the event, Raulinga J came to a decision based on the doctrine of constitutional legality.

146 TSH 2015—May 2015

Words & phrases: exceptio non adimpleti contractus

In 82 TSH 2010 and 127 TSH 2013, I conjured with the defence exceptio non adimpleti contractus—essentially, the ability of a party to a qualifying contract to plead the exception of unfulfilled contract.

It applies only when a contract displays the necessary degree of reciprocity, essentially (although not exclusively), one requiring simultaneous performance by both parties. What interests me about the maxim is its impact, if any, upon fiscal issues, such as accrual, incurrall and supply.

Smith v Van den Heever

Smith v Van den Heever (136/10) [2011] ZASCA 5 (4 March 2011) deals with a type of agricultural contract that, in various guises and over the years, I have spent scores of hours analyzing. In my humble opinion, it has nothing to do with farming at all but is a disguised financial transaction, no doubt in violation of every banking and financing law on the statute book. It has given rise, I imagine, to innumerable disputes. In my humble opinion, it has nothing to do with farming at all but is a disguised financial transaction, no doubt in violation of every banking and financing law on the statute book. It has given rise, I imagine, to innumerable disputes.

But the case itself had to do with Smith, the actual farmer, being sued by the liquidators of the company effectively financing him (entirely my construction of the company’s role). He pleaded the exceptio, on the basis of nonperformance by the company, and, effectively, won.

As a result, all the supposed (my term, again) commercial transactions between him and the company vanished like snow on the proverbial desert’s face. He was left with a bunch of chicks, res derelictae, said the court, which, hugger-mugger, he nourished, sort of, and sold, at a handsome profit. Those were his expenses; those his proceeds. He owed the company nothing, having bought nothing from it, and not being liable to it for any proceeds, since it had abandoned what the contract claimed was its property, the chicks. If that is not wiping the tax slate clean, I do not know what a clean slate looks like.

Locus classicus

Thanks to the judgment in this matter of Harms DP, I now know the locus classicus on the exceptio. It is Motor Racing Enterprises (Pty) Ltd. (in liquidation) v NPC (Electronics) Ltd (917/95) [1996] ZASCA 113; [1996] 4 All SA 601 (A) (26 September 1996). I am also in possession of this wonderful summary of the law on this issue (footnote suppressed):

In Motor Racing Enterprises, the court laid stress on the following relevant principles: First, the exceptio presupposes the existence of mutual obligations which are intended to be performed reciprocally, and that the parties’ intention is to be sought primarily in the terms of their agreement. Second, interdependent promises are prima facie reciprocal. Third, the exceptio is often a temporary defence raised in order to compel the other contracting party to perform unfulfilled obligation(s) but only if defective performance of an obligation faciendo can still be remedied. It is otherwise a complete defence. Fourth, the applicability of the exceptio is (subject to the de minimis principle) not dependent on the degree of nonperformance.

149 TSH 2015—August 2015

Words & phrases: ‘related finance charges’

The Income Tax Act mentions ‘related finance charges’ in s 8(4)(i)(i) and (iii), on recoupments, and, far more significantly, in the definition of ‘interest’ in s 24J(1), on the incurrall and accural of interest. This definition of ‘interest’ is relied upon to such a large extent by so many provisions that it ought to be...
Words & phrases: the parol evidence or integration rule

A rule often mentioned in the context of contracts is the parol evidence rule. Per Botha JA, in National Board (Pretoria) (Pty) Ltd and Another v Estate Swanepoel 1975 (3) SA 16 (A):

The general rule, as formulated by WATERMEYER JA, in Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd 1941 AD 43 at p47, is—

that when a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added to or varied by parol evidence.

The rule is well summarized by Wigmore Evidence 3rd ed vol 9 sec 2425 as follows:

This process of embodying the terms of a jural act in a single memorial may be termed the integration of the act, ie its formation from scattered parts into an integral documentary unity. The practical consequences of this is that its scattered parts, in their former and inchoate shape, do not have any jural effect; they are replaced by a single embodiment of the act. In other words: When a jural act is embodied in a single memorial, all other utterances of the parties on that topic are legally immaterial for the purpose of determining what are the terms of their act.

See also the judgment of JANSEN JA in Venter v Birchholz 1972 (1) SA 276 (AD) at p 282, in regard to the application of the parol evidence or integration rule.

Per Boruchowitz JA, in Affirmative Portfolios CC v Transnet Ltd T/A Metrorail 2009 (1) SA 196 (SCA) (footnotes suppressed):

The appellant is precluded from relying on the alleged oral agreement by virtue of the so-called ‘parol’ evidence or ‘integration’ rule. The oral agreement for which it contends would have been entered into before the signing of the written agreement and also contains terms which are at variance therewith. It is a well-established principle that where the parties decide to embody their final agreement in written form the execution of the document deprives all previous statements of their legal effect. See National Board (Pretoria) (Pty) Ltd and Another v Estate Swanepoel and cases there cited. As was stated by Watermeyer JA in Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd:

[T]his Court has accepted the rule that when a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added to or varied by parol evidence.

Not all oral or collateral agreements are necessarily deprived of legal effect. The parol evidence rule applies only where the written agreement is or was intended to be the exclusive memorial of the agreement between the parties. Where the written agreement is intended merely to record a portion of the agreed transaction, leaving the remainder as an oral agreement, then the rule prevents the admission only of extrinsic evidence to contradict or vary the written portion without precluding proof of the additional or supplemental oral agreement. This is often referred to as the ‘partial integration’ rule. See Johnston v Leal and the cases there cited.

A court may look to surrounding circumstances, including the relevant negotiations of the parties, in order to determine whether the parties intended a written contract to be an integration of their whole transaction or merely a partial integration.
Words & phrases: ‘related finance charges’—more

In 149 TSH 2015, I cited CSARS v South African Custodial Services (Pty) Ltd (131/10) [2011] ZASCA 233 (30 November 2011) (105 TSH 2011, 111 TSH 2012), as authority for the proposition that a guarantee fee, a bid guarantee fee, an introduction fee, a financial advisory fee, a margin fee, a commitment fee, an initial fee, administration fees, and associated legal fees were all ‘related finance charges’ as envisaged by the now repealed s 11(bA) of the Income Tax Act.

Doubling up on that proposition, I now say that, wherever you come across the expression ‘related finance charges’ in the act, it means the same thing.

But before pursuing that income tax idea, I must interrupt myself to mention that such fees are, surely, part of the subject-matter of the widely misunderstood proviso to s 2 of the Value-Added Tax Act, the section defining ‘financial services’, which are exempt supplies under the VAT law.

Provided that the activities contemplated in paragraphs (a), (b), (c), (d) and (f) of s 2 shall not be deemed to be financial services to the extent that the consideration payable in respect thereof is any fee, commission, merchant’s discount or similar charge, excluding any discounting cost.

In the handout to my latest seminar, on ‘VAT Basics’, there appears this invaluable little table:

<table>
<thead>
<tr>
<th>Fee-based financial services</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Banking—s 2(1)(d)</td>
<td>Standard-rated</td>
</tr>
<tr>
<td>More banking—s 2(1)(d)</td>
<td>Standard-rated</td>
</tr>
<tr>
<td>Raising finance—s 2(1)(c)</td>
<td>Standard-rated</td>
</tr>
<tr>
<td>Share &amp; unit-trust-type transactions—s 2(1)(d)</td>
<td>Standard-rated</td>
</tr>
<tr>
<td>Lending at interest—s 2(1)(d)</td>
<td>Standard-rated</td>
</tr>
<tr>
<td>Long-term insurance &amp; reinsurance—s 2(1)(d)</td>
<td>Exempt</td>
</tr>
<tr>
<td>Retirement funds &amp; medical schemes—s 2(1)(d)</td>
<td>Exempt</td>
</tr>
<tr>
<td>Futures, options &amp; the like—s 2(1)(d)</td>
<td>Exempt</td>
</tr>
</tbody>
</table>

In other words, whatever the significance of related finance charges for income tax purposes (and it is considerable), donning your VAT cap, you have to recognize that a supplier supplying what the table refers to as fee-based ‘financial services’ as defined for VAT purposes is making outgoing standard-rated taxable services and has to account for output tax (unless the supplies are zero-rated).

More to the point, the making of such supplies could send the supplier crashing over the registration threshold.

Words & phrases: exceptio non adimpleti contractus—III


Essentially, the exceptio refers to the ability of a party to a qualifying contract to plead the exception of unfulfilled contract. The case offers a useful illustration of the circumstances in which the exceptio applies.

MRE was the lessee of the Kyalami race track, where it held the rights to stage the 1993 South African Formula 1 Grand Prix Motor Race, which Panasonic wanted to sponsor. MRE was wound up after the event was held but before Panasonic had paid the final instalment due or the full amount due on the penultimate instalment. Panasonic raised the exceptio as its defence, since MRE had failed to meet its numerous obligations under the contract—for example, by not preventing what today would be called ambush marketing.

However, the most serious flaw in the argument is this. As stated, counsel for MRE conceded that Panasonic’s obligation to pay the sponsorship fee was reciprocal with inter alia MRE’s obligation to permit Panasonic to sponsor the event. But that ‘permission’ did not exist in vacuo. It was specifically given concrete form in clause 6, the preamble to which reads:

In consideration for the sponsorship by Panasonic in terms of Clause 4.1 MRE grants to Panasonic, and undertakes to procure that Panasonic is granted, the following rights:

Clause 6.1.1 then provides that Panasonic will have the exclusive right to be the official sponsor of the event. This is followed by any number of sub-clauses spelling out Panasonic’s rights and, in most cases, MRE’s corresponding obligations. Hence the conclusion is inescapable that the parties intended MRE’s obligations under clause 6 to be reciprocal with Panasonic’s obligation to pay the full sponsorship fee under clause 4.1.

In conclusion I should say that I have not found it...
necessary to consider whether MRE’s additional obligations under clauses other than clause 6 were reciprocal with Panasonic’s obligation to pay the sponsorship fee. The reason is that the most important non-performances or defective performances relied upon by Panasonic concerned breaches by MRE of its obligations under clause 6.

Go ahead. You decide. Were the unpaid sums incurred by Panasonic or derived by MRE?

As pointed out by Van Heerden JA, when defective performance cannot be remedied the exceptio is a final defence. Sometimes performance is critical in tax matters.

151 TSH 2015—October 2015

**Words & phrases: ‘resides’**

A natural person who resides in the Republic is the only one who might be a ‘representative taxpayer’ as defined in s 1(1) of the Income Tax Act. Similarly, a ‘representative employer’ as defined in para 1 of the Fourth Schedule to the act has to be someone or an entity that resides in the Republic. And a ‘primary residence’ as defined in para 44 of the Eighth Schedule requires a natural person to ordinarily reside or to have ordinarily resided there. What might be the meaning of reside? In SALTC, I found four hits for the string “meaning of reside”, of which the most recent was the most apposite. Here is the relevant extract from the judgment of Mpati P in Poultry Farm (Pty) Ltd V Phasiya (footnotes suppressed):

> In Ex parte Minister of Native Affairs this court was concerned with the interpretation of the word ‘resides’ in s 10(3) of Act 38 of 1927. The court said:
> In construing the word ‘resides’ one must bear in mind what was said by SOLOMON J in *Buck v Parker* (1908 TS at p 1104) where the learned Judge said: ‘The word “residence” is one which is capable of bearing more than one meaning, and the construction to place upon it in a particular statute must depend upon the object and intention of the Act. As was said by EARLE CJ, in *Naef v Mutter* (CP p 359), “Residence has a variety of meanings according to the statute in which it is used.”
> This court has held, recently, that the main purpose of the [Extension of Security of Tenure Act] is to regulate the eviction process of vulnerable occupiers of land and that the Act ‘generally seeks to protect a designated class of poor tenants occupying rural and peri-urban land...with the express or tacit consent of the owner against unfair eviction from such land’. The term ‘residing’ in the definition of an ‘occupier’ in the Act must thus be construed with this purpose in mind.

In Mkwanazi v Bivane Bosbou (Pty) Ltd and Another and Three Similar Cases one of the issues the court was called upon to determine was the meaning of the term ‘reside’ in the definition of ‘labour tenant’ in the Land Reform (Labour Tenants) Act 3 of 1996. Gildenhuys J (Moloto J concurring) adopted the meaning ascribed to the word ‘reside’ by Baker J in *Barrie NO v Ferris*, viz: ‘[R]eside’ means that a person has his home at the place mentioned. It is his place of abode, the place where he sleeps after the work of the day is done. It does not include one’s weekend cottage unless one is residing there. The essence of the word is the notion of ‘permanent home’.

Just as the Act regulates the eviction of vulnerable occupiers of land, the Land Reform (Labour Tenants) Act regulates the eviction of labour tenants. I can find no reason why I should not adopt in this case, as Gildenhuys J did in *Mkwanazi*, the meaning ascribed to the word ‘reside’ by Baker J in *Barrie NO v Ferris* (supra). There could be no dispute that at least before February 2004 Sam’s permanent home was the premises on Zandspruit. He resided there.

152 TSH 2015—November 2015

**Words & phrases: ‘association of persons’**

- Per Nestadt AJA (as he then was) in *Shillings CC v Cronje and Others* 1988 (2) SA 402 (A): [link]

- The use of ‘persons’ in conjunction with ‘association’ is probably superfluous. ‘Unincorporate’ refers to an association ‘which does not have a legal persona separate from its constituent members’ (per Ogilvie Thompson JA in *CIR v Witwatersrand Association of Racing Clubs*). ‘Corporate’ would have a correspondingly opposite meaning. The central enquiry is the meaning of ‘association’ (‘vereniging’). It is defined in substantially the same terms by a number of dictionaries to which we were referred. I confine myself to the following. According to Black’s *Law Dictionary* 5th ed: [link]

- It is a term of vague meaning used to indicate a collection or organization of persons who have joined together for a certain or common object. An unincorporated society: a body of persons united and acting together without a charter, but upon the methods and forms used by incorporated bodies for the prosecution of some common enterprise.

- The Afrikaanse Woordenboek of Terblanche and Odendaal gives the meaning of ‘vereniging’ (and it was the Afrikaans version of the [Group Areas] Act that was signed) as:
saambinding, saamvoeging; vrywillige organisasie van 'n aantal persone met 'n bestuur aan die hoof en statute en gereg op 'n doel wat nie met die openbare orde in stryd mag wees nie; die saamkom en saamwerk van persone tot 'n bepaalde doel, samekoms, geselskap, genootskap, maatskappy, klub.

(See, too, Nibo (Edms) Bpk v Voorsitter van die Drankraad en Andere 1984 (2) sa 209 (NC) at 213E–in fin....)

Some brief amplification of the criterion that 'association' takes the form of an (organized) body of persons and its equation to a society is desirable. The appropriate Oxford English Dictionary definition of 'body' is 'a number of persons taken collectively; an aggregate of individuals'. In Group Areas Development Board v Hurley NO...Steyn CJ, in rejecting an argument that certain persons were 'an association' within the meaning of 'company' in the Group Areas Act (or a body of persons as defined in the Interpretation Act), said at 131A:

These Indians are, however, on the information before us, no more than a number of individuals having a common religious belief. There is nothing to indicate that they are, as Roman Catholic Indians, in any way congregated, organized or associated as a distinct body or association of persons, and they cannot, in my view, pass as either a person or a company in terms of the above mentioned definitions.

Black (op cit ) describes a 'society' as being:

An association or company of persons (generally unincorporated) united together by mutual consent, in order to deliberate, determine and act jointly for some common purpose.

In practice their union and consent usually take place by the approval and adoption of a constitution (Law of South Africa vol 1 sv 'Associations' para 498 at 287), providing for membership of the association, office bearers and/or a committee and a name of the association.

In most cases there will be little difficulty in identifying a body of persons as an association within the meaning of the definitions referred to. The prime example of a corporate one (under the common law) is the universitas and (by statute) those registered as companies under s 21 of the Companies Act. Illustrative of an unincorporate one is the well-known voluntary association in all its diverse forms....

More about 'related finance charges’

Suppose that, following 149 TSH 2015, I am correct in asserting that, wherever you come across the expression 'related finance charges' in the Income Tax Act, it means a guarantee fee, a bid guarantee fee, an introduction fee, a financial advisory fee, a margin fee, a commitment fee, an initial fee, administration fees, and associated legal fees (CSARS v South African Custodial Services (Pty) Ltd (131/10) [2011] ZASCA 233 (30 November 2011) (105 TSH 2011, 111 TSH 2012).

What are the fiscal implications, other than under the VAT law (which were covered in 150 TSH 2015)?

Recoupment

Under s 8(4)(l), a deemed recoupment arises if, in transferring a financial arrangement, you transfer as well an obligation to pay related finance charges (and interest) that you incurred or were deemed to incur, and you were allowed as a deduction.

Incurral and accrual of interest

For purposes of s 24J, ‘interest’ is defined (in s 24J(1)) as including the

(a) gross amount of any interest or related finance charges, discount or premium payable or receivable in terms of or in respect of a financial arrangement;

The upshot is that, as a borrower carrying on a trade, you may claim related finance charges (and interest) incurred in the production of the income, regardless of any other circumstances (s 24J(2)).

As a lender under an ‘income instrument’, related finance charges (and interest) will be deemed to accrue to you and will be included in your gross income.

In both instances, the related finance charges will be accounted for on a so-called day-by-day basis (also known as an internal-rate-of-return basis) (s 24J(3)).

(As a lender under a mere ‘instrument’, your liability to normal tax is decided under general principles, but you may rest assured that all the fees mentioned here will represent gross income, the only difference being that they might accrue under a different timing.)

And that is that

Since no other specific reference is to be found to related finance charges, you might suppose that this little story is at an end. Wrong! What about all the references to ‘interest as defined in section 24J’?

- Section 8F, on interest on hybrid instruments, uses ‘interest’ in this sense.
- So does s 8FA, also on hybrid instruments.
So does s 9(2)(b), on sources of income in the Republic.
And s 9(4)(b), on sources of income outside the Republic.
And s 12E, on sasci, where the definition of ‘investment income’ (in s 12E(1)) is based on such interest.
And s 23G, on sale-and-leaseback arrangements.
And s 23K, on the limitation of deductions in reorganization and acquisition transactions.
And s 23M, on the limitation of interest deductions on debts owed to persons not subject to the so-called income tax.
And s 23N, on the limitation of interest deductions in reorganization and acquisition transactions.
And para 20(1)(g) of the Eighth Schedule to the act, on the portion of interest to be included in the base cost of an asset.
And para 20(2)(a) of the Eighth Schedule, on the borrowing costs to be excluded from the base cost of an asset. Raising fees are explicitly excluded.

Why? Are raising fees excluded from related finance charges? This is the only reference to raising fees in the entire act. In this context, the SARS Comprehensive Guide to the CGT (issue 4) says:

Raising fees are not regarded as interest and are excluded by para 20(2)(a).

That is the only reference to raising fees in the entire SARS literature on the Income Tax Act. Yet, in the Custodial Services case, the various fees mentioned here were incurred ‘to raise the loans that [the taxpayer] required to finance the construction of the prison’. And, in TC 13356 (9 May 2914) (134 TSH 2014), the case launched to interpret the decision in Custodial Services, the fees were specifically referred to as ‘raising fees’. And in the famous Genn case, the commissions under consideration were raising fees (see also TC 11247 (2 February 2005)), and were allowed as a deduction.

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Yet more about ‘related finance charges’

I’ll leave it to SARS to explain why it purports to discriminate against raising fees under the CGT, in the face of the case law on the subject. What is far more important is to ask whether what has been said so far about related finance charges is all that might be said on the topic. The answer is No, but, thanks to the invidious legal drafting practice of relying upon cross-references, rather than defined terms, and then inconsistently, you might search the Income Tax Act for hours without hitting upon the reason why.

Q: Does the withholding tax on interest rely upon common-law interest or s 24J ‘interest’?
A: It refers to interest, without defining it by reference to s 24J.
ADJUDICATOR: Look again.
A: I have looked again.
ADJUDICATOR: Remember how poorly trained is the legal draftsman.
A: You reckon?

Speaking of crappy drafting, here is something never seen until modern times—a broken charging provision, in the unprecedented sense that a tax is charged in more than a single provision, the other half to be found in s 50C:

50B. (1) There must be levied for the benefit of the National Revenue Fund a tax, to be known as the withholding tax on interest, calculated at the rate of 15 per cent of the amount of any interest that is paid by any person to or for the benefit of any foreign person to the extent that the amount is regarded as having been received or accrued from a source within the Republic in terms of section 9(2)(b).

ADJUDICATOR: D’ya geddit?
A: Nope. It’s a reference to interest in its ordinary sense.
ADJUDICATOR: No it isn’t. It’s a reference to s 9(2)(b) interest.
A: So what?

Here is the relevant part of s 9(2)(b):

(2) An amount is received by or accrues to a person from a source within the Republic if that amount—
(b) constitutes interest as defined in section 24J where that interest;

Thus interest for purposes of the withholding tax on interest is ‘interest’ as defined in s 24J(1) with a domestic source under s 9(2)(b). The result is that related finance charges—raising fees, if you like—with a domestic source are subject to the withholding tax on interest. The draftsman expects you, when reading s 50C, to drill through s 9(2)(b) in order to arrive at s 24J(1). All he needed to do—especially in the light of the many references to s 24J(1) interest throughout the act, which all include references to related finance charges—was to devise a memorable term of art to replace all the direct and the single indirect cross-references to s 24J(1). Finance charge would have been an excellent choice, since it is already used in several provisions in its ordinary sense, which, I am willing to bet, is, in the context, intended to include related finance charges.
From the case law: terms v conditions

The so-called conditions of the policy are not conditions as understood in our law; they are undertakings by the insured and therefore terms of the contract. The nomenclature of the policy is that of the English law, which fails to observe the distinction between a condition proper and a term of the contract. Let me quote the following from The Law of Contract by Cheshire and Fifoot, 5th ed. at p 118:

To lawyers familiar with the Roman jurisprudence and trained in modern continental systems the use of the word condition in this context must appear a solecism. By them a condition is sharply distinguished from the actual terms of a contract, and is taken to mean, not part of the obligation itself, but an external fact upon which the existence of the obligation depends.

The orthodox application of the word is by no means unknown to English lawyers. An obligation or a right, suspended until the happening of a stated event, is said in the common law to be subject to a condition precedent.

I repeat that clause 6 contains no conditions suspending the operation of the policy but only terms of the contract. The terms of the contract cannot be changed into suspensive conditions merely by calling them conditions precedent. A term of the contract may be so material that a breach of it will entitle the other party to repudiate the contract, and in the present case the parties have used the words ‘conditions precedent to any liability’ to indicate that the so-called conditions are material terms of the contract.

In our law the fulfilment of a true suspensive condition must be pleaded and proved by the person who is relying on the contract, but the breach of a term in the contract must be pleaded and proved by the person who relies on such a breach as a ground for repudiating liability under the contract.

Words & phrases: ‘directly or indirectly’

The expression ‘directly or indirectly’ appears often in fiscal statutes but a search of SALR (Jutas) fails to turn up any universal explanation of what it might mean. These are the best references I could find:

**Bulk Joyance**—extension of application

*Per* Lopes J in *MV Bulk Joyance Elstead Ltd v MV Bulk Joyance and Others* 2014 (5) SA 414 (K2D):

In order to determine whether HNA Group ‘controlled’ Grand China Logistics Holding Group, I have been referred to *MV Heavy Metal Belfry Marine Ltd v Palm Base Maritime SDN BHD* 1999 (3) SA 1083 (SCA) and in particular the judgment of Smalberger JA. With regard to the concept of control as envisaged in s 3(7)(a)(iii) of the [Admiralty Jurisdiction Regulation] Act, Smalberger JA stated in para 8:

Control is expressed in terms of power. If the person concerned has power, directly or indirectly, to control the company, he/she shall be deemed (geag...word) to control the company. Power is not circumscribed in the Act. It can be the power to manage the operations of the company or it can be the power to determine its direction and fate. Where these two functions happen to vest in different hands, it is the latter which, in my view, the Legislature had in mind when referring to power and hence to control. In South African legal terminology that means...the person who controls the shareholding in the company.

The learned judge of appeal then drew the distinction in the subsection between ‘direct’ and ‘indirect’ power. He viewed direct power as the legal authority over the company by a person who, according to the register of the company, is entitled to control its destiny. Indirect power referred to the factual position of a person who is able to command or exert authority over the person who had legal power. He referred to this distinction as being between a ‘beneficial owner’ and a ‘legal owner.

Although the learned judge of appeal was dealing with a situation in that case where the legal power over the companies concerned vested in the same person, he continued in paras 12–13:

On the other hand, if *de jure* control of the respective companies vests in different hands, it would still be open to the applicant for arrest to establish that the same person was *de facto* (ie indirectly) in control of both, thereby also supplying the required statutory nexus to satisfy the provisions of s 3(7)(a) of the Act.

The principal purpose of the Act is to assist the party applying for arrest rather than the party opposing it.

In para 14 he continued:

... There is much to be said for the view that where one speaks simply of a power to control one is concerned with a single repository of power—the person who is in actual, overall control. But the power to control directly or indirectly envisages two possible repositories of power, one *de jure*
and one de facto. Either form of control can be satisfied to bring the subsection into operation. If there can only be one repository of power in terms of the subsection it would follow that the person who has de jure control could be ignored once it has been established that someone else has de facto power. This would appear to be contrary to the clear wording of the subsection. By using the words directly or indirectly the Legislature clearly intended to extend and not restrict the expression power to control....

**MV Heavy Metal**—extension of application  
*Per Smaalberger ja in MV Heavy Metal: Belfry Marine Ltd v Palm Base Maritime SDN BHD 1999 (3) SA 1083 (SCA):*

The subsection [s 3(7)(a)(iii) of the Admiralty Jurisdiction Regulation Act] clearly distinguishes between ‘direct’ and ‘indirect’ power. That distinction must be given a meaning. Indirect power can only refer to the person who de facto wields power through, and hence over, someone else. The latter can only be someone who wields direct power vis-à-vis the company and the outside world and who therefore, in the eyes of the law (ie de jure), controls the shareholding and thus determines the direction and the fate of the company. On the facts of the present case Lemonaris is the person in that situation. Of course, the same person may in given circumstances exercise both de facto and de jure control.

In my view, therefore, direct power refers to de jure authority over the company by the person who, according to the register of the company is entitled to control its destiny; and indirect power to the de facto position of the person who commands or exerts authority over the person who is recognized to possess de jure power (ie the beneficial ‘owner’ as opposed to the legal ‘owner’). This extension of de jure power to de facto power is in line with the objective of the section: to prevent the true ‘owner’, by presenting a false picture to the outside world, from concealing his assets from attachment and execution by his creditors.

**Ingram**—probable contribution  
*Per Chetty j in Mutual and Federal Insurance Co Ltd v Ingram NO and Others 2009 (6) SA 53 (E):*

Before commencing with that exercise, however, it is apposite to consider the precise ambit, if any, of the words ‘directly or indirectly’ contextually. The phrase has been judicially considered in a number of cases, eg Agiakatsikas NO v Rotterdam Insurance Co Ltd 1959 (4) SA 726 (C) where Van Winsen j said the following at 730B:

The word indirectly would seem to absolve the Company from having to prove that the intoxication of the deceased was the approximate cause of the injuries sustained by him. (See Coxe v Employers’ Liability Assurance Co. Ltd 114 LR 1180.) If it could be shown that the state of intoxication of the deceased materially contributed to the bringing about of the collision then I think defendant could be said to have discharged the onus resting upon it. [Emphasis added.]

See also Taylor NO v National Mutual Life Association of Australasia Ltd 1988 (4) SA 341 (C). What these cases illustrate is that it is sufficient for an insurer, who, like the appellant, bears an onus, to show that the weather conditions in some material way probably contributed to the damage to the stock in trade.

**Kirsten**—substance  
*Per Friedman JP in Kirsten and Another v Bankorp Ltd and Others 1993 (4) SA 649 (C);*

In S v Pouroulis and Others (1991) 2 CLD 123 (w)...Stegmann J, in considering the effect of s 226 of the Act [Companies Act 61 of 1973], suggested at 147 that an example of a loan made indirectly occurred where the lender makes a payment directly to a creditor of the intended borrower and thereby makes a loan to the borrower indirectly.

Stegmann J added, however, on the same page, that:

A transaction is not prohibited by s 226(1) unless it is shown to be a contract of loan between a company and a borrower disqualified in terms of this section. (My italics.) He went on to state:

The words ‘directly or indirectly’ merely emphasize that the prohibition applies whether the loan is constituted by a payment made by the lender directly to the borrower or indirectly upon the borrower becoming obliged to repay to the lender a sum of money which has become a loan from the lender to the borrower in any number of possible indirect ways. The prohibited indirect ways do not encompass any transaction which does not result in a contract of loan between a lender company and a borrower who is disqualified in relation to such lender company. (My italics.)

This approach emphasizes that what is prohibited must in substance amount to a contract of loan....
Words & phrases: ‘Republic’—I

Meaning of ‘Republic’
The post-constitutional definition of ‘Republic’ in s 1(1) of the Income Tax Act currently reads as follows:

‘Republic’ means the Republic of South Africa and, when used in a geographical sense, includes the territorial sea thereof as well as any area outside the territorial sea which has been or may be designated, under international law and the laws of South Africa, as areas within which South Africa may exercise sovereign rights or jurisdiction with regard to the exploration or exploitation of natural resources;

Previously, the definition read as follows:

‘Republic’ means the Republic of South Africa;

It is instructive to compare the current definition with the definition of the same term in the Value-Added Tax Act, which has remained in the following form as from 1996:

‘Republic’, in the geographical sense, means the territory of the Republic of South Africa and includes the territorial waters, the contiguous zone and the continental shelf referred to respectively in sections 4, 5 and 8 of the Maritime Zones Act, 1994 (Act no 15 of 1994);

Both current definitions in fact rely, in the geographical (as opposed to the political) sense, upon land borders established under international law and, at least in the post-constitutional era, not anywhere specifically recorded as points on a map. The geographical extension beyond those borders is in fact also established by international law, which is merely recorded in the Maritime Zones Act.

Although the definition in the Income Tax Act does not specifically mention the Maritime Zones Act, that is the act to which it in fact refers in its mention of the laws of South Africa. But even without such a mention, the proper place to identify the limits to South Africa’s geographical jurisdiction is the Maritime Zones Act, since, to my knowledge, these are nowhere else established.

The draftsperson responsible for the Income Tax Act’s definition was perhaps not as familiar with the topic as was the draftsperson of the Value-Added Tax Act’s definition. The tax chap’s mistake, in a South African context, was to refer to the territorial sea, rather than to the territorial waters, but Black’s Legal Dictionary 9 ed (2009) suggests that territorial sea (sv ‘territorial waters’, ‘water—territorial waters’) is a synonym for territorial waters.

The Maritime Zones Act identifies the territorial waters in s 4, the contiguous zone in s 5, the maritime cultural zone in s 6, the exclusive economic zone in s 7, and the continental shelf in s 8. It is what I call a sub-constitutional act, in that it represents a significant footnote to the Constitution, in my opinion overriding all other statutes, unless expressly excluded from application. (It is, for example, overridden by s 12 of the Antarctic Treaties Act.)

On this basis, South African law, including its tax laws, applies within the territorial waters, which comprise only the twelve-mile zone. Within the next twelve-mile zone only some laws apply, and then only within the context of an intent to contravene those laws (intent is a legal concept, in my opinion vital to the interpretation of s 5 of the Maritime Zones Act). The exclusive economic zone is relevant in relation only to natural resources, and it is only in that context that South African laws, including, presumably, tax laws, would apply. The continental shelf figures essentially in a mining context only, and South African laws, including tax laws, apply solely within that context.

Lacking any specific text to such an effect, the Income Tax Act is incapable of changing the following, simplified presentation of fiscal reality:

- Territorial waters: All tax laws apply.
- Contiguous zone: Tax laws apply to intentional contraventions only.
- Exclusive economic zone/Continental shelf: Only tax laws relating to mining apply.

It is against this constitutional background that the definition of ‘Republic’ in s 1(1) of the Income Tax Act must be judged. And it is thus that an apparent second mistake of the draftsperson emerges, in that he has seemingly forgotten the contiguous zone. But, on the basis that areas within which South Africa may exercise sovereign rights or jurisdiction with regard to the exploration or exploitation of natural resources is a reference to the exclusive economic zone, and that the exclusive economic zone extends from the landmass baselines, the definition may be seen as encompassing the contiguous zone, even though it is not specifically mentioned.

References to the ‘Republic’ in the Income Tax Act therefore constitute references to both its landmass and its territorial waters and its exclusive economic zone. But the application of the act beyond its landmass depends upon both the location of a potential fiscal event and its nature:
Territorial waters: All chargeable events are accessible by the Income Tax Act.
Contiguous zone, excluding the territorial waters: Only intentional contraventions of the Income Tax Act are accessible.
Exclusive economic zone, excluding the territorial waters: The Income Tax Act otherwise applies only to the extent that it deals with natural resources, in particular, the mining of such resources on the continental shelf.
In other words, the Income Tax Act cannot override the provisions of the Maritime Zones Act or, indeed, international law.

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Words & phrases: ‘Republic’—II
Locational references to ‘the Republic’
The string “the Republic” appears a maximum of 378 times in the current version of the Income Tax Act, with specifically locational references taking the form, exclusively, as far as I can tell, of ‘in the Republic’, ‘within the Republic’ and ‘outside the Republic’.
Taken at face value, the definition of ‘Republic’ refers, locationally, to a place
- within its landmass,
- within its territorial waters (the twelve-mile zone), or
- within it exclusive economic zone (the 200-mile zone).

There can be no warrant whatsoever for claiming that it applies only to the landmass and the twelve-mile zone, since to do so is to ignore the full text of the definition of ‘Republic’ in s 1(1).
Nor can there be any warrant for claiming that it applies beyond the landmass only to the extent of the twelve-mile zone, on the ground that that is the area in which all SA laws apply, since to do so is to ignore the important anti-avoidance powers effectively granted to the fiscal authorities (and the courts) by the Maritime Zones Act within the contiguous zone, and the wider, although solely resource-related, powers granted in the exclusive economic zone (inclusive of the continental shelf).
Nor, to repeat the point more generally, may location within or without the Republic depend upon the precise laws, as established by the Maritime Zones Act, applying to various subdivisions of the sea, since the freedoms and limitations imposed by that act constitute powers claimed by and granted to the state under international law and not directions whether an event or a person is within or without the Republic.

If SARS, looking no further than the Income Tax Act, wanted to locate an event or a person within the Republic, it would have to search for a presence either on the landmass or within a border drawn 200 nautical miles from the baselines of that landmass. Under that act, it enjoys, in my view, no other choice, despite the specific reference in the definition of ‘Republic’ to the territorial sea, that is, presumably, the twelve-mile zone. That reference does not extend to it the choice of selecting the part while ignoring the whole subsuming that part.
By contrast, the Value-Added Tax Act is more subtle, allowing, say, the address or location of a place
- to be located on the landmass and within the twelve-mile zone for all purposes of the act;
- to be located within the outer twelve-mile part of the contiguous zone if to do so would defeat the mischief of tax avoidance; and
- to be located on the continental shelf for purposes related to the mining of resources.

When the Value-Added Tax Act follows a supply of goods, it does so in lockstep with the Customs and Excise Act, which has its own rules and conventions regulating the location of goods within or without the Republic. When it follows the supply or services or the location of an enterprise or an activity beyond the landmass, it effectively relies, I say, upon the relevant provisions of the Maritime Zones Act.
As for the Customs and Excise Act itself, the ordinary meanings of import and export are irrelevant, being overridden by customs law. Without an artificial basis for establishing importations and exports, customs law would be meaningless.

Role of the Immigration Act
Within the present context, and specifically in relation to the location of persons within or without the Republic, the equivalent of the customs law, in my view, is the Immigration Act (which no longer defines ‘Republic’). The relevant provisions are s 9, on admission and departure, and s 9A, on the place of entry or exit.
To the extent that the Immigration Act deals with admission to and departure from the Republic, I say that it, too, is of a sub-constitutional nature, in that it defines, for all purposes, unless specifically overridden (as it is, for example, by s 16(1) of the Prevention and Combating of Trafficking in Persons Act, although only to a limited extent), when a person is within or without the Republic.

Thus, as opposed to the ridiculous and unworkable proposition that a person is outside the Republic if a metre beyond the exclusive economic zone but within the Republic if he or she travels a metre towards the shoreline, the Immigration Act effectively settles the issue by considering whether the person is on the landward or seaward side of an immigration desk.

The contrary viewpoint—Master Currency case

In my view, anything to the contrary suggested by the Master Currency case in the lower court was obiter and altogether irrelevant to the decision reached (Master Currency (Pty) Ltd v CSARS (VAT 712) [2011] ZAPGHJC and, on appeal, Master Currency v CSARS (155/2012) [2013] ZASCA 17). As the SARS Interpretation Note 85 confirms, on appeal, the taxpayer lost its case on the second exception to the s 11(2)(l) zero-rating (‘not being services which are supplied directly...in connection with movable property...situated inside the Republic at the time the services are rendered’).

On any meaning of exported, its defined or its ordinary meaning, said the SCA, the movable property concerned, being currency, was not exported to the said person, being the nonresident recipient of the vendor’s currency-exchange services.

Nowhere in either judgment or in the Interpretation Note is any point of law made to the effect that the recipients were in the Republic at the time the services were rendered, although the trial judge and SARS obviously believed that they were, in my view, erroneously.

The contrary viewpoint

In principle more hostile to the views expressed here are the two provisions of the Income Tax Act specifically referring to the Immigration Act, the obvious counterargument arising being that, in the interpretation of the Income Tax Act, reference to the Immigration Act is appropriate only when specifically authorized by the explicit terms of the act.

The first such reference appears in the proviso to the definition of a ‘resident’ in s 1(1): Provided that—

(a) a day shall include a part of a day, but shall not include any day that a person is in transit through the Republic between two places outside the Republic and that person does not formally enter the Republic through a ‘port of entry’ as contemplated in section 9(1) of the Immigration Act, 2002 (Act no 13 of 2002), or at any other place as may be permitted by the Director General of the Department of Home Affairs or the Minister of Home Affairs in terms of that Act (the Immigration Act), and

Although explanatory memoranda may not in my view be used in the interpretation of statutes (149 TSH 2015), they do serve as a guide to the thinking of the fiscal authorities in presenting proposed amendments to the National Assembly. The following extract from the Explanatory Memorandum to the Revenue Laws Amendment Bill, 2003 shows that the amendment leading to the proviso cited above was aimed not at incorporating, to any extent, the Immigration Act into the Income Tax Act but at equalizing the treatment of residents and nonresidents:

Subclause (k): For purposes of determining whether a person is a resident of the Republic in terms of the ‘physical presence’-test, the days that a person is in transit through the Republic are not taken into account. This, however, only applies where a person does not enter the Republic through a port of entry. In terms of the Immigration Act, 2002 (Act no 13 of 2002), a person may only enter the Republic through a port of entry. The term ‘port of entry’ as defined in section 1 of the Immigration Act, 2002 refers only to foreigners who enter the Republic and does not include South African residents or citizens. Hence, the law pertaining to South African residents and citizens is unclear. The proposed amendment will clarify this issue so that the ‘port of entry’ refers to all South African residents, citizens and foreigners who enter the Republic through a ‘port of entry’. The Minister of Home Affairs may, however, authorize any person or category of persons to enter the Republic at a place other than a port of entry. It is proposed that ‘physical presence’ test also take account of the possibility that a person may enter the Republic at such other place.

It so happens that this restrictive feature of the Immigration Act was removed upon the promulgation of the Immigration Amendment Act 19 of 2004, which, amongst other things, amended the definition of ‘port of entry’ in s 1.

The second such reference appears in the following proviso to the remuneration exemption provided by s 10(1)(o)(ii) of the Income Tax Act:

Provided that—

(a) for purposes of this subparagraph [s 10(1)(o)(ii)], a person who is in transit through the Republic between two places outside the Republic and who does not formally enter the Republic through a port of entry as contemplated in section 9(1) of the Immigration Act, 2002 (Act no 13 of 2002), or (VAT 712) [2011] ZAGPJHC and, on appeal, Master Currency v CSARS (155/2012) [2013] ZASCA 17. As the SARS Interpretation Note 85 confirms, on appeal, the taxpayer lost its case on the second exception to the s 11(2)(l) zero-rating (‘not being services which are supplied directly...in connection with movable property...situated inside the Republic at the time the services are rendered’).

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at any other place as may be permitted by the Director General of the Department of Home Affairs or the Minister of Home Affairs in terms of that Act [the Immigration Act], shall be deemed to be outside the Republic.

It turns out that this reference to the Immigration Act arose at the same time and, ostensibly, for same reasons, the (somewhat garbled) relevant extract from the Memorandum reading as follows:

Subclause (j): In terms of section 10(1)(o) of the Income Tax Act, 1962, any remuneration received by or accrued to a person in respect of services rendered outside the Republic is exempt if that person was outside the Republic for a certain period. In determining the number of days that a person was so outside the Republic, the days that a person is in transit through the Republic are not taken into account. This, however, only applies where a person does not enter the Republic through a port of entry. In terms of the Immigration Act, 2002 (Act no 13 of 2002), a person may enter the Republic through a port of entry. The Minister of Home Affairs may, however, authorize any person or category of persons to enter the Republic at a place other than a port of entry. It is proposed that in determining the period that a person is outside the Republic for purposes of section 10(1)(o) the possibility that a person may enter the Republic at such other place must also be taken into account.

Conclusion
It follows that there is nothing in the case law or the text of the Income Tax Act contradicting my assertion that a person’s presence within or without the ‘Republic’ depends not only upon the definition of that term in s 1(1) of the Income Tax Act but upon the application of the overriding provisions of the Immigration Act pertaining to the movement of persons. By contrast, the counterargument that the definition of ‘Republic’ must be interpreted literally would mean that entry into or exit from the Republic takes place on an invisible line extending 200 nautical miles from the landmass of the Republic. In my view, the counterargument is risible, and is prevented from obviously being so by the altogether unsupportable view apparently taken by some SARS officials (unsupported by SARS’s own literature) that the invisible line that counts is that drawn twelve nautical miles from the landmass.

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Words & phrases: ‘debt’ (and prescription)

In Makate v Vodacom (Pty) Ltd [2016] ZACC 13 (26 April 2016) (see the Monthly Listing), this is what Jafta J, delivering the judgment of the majority (the minority concurred, for different reasons), said (footnotes suppressed):

Constitutional approach
Since the coming into force of the Constitution in February 1997, every court that interprets legislation is bound to read a legislative provision through the prism of the Constitution. In Fraser, Van der Westhuizen J explained the role of section 39(2) in these terms:

When interpreting legislation, a court must promote the spirit, purport and objects of the Bill of Rights in the process of interpreting the provision in question.

It is apparent from Fraser that section 39(2) introduced to our law a new rule in terms of which statutes must be construed. It also appears from the same statement that this new aid of interpretation is mandatory. This means that courts must at all times bear in mind the provisions of section 39(2) when interpreting legislation. If the provision under construction implicates or affects rights in the Bill of Rights, then the obligation in section 39(2) is activated. The court is duty-bound to promote the purport, spirit and objects of the Bill of Rights in the process of interpreting the provision in question.

The objects of the Bill of Rights are promoted by, where the provision is capable of more than one meaning, adopting a meaning that does not limit a right in the Bill of Rights. If the provision is not only capable of a construction that avoids limiting rights in the Bill of Rights but also bears a meaning that promotes those rights, the court is obliged to prefer the latter meaning. For, as this Court observed in Fraser:

Section 39(2) requires more from a court than to avoid an interpretation that conflicts with the Bill of Rights. It demands the promotion of the spirit, purport and objects of the Bill of Rights.

It cannot be disputed that section 10(1) read with sections 11 and 12 of the Prescription Act limits the rights guaranteed by section 34 of the Constitution. Therefore, in construing those provisions, the High Court was obliged to follow section 39(2), irrespective of whether the parties had asked for it or not. This is so because the operation of section 39(2) does not depend on the wishes of litigants. The Constitution in plain terms mandates courts to invoke the section when discharging their judicial function of interpreting legislation. That duty is triggered as soon as the provision under interpretation affects the rights in the Bill of Rights.
In Road Accident Fund, this Court, having expressed reservations on whether an obligation may constitute a debt contemplated in the Prescription Act, stated that the failure to meet a prescription deadline set in terms of the Act, denies a litigant access to a court. What this means is that if the Act finds application in a particular case, it must be construed in accordance with section 39(2). On this approach an interpretation of debt which must be preferred, is the one that is least intrusive on the right of access to courts. In SATAWU, this Court affirmed the principle in these terms: Constitutional rights conferred without express limitation should not be cut down by reading implicit limitations onto them, and when legislature provisions limits or intrudes upon those rights they should be interpreted in a manner least restrictive of the right if the text is reasonably capable of bearing that meaning.

However, in present circumstances it is not necessary to determine the exact meaning of ‘debt’ as envisaged in section 10. This is because the claim we are concerned with falls beyond the scope of the word as determined in cases like Escom which held that a debt is an obligation to pay money, deliver goods, or render services. Here the applicant did not ask to enforce any of these obligations. Instead, he requested an order forcing Vodacom to commence negotiations with him for determining compensation for the profitable use of his idea.

To the extent that Desai went beyond what was said in Escom it was decided in error. There is nothing in Escom that remotely suggests that ‘debt’ includes every obligation to do something or refrain from doing something apart from payment or delivery. It follows that the trial Court attached an incorrect meaning to the word ‘debt’. A debt contemplated in section 10 of the Prescription Act does not cover the present claim. Therefore, the section does not apply to the present claim, which did not prescribe.

‘Debt’, property, prescription

Maya ADP delivered the judgment of the majority (there were two further, concurring judgments) in Off-Beat Holiday Club v Sanbonani Holiday Spa (2023/1/2014) [2016] ZASCA 62 (25 April 2016) (see the Monthly Listing). The facts are awfully complicated but not this exposition of the relevant law (footnotes suppressed) (see also 157 TSH 2016):

... To my mind, the real issues are rather whether the claims are ‘debts’ susceptible to extinctive prescription under s 11(d) of the Prescription Act, which stipulates a general prescriptive period of three years in respect of most debts, and the impact of s 13(1)(e) thereof, if any, for purposes of the s 266 [of the Companies Act] claims.

As our courts have frequently observed, the Prescription Act does not define the term ‘debt’. However, it is established that for purposes of this Act the term has a wide and general meaning; that it includes an obligation to do something or refrain from doing something and entails a right on one side and a corresponding obligation on the other. The answer to whether a claim is a debt susceptible to prescription after a period of three years is to be found in the basic distinction in our law, which has its origin in Roman law, between a real right (jus in re), and a personal right (jus in personam).

Our case law has steadfastly acknowledged the distinction between real rights, which are primarily concerned with a relationship between a person and the thing he claims, and personal rights, which are concerned with the relationship between two persons, ie a creditor and a debtor who is under a legal obligation to pay the creditor what is due to him. This distinction was explained as follows in National Stadium South Africa (Pty) Ltd & others v Firstrand Bank Ltd [2010] ZASCA 164; 2011 (2) SA 157 (SCA) para 31:

Real rights have as their object a thing (Latin: res; Afrikaans: saak). Personal rights may have as their object performance by another, and the duty to perform may...arise from a contract. Personal rights may give rise to real rights, for instance, a personal obligation to grant someone a servitude matures into a real right on registration. Real rights give rise to competencies: ownership of land entitles the owner to use the land or to give others rights in respect thereof. [Footnote omitted]

In Absa Bank Ltd v Keet Zondi a took the discussion further and said:

The person who is entitled to a real right over a thing can, by way of vindicatory action, claim that thing from any individual who interferes with his right. Such a right is the right of ownership. If, however, the right is not absolute, but a relative right to a thing, so that it can only be enforced against a determined individual or a class of individuals, then it is a personal right....

The obligation which the law imposes on a debtor does not create a real right...but gives rise to a personal right.... In other words, an obligation does not consist in causing something to become the creditor’s property, but in the fact that the debtor may be compelled to give the creditor something or to do something for the creditor or to make good something in favour of the creditor.

The manner in which the Prescription Act is structured reflects this distinction—acquisitive prescription of real rights is dealt with in...
general notices are referred to (GN), rather than proclaimed under s 41 of the Special Economic Zones Act. For example, the regulations it must be. Except that this supposed rule is not and if it calls for general notices, general notices for regulations, regulations must be proclaimed, proclamation (155 GZ) seem to have emerged as a regulation, as should GN 1023 which is a much shorter list, where there are a mere three vacancies. Then there is also a ‘Record of regulations’, since the act conjures as well with regulations, which is a much shorter list, where there are a mere three vacancies.

But then the act, which fails to define ‘prescribe’, also refers to a wide range of matters to be prescribed by SARS or by the Commissioner (although what the difference might be, I shall probably never fathom) or by an official, as well as by some unspecified entity or person. You will find these in ss 22(2)(a), (b), 22(3), 25(1)(a), 26(2), 26(2)(a), 27(2), 30(1)(b), 38, 67(2), 78(5), 79(1), 87(2), 89(3), 103(3), 147(3), 153(2), 167(1), 176(3), 185(2), 190(5A), 204(2)(b), 215(1), 215(2), 227, 230, 240(1), 240A(3), 244(2), 244(3) and 256(4).

That is an awful lot of work to be accomplished by the same, undefined word. In many instances, I suppose, if someone is authorized to design a form, he or she gets to ‘prescribe’ its content. Besides the problem of actually laying hold of SARS forms (a topic, possibly, for another day), there is no defined location of the full list of such forms, unless you are prepared to put up with the Forms page on the SARS website, which has never struck me as being particularly comprehensive or reliable, especially over time. To mention just a few problems, the SARS forms are usually undated, are silently updated, and are suddenly changed without notice, while no chronological record is maintained of the various vintages of forms that have appeared over the years. These are significant issues within the adversarial environment in which tax professionals ought to be operating.

In 141 TSH 2014, in which I first looked at this topic, I speculated whether there is some difference between ‘prescribe’, ‘prescribes’ and ‘prescribed’ as used in the act, and ended with an ominous reproduction of s 257(1)(b):

257. (1) The Minister may make regulations regarding—
(b) any matter which under this Act is required or permitted to be prescribed.

If words mean anything, my previous conclusion has to be correct:

Anything requiring or permitted to be prescribed must be prescribed by the Minister, and by way of regulation!
Wrapping up official interest (official rate of interest)

As this month’s Monthly Listing shows, in 159 TSH 2016, I picked up an incorrect date for one of the ill-advised recent increases in the repo rate by the SARB’s monetary policy committee (MPC).

As a result, I could not reconcile the SARS date for the change in the ‘official rate of interest’ and the one I derived. The confusion, which was all on my side, has now been cleared up, and the correct dates of all the various interest rates are given in the Monthly Listing.

The topic is in any event horribly complicated, as was made evident in 158 TSH 2016, and is currently relevant only because the MPC is hell-bent on upping rates, even in the face of looming economic disaster, supposedly in the pursuit of a lower rate of inflation.

Worse still, I have yet to cover the ‘official rate of interest’—defined in the Seventh Schedule to the Income Tax Act, which deals with so-called fringe benefits taxation. The official rate of interest also plays a role in s 23M (limitation of interest deductions) and s 64C (deemed dividends for the purposes of the dividends tax).

Here is the definition:

‘[O]fficial rate of interest’ means—
(a) in the case of a debt which is denominated in the currency of the Republic, a rate of interest equal to the South African repurchase rate plus 100 basis points; or
(b) in the case of a debt which is denominated in any other currency, a rate of interest that is the equivalent of the South African repurchase rate applicable in that currency plus 100 basis points:

Provided that where a new repurchase rate or equivalent rate is determined, the new rate of interest applies for the purposes of this definition from the first day of the month following the date on which that new repurchase rate or equivalent rate came into operation;

In the Seventh Schedule, as in the Fourth (PAYE and provisional tax), a ‘month’ is defined, in para 1, as ‘any of the twelve portions into which any calendar year is divided’. It is not quite what is commonly known as a ‘calendar month’ but just one of the three possible types of ‘calendar month’ (158 TSH 2016).

In other words, it is not the period between the same day in successive months; nor is it a month measured in a pregnancy. It is January, or March, or September. (I have for years assumed that it includes a ‘standard month’ used for payroll or accounting purposes, but I now think I may be wrong.)

Thus, if the MPC raises the repo rate on 29 January 2016 (to 6,75%), the official rate of interest goes up on 1 February 2016 (to 7,75%), that is, from the very next month.

And, if it raises the repo rate on 18 March 2016 (to 7%), the official rate of interest goes up on 1 April 2016 (to 8%).

This is the chain of events, across the board:

- The MPC raises the repo rate, on Day x of Month 1.
- The official rate of interest (fringe benefits and dividends tax) goes up, by 1 percentage point, on Day 1 of Month 2.
- The Standard Interest Rate (Public Finance Management Act; government loans) goes up, by 3,5 percentage points, on Day 1 of Month 3.
- The prescribed rate of interest (Prescribed Rate of Interest Act) goes up, by 3,5 percentage points, on Day 1 of Month 3.
- The ‘prescribed rate’ (Tax Administration Act) effectively goes up by the same amount as the Standard Interest Rate (by 3,5 percentage points), on Day 1 of Month 3.

‘Spouses’ and the administration of estates

This is what Nkabinde J said in Hassam v Jacobs NO and Others 2009 (5) SA 572 (CC) about s 1 of the Intestate Succession Act:

As the text stands now, the word ‘spouse’ is not reasonably capable of being understood to include more than one spouse in the context of a polygynous marriage. The omission of the words ‘or spouses’ is therefore inconsistent with the Constitution and those words thus need to be added to the Act so as to cure the defect.

Accordingly, I would add the words ‘or spouses’ after each use of the word ‘spouse’ in the Act.

The case involved widows in polygynous Muslim marriages.

The Administration of Estates Act refers in some places to a ‘spouse’ and in others to more than one spouse.

In s 7(1)(a), in connection with death notices, it allows for the possibility that there might be ‘more than one surviving spouse’. Section 9(1), in connection with inventories, does the same thing. Section 9(1)(a)(ii) refers to ‘two or more
spouses married in community of property’, as does s 9(2)(a)(ii), in connection with the Master’s notice. Section 38(1)(a), in connection with a surviving spouse, refers to ‘one of two spouses’.

In the light of Hassam, it seems safe to conclude that, in the Administration of Estates Act, all references to a single ‘spouse’ should be read as ‘spouse or spouses’, and that the concept of a marriage of spouses is not confined to a ‘customary marriage’ as defined in s 1 of the Recognition of Customary Marriages Act, which is restricted in its application to the ‘customary law’ of ‘the indigenous African peoples of South Africa’.

The word ‘customary’ appears only once in the Administration of Estates Act, in s 4(2), in relation to the ‘property of a minor governed by the principles of customary law’, another topic entirely.

Thus it seems safe to conclude that, like the Intestate Succession Act, the Administration of Estates Act recognizes customary Muslim and Hindu marriages, while the Recognition of Customary Marriages Act applies across the board, to all statutes, including these acts.

Words & phrases: ‘a bona fide inadvertent error’

According to the Oxford Dictionary the origin of the word ‘bona fide’ is Latin and literally means ‘with good faith’. The word is also defined as ‘genuine’; ‘real’; ‘without intention to deceive’.

‘Inadvertent’ is defined as ‘not resulting from’ or ‘achieved through deliberate planning’. The Merriam-Webster online dictionary gives the following as some of the synonyms for the word inadvertent: ‘accidental’ ‘unintentional’, ‘unintended’, ‘unpremeditated’, ‘unplanned’ and ‘unwitting’. Error is defined by the Oxford Dictionary as ‘a mistake’. It also gives the following synonyms: ‘the state or condition of being wrong in conduct or judgement’.

It follows from the above that the bona fide inadvertent error has to be an innocent misstatement by a taxpayer on his or her return, resulting in an understatement, while acting in good faith and without the intention to deceive.

Per Boqwana J in TC IT 13772 (4 November 2016) (See the Monthly Listing) The expression appears in s 222(1) of the Tax Administration Act.

Words & phrases: ‘sell’, ‘sale’

Per Schippers AJA in SABC v Masstores (1221/15) [2015] ZASCA 174 (25 November 2016). Footnotes suppressed:

As to the meaning of ‘sell’ in s 27(4) of the [Broadcasting] Act, Wessels J in Nimmo v Klinkenberg Estates Co Ltd, noted that the word ‘sale’ has different meanings. He said (at 314):

Now the word ‘sale’ is used with various meanings. To lawyers discussing it from an academic point of view it means the time when the parties have arrived at a valid and binding agreement, apart from any question whether the purchase-price has been paid or whether there has been delivery of the article sold. But it is also clear that in ordinary parlance the word ‘sale’ is used in a somewhat wider sense than a mere agreement. In a cash transaction it means delivery of the property on payment of the purchase-price, and a sale is said to fall through when the seller or the purchaser fails to complete his part of the contract. In the case of a sale for credit the word ‘sale’ ordinarily means the actual transfer of the property.

The term ‘sale’ in a statutory provision has been interpreted to mean a sale in the wider sense rather than a mere agreement. In R v Nel, Solomon JA held that the word ‘sale’ in the Transvaal Liquor Licensing Ordinance of 1902 meant a sale in the ordinary sense, namely a sale completed by delivery, in defining a general retail liquor licence, an hotel liquor licence and other licences where liquor sold is to be consumed on the premises.

Likewise in R v Levy & another, a case in which the accused was charged with selling bread below the prescribed weight, it was held that the word ‘sale’ as used in a regulation made under s 48 of the Weights and Measures Act 32 of 1922, was not limited to the mere formation of a contract of sale but included delivery of the thing sold: the main obligation of a seller in a contract of sale.

The promulgation of statutes

Altogether irrationally, I remember, years and years later, my equally irrational annoyance at being challenged on what it means when you say an act has been ‘promulgated’. Thus, even
today, it remains a pleasure to leave the topic to the Constitutional Court. Per Khampepe J, in Liebenberg NO and Others v Bergrivier Municipality 2013 (5) SA 246 (CC) (minority judgment; footnotes suppressed):

From the above the position at common law is clear: statutory laws—whether they be Acts of parliament or municipal by-laws—must be duly promulgated in order to have legal force, and this promulgation occurs by way of publication in the relevant Gazette. Of course, parliament may allow for alternative forms of promulgation, and may impose additional publicity requirements. Courts and organs of state should, however, be wary of any approach to enacting legislation that detracts from the general principle of gazetting statutes as a prerequisite for the legal force thereof.

The position has not changed since the advent of the Constitution. Section 162(1) of the Constitution, for example, provides that ‘[a] municipal by-law may be enforced only after it has been published in the official gazette of the relevant province’. This promulgation requirement is in addition to and separate from the obligations regarding a public-comment procedure set out in s 160(4) of the Constitution. The Constitution thus enshrines both the promulgation requirement and the importance of due publication with regard to the legal efficacy of legislative acts. The common-law and statutory position set out above is, in my view, wholly consistent with s 162(1) of the Constitution.

In National Police Service Union and Others v Minister of Safety and Security the Supreme Court of Appeal had to determine whether a certain scheme for the rationalization of various police forces (in terms of the interim Constitution) had to be promulgated by publication in the Government Gazette in order to have legal force. Smalberger JA confirmed the continued applicability under our constitutional dispensation of the common-law and statutory position set out above:

It is a requirement of both the common-law and statute that subordinate legislation, even if it has been validly enacted, is not of binding force and effect in law until it has been promulgated. The requirement is subject to qualification.

The qualifications referred to are those expressed in Byers. In NPSU the Supreme Court of Appeal ultimately determined that promulgation was not required in the circumstances of the case because the determination of the scheme was administrative rather than legislative in nature.

What the above discussion establishes is that in South Africa, as a matter of common law and statutory law, and further in terms of the Constitution, legislative enactments must be duly promulgated by publication in the relevant Gazette in order to have the force of law. Parliament may impose additional requirements for promulgation, and in exceptional circumstances an alternative form of promulgation may be used. Accordingly, close attention must be paid to the applicable statutory regime in order to determine the effects of non-compliance with obligations regarding the publication of a law. While there may be less stringent requirements for the effectiveness of administrative acts, the prescribed validity requirements for legislative enactments must be strictly observed.

And here are the relevant provisions of the Interpretation Act:

Commencement of laws
13. (1) The expression ‘commencement’ when used in any law and with reference thereto, means the day on which that law comes or came into operation, and that day shall, subject to the provisions of subsection (2) and unless some other day is fixed by or under the law for the coming into operation thereof, be the day when the law was first published in the Gazette as a law.

(2) Where any law, or any order, warrant, scheme, letters patent, rules, regulations or by-laws made, granted or issued under the authority of a law, is expressed to come into operation on a particular day, it shall be construed as coming into operation immediately on the expiration of the previous day.

(3) If any Act provides that that Act shall come into operation on a date fixed by the President or the Premier of a province by proclamation in the Gazette it shall be deemed that different dates may be so fixed in respect of different provisions of that Act.

Certain enactments to be published in Gazette
16. When any by-law, regulation, rule or order is authorized by any law to be made by the President or a Minister or by the Premier of a province or a member of the Executive Council of a province or by any local authority, public body or person, with the approval of the President or a Minister, or of the Premier of a province or a member of the Executive Council of a province, such by-law, regulation, rule or order shall, subject to the provisions relative to the force and effect thereof in any law, be published in the Gazette.
VAT: ‘supply’ and deemed time-of-supply rules (fixed property)

Fixed property
If a ‘supply’ requires complete performance by the supplier but was made to do so only once the Value-Added Tax Act was already highly developed (164 TSH 2016), how well does the deemed time-of-supply rule applying to fixed property, s 9(3)(d), shape up? This rule deems the time of supply of fixed property to be the date of registration of transfer in a deeds registry or the date of payment of the consideration (excluding a deposit).
Performance by the supplier will surely be impossible without registration of transfer. Only upon registration will the supplier’s performance be complete. How, then, might an earlier payment (other than a deposit) possibly be significant?
Try a little thought experiment: The recipient is an idiot or advised by an idiot (I have seen it happen), and settles the purchase price before transfer. The supplier says ‘What the hell!’, and absconds, leaving the would-be recipient with a claim for specific performance or damages. Is the would-be supplier liable to account for output tax? Why? What ‘supply’ of goods is he guilty of?
Say SARS mulcts him of the output tax, while the frustrated recipient sues him for damages. Does he issue a tax invoice? If he does, can the recipient claim input tax relief? Can the supplier claim input tax relief on the damages payment?

Estate duty: debts due by the deceased

Section 4(b) of the Estate Duty Act allows as a deduction from the total value of all property included in a deceased estate
all debts due by the deceased to persons ordinarily resident within the Republic which is proved to the satisfaction of the Commissioner have been discharged from property included in the estate;
These are debts incurred by the deceased himself or herself before death.
In administering and liquidating the estate, the executor might have to incur liabilities, but these cannot figure in the calculation of the net value of the estate and thus the estate’s liability for estate duty, unless they are specifically catered for, such as funeral expenses.
In Myer, NO v CIR 1956 (4) SA 342 (T), Kuper J said:
It is, in my view, clear from the wording of the section that before any debt can be deducted from the gross estate of a deceased person, that debt must have been due by the deceased and in this regard a distinction must be drawn between the deceased and the executor of a deceased estate.
If, for example, the deceased was the owner of a building which, after death, was administered by the executor of his estate, and a tenant in that building obtains damages against the estate because of the negligence of the executor, the amount of damages could not be deducted from the gross estate. The only liabilities incurred by the executor after death which can be deducted are those referred to specifically in sec 4 and particularly those set out in sub-paras (c), (d) and (e) of the section. On the other hand if the deceased had a contingent liability, which only became payable after death, such a liability could be deducted because it arose from an obligation of the deceased incurred during his lifetime. The fact that the debt is not due and payable at the moment of death is irrelevant as long as the debt when due was not one incurred by the executor in the liquidation and administration of the estate but arose because of some action taken or obligation assumed by the deceased.

Words & phrases: ‘debt due’

A debt is what is due from an obligation. Consult The Oxford English Dictionary 2nd ed (1989) vol 4 sv ‘due’ as an adjective: ‘That is owing or payable, as an enforceable obligation or debt’, and sv ‘debt’ as a noun:
1. That which is owed or due; anything (as money, goods or service) which one person is under obligation to pay or render to another.

In Whatmore v Murray 1908 TS 969 at 970 Innes CJ construed a ‘debt due’ as follows:
It seems to me that for a debt to be due there must be a liquidated money obligation presently claimable by the debtor, for which an action could presently be brought against the garnishee. If such
an obligation exists, then to my mind, a debt is due.

See also Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd 1991 (1) SA 525 (A) at 532G–H:

Section 12(1) of the Prescription Act 68 of 1969 provides that ‘prescription shall commence to run as soon as the debt is due’. This means that there has to be a debt immediately claimable by the creditor or, stated in another way, that there has to be a debt in respect of which the debtor is under an obligation to perform immediately.

(My emphasis.)

166 TSH 2017—January 2017

Words & phrases: ‘spouse’

In Govender v Ragavayah NO and Others 2009 (3) SA 178 (B), Moosa AJ held that:

The word ‘spouse’ as used in s 1 of the Intestate Succession Act 81 of 1987 includes the surviving partner to a monogamous Hindu marriage.

As I read the Reform of Customary Law of Succession and Regulation of Related Matters Act (20 September 2010), it does not impinge upon this issue, since it applies solely to persons whose estates are subject to ‘customary law’, defined in s 1 as follows:

‘customary law’ means the customs and practices observed among the indigenous African people of South Africa which form part of the culture of those people;

167 TSH 2017—February 2017

Words & phrases: ‘retrospective’ v ‘retroactive’

The Supreme Court of Appeal [the court a quo] relied on the presumption against retrospectivity to reject the applicant’s broad reading of section 20(10) [of the Promotion of National Unity and Reconciliation Act] that would result in the retrospective application of that section to the consequences of the conviction and sentence. It held that, because of the presumption, the consequences of the conviction and sentence were not affected by the grant of amnesty. This seems to me to afford too much weight to the presumption against retrospectivity in a matter like the present. In particular, it fails to give sufficient weight to the fine distinction between the broad concept of retrospectivity and the distinctive notion of retroactivity. A retrospective provision operates for the future only but imposes new results in respect of past events. A retroactive provision operates as of a time prior to the enactment of the provision itself and changes the law applicable with effect from a past date.


168 TSH 2017—March 2017

From the cases: ‘one-stop arbitration’

Per Cachalia JA, in Riversdale Mining Ltd v Du Plessis (536/2016) [2017] ZASCA 007 (10 March 2017) (footnotes suppressed):

So, did the arbitrator exceed his jurisdiction in deciding the issue? The basic principle in the interpretation of arbitration clauses is that they must be construed liberally to give effect to their essential purpose, which is to resolve legal disputes arising from commercial relationships before privately agreed tribunals, instead of through the courts. When business people choose to arbitrate their disputes they generally intend all their disputes to be determined by the same tribunal, unless they express their wish to exclude any issues from the arbitrator’s jurisdiction in clear language. There is thus a presumption in favour of ‘one stop arbitration’.

....

To conclude, the Arbitration Agreement gave the arbitrator the power to determine all existing disputes that had arisen between the parties. The main dispute between the parties concerned the validity, binding effect and enforceability of the Subscription Agreement. The issue concerning the effect of clause 31 of the Arbitration Agreement on clause 8 of the Subscription fell within the ambit of this dispute. The Arbitration Agreement thus clothed the arbitrator with the jurisdiction to decide this issue. The arbitrator considered the submissions from the parties and interpreted clause 31. If the arbitrator erred in his
Words & phrases: ‘as from’ (vs ‘on’)


To return to the main issue in this case, when is the property rate payable? In terms of s 13(1)(a) of the Rates Act, a rate becomes payable ‘as from the start of a financial year’. (Emphasis added.) In my view, the use of the phrase ‘as from’ as opposed to the word ‘on’ is significant. The phrase ‘as from’ denotes the commencement of a period while the word ‘on’ specifies a particular date. If the word ‘on’ had been used by the legislature, the rate would have been payable on 1 July, the start of the municipality’s financial year. Support for this view can be found in Kleynhans v Yorkshire Insurance Co Ltd where Schreiner ACJ said:

It seems to me that the important words are those that fix the commencement of the period, which here are ‘as from’ (‘vanaf’) the date on which the claim arose. Those words are the typical words of commencement that bring the ordinary civil method of computation into operation.

In attributing a meaning to the phrase ‘as from’, regard must be had to the ordinary meaning of the words, which must be determined in the context of the statute, read as a whole, with reference to the scope and purpose of the statute. The Rates Act defines a ‘financial year’ as the period starting from 1 July in a year to 30 June the next year. Section 13 falls under Chapter 2 of the Act which is titled ‘rating’ and is preceded by s 12(1), which provides that a municipality must levy the rate for a financial year and that a rate lapses at the end of the financial year for which it was levied.

Words & phrases: ‘cession’

Cession is a particular method of transferring rights in a movable incorporeal thing in the same manner in which delivery (traditio) transfers rights in a movable corporeal thing. It is in substance an act of transfer (‘oordragshandelin’) by means of which the transfer of a right (translatio juris) from the cedent to the cessionary is achieved. The transfer is accomplished by means of an agreement of transfer (‘oordrags-ooreenkoms’) between the cedent and the cessionary arising out of a justa causa from which the former’s intention to transfer the right (animus transferendi) and the latter’s intention to become the holder of the right (animus acquirendi) appears or can be inferred. It is an agreement to divest the cedent of the right and to vest it in the cessionary. Moreover, the agreement of transfer can coincide with, or be preceded by, a justa causa which can be an obligatory agreement, also called an obligatory agreement (‘verbintenisskkeppende ooreenkoms’), such as a contract of sale, exchange or donation. See Johnson v Incorporated General Insurances Ltd 1983 (1) SA 318 (A) at 331G. Even an agreement to provide security by means of a cession in securitatem debiti is in itself adequate justa causa for the cession. See De Wet and Van Wyk Die Suid-Afrikaanse Kontraktereg en Handelsreg 5th ed vol 1 at 420:

As ‘n causa noodsaaklik is vir die sessie, dan is die afspraak dat dit in securitatem debiti geskied, tog seker genoegsame causa daarvoor....

In Joubert (ed) The Law of South Africa vol 2 (First Reissue, 1993) sv ‘Cession’ para 229 the constituent elements of cession are enumerated as follows:

(a) it is an act of transfer;
(b) the subject-matter of the transfer is a right; and
(c) the transfer is effected by agreement between the cedent and the cessionary.

Per Joubert JA, delivering the minority judgment in First National Bank of SA Ltd v Lynn no and Others 1996 (2) SA 339 (A).

Words & phrases: ‘due and payable’

The appellant argued that because the debt was repayable on demand, prescription commenced only once payment of the debt had been demanded (ie on 9 December 2013). One must be careful not to conflate the date when a debt becomes ‘due’ and that upon which repayment thereof is demanded. A debt which is repayable on demand becomes due the moment the
money is lent to the debtor—or, to use banking terminology, ‘the advance is made’. The fact that a debtor may be given 30 days within which to repay that which has been demanded does not, in my opinion, alter the principle that the debt became due the moment it was lent and therefore, in terms of s 11(d) of the 1969 Prescription Act, prescription begins to run from that date.

In Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd, this court said (at 532G–I) that for a debt to be ‘due’:

... there has to be a debt immediately claimable by the creditor or, stated in another way, that there has to be a debt in respect of which the debtor is under an obligation to perform immediately.

It is easy for confusion to arise. A debt can be immediately claimable even though a demand may be necessary for it to be payable. The distinction between ‘claimability’ and ‘payability’ was one of which this court was keenly aware in Union Share Agency & Investment Ltd v Spain where it said:

The distinction between the indebtedness being subject to the happening of an event and the payment being so subject is a vital one and should not be overlooked.

In any event, clause 2.3 refers to the loan being ‘due and payable’. The very phrase ‘due and payable’, ie both ‘claimable’ and ‘payable’ as at a point in time, indicates that ‘due’ and ‘payable’ are not coextensive with one another.


171 TSH 2017—June 2017

Words & phrases: ‘retrospective’ v ‘retroactive’

It is true that if s 118(3) [of the Local Government: Municipal Systems Act] is applied to bonds existing before 1 March 2001, it would reduce the security enjoyed by mortgagees under those bonds and in that sense interfere with existing rights. However, that in itself would not mean that the section is afforded retrospective effect. As was pointed out by Buckley LJ in West v Gwynne [1911] 2 Ch 1 (CA) at 11–12: ‘Retrospective operation is one matter. Interference with existing rights is another.’ In the same case Buckley LJ formulated the following test to determine the difference between the two:

If an Act provides that as at a past date the law shall be taken to have been that which it was not, that Act I understand to be retrospective. That is not this case. The question here is whether a certain provision as to the contents of leases is addressed to the case of all leases or only of some, namely leases executed after the passing of the Act. The question is as to the ambit and scope of the Act, and not as to the date as from which the new law, as enacted by the Act, is to be taken to have been the law.

The test thus formulated has been approved and applied by our Courts on various occasions (see eg Parow Municipality v Joyce and McGregor (Pty) Ltd 1974 (1) SA 161 (C) at 164E–165A; Adampol (Pty) Ltd v Administrator, Transvaal 1989 (3) SA 800 (A) at 811B–813C; Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman, National Transport Commission, and Others; Transnet Ltd (Autonet Division) v Chairman, National Transport Commission, and Others 1999 (4) SA 1 (SCA) at 7A–D).

It follows that an enactment can be described as retrospective in the true sense only if it requires the law to be taken as amended prior to its date of amendment. Applying this formula, I find myself in agreement with the Court a quo that on the interpretation of s 118(3) contended for by the municipality, the section requires no such thing. It does not expressly or impliedly purport to state that before 1 March 2001, the law in Gauteng was in any way different from what it was under the 1939 Transvaal Ordinance. The extended security contended for by the municipality is effective only from 1 March 2001. The bank’s contention was that s 118(3) should be applied only to bonds registered after 1 March 2001. This contention cannot find any basis in the presumption against retrospectivity. What it would amount to in effect is a limitation of the ambit and scope of the section for which, as I read it, there is no warrant.

Per Brand JA in BOE Bank Ltd v Tshwane Metropolitan Municipality 2005 (4) SA 336 (SCA).
‘Spouses’ and the administration of estates (2)

In a much-cited judgment, Sach J, in Daniels v Campell NO and Others 2004 (5) SA 331 (CC), found that the word ‘spouse’ as used in the Intestate Succession Act includes the surviving partner to a monogamous Muslim marriage, and that the word ‘survivor’ as used in the Maintenance of Surviving Spouses Act includes the surviving partner to a monogamous Muslim marriage:

The word ‘spouse’ in its ordinary meaning includes parties to a Muslim marriage. Such a reading is not linguistically strained. On the contrary, it corresponds to the way the word is generally understood and used. It is far more awkward from a linguistic point of view to exclude parties to a Muslim marriage from the word ‘spouse’ than to include them. Such exclusion as was effected in the past did not flow from courts giving the word ‘spouse’ its ordinary meaning. Rather, it emanated from a linguistically strained use of the word flowing from a culturally and racially hegemonic appropriation of it. Such interpretation owed more to the artifice of prejudice than to the dictates of the English language. Both in intent and impact the restricted interpretation was discriminatory, expressly exalting a particular concept of marriage, flowing initially from a particular world-view, as the ideal against which Muslim marriages were measured and found to be wanting.

One of several citations of the case by the Constitutional Court is to be found in Hassam v Jacobs NO and Others 2009 (5) SA 572 (CC) (161 TSH 2016), in which Nkabinde J held that s 1 of the Intestate Succession Act must be read as though the words ‘or spouses’ appear after the word ‘spouse’ wherever it appears in s 1 of the Intestate Succession Act (footnote suppressed):

Hassam dealt with the situation in which the deceased, who was married to two women in accordance with Muslim rites (although not to the immediate knowledge of his first spouse), died intestate.

Words & phrases: ‘terms’ v ‘conditions’

A search of SALR (Juta) reveals that the following is the definitive statement on the difference between these two expressions:

In Design and Planning Service v Kruger 1974 (1) SA 689 (T) Verklaar Botha R op 695C-F soos volg:

In the case of a suspensive condition, the operation of the obligations flowing from the contract is suspended, in whole or in part, pending the occurrence or non-occurrence of a particular specified event (cf Thiart v Kraukamp 1967 (3) SA 219 (T) at 225). A term of the contract, on the other hand, imposes a contractual obligation on a party to act, or to refrain from acting, in a particular manner. A contractual obligation flowing from a term of the contract can be enforced, but no action will lie to compel the performance of a condition (Scott and Another v Poupard and Another 1971 (2) SA 373 (A) at 378 in fin).

This distinction between a condition and a term is of particular importance in determining the consequences of the non-occurrence of the event postulated in a positive suspensive condition.

Hierdie siening is, met eerbied gesê, suiwer.

Per Nienaber WNAR (as he then was) in Jurgens Eiendomsagenten v Share 1990 (4) SA 664 (A).
Words & phrases: ‘rectification’

In Spiller and Others v Lawrence 1976 (1) SA 307 (N), Didcott J (as he then was) said:

When a written contract does not reflect the true intention of the parties to it, but has been executed by them in the mistaken belief that it does, it may be rectified judicially so that the terms which it was always meant to contain are attributed in fact to it. That, as a general principle, is well recognized by both South African and English law.

This dictum was cited with approval by Bertelsmann AJA (as he then was) in Dormell Properties 282 CC v Renasa Insurance Co Ltd and Others NNO 2011 (1) SA 70 (SCA) (on a nostalgic note, the other case he cited seems to have concerned a late friend of mine).

In Intercontinental Exports (Pty) Ltd v Fowles 1999 (2) SA 1045 (SCA), Smalberger JA said:

That it is not competent to rectify a contract that is invalid for non-compliance with statutory formalities must therefore be taken to be established law despite the criticism that has been directed at this view. On the other hand, where such formalities have been complied with, rectification is permissible if the requirements for rectification have been satisfied. There are therefore two separate and distinct enquiries in a matter such as the present. The first relates to the formal validity of the deed of suretyship; the second to whether the requirements for rectification have been satisfied. The factual allegations relevant to the second enquiry should not be allowed to impinge on the first.

Rectification is a well established common-law right. It provides an equitable remedy designed to correct the failure of a written contract to reflect the true agreement between the parties to the contract. It thereby enables effect to be given to the parties’ actual agreement. The requirement of formal validity in the case of a deed of suretyship flows from the Legislature’s perceived need to provide safeguards in such matters. To the extent that the need to satisfy the latter may preclude recourse to the former, tension will inevitably exist between the two. While care must be taken not to defeat the object of the Act, the formality requirements must not be allowed to become an unnecessary stumbling-block to rectification and, consequently, to giving effect to the true intention of the contracting parties.

Intercontinental Exports is an oft-cited case.

Wills: how to apply the cy-près doctrine

What is the cy-près doctrine?

In In Re Denton’s Estate 1951 (4) SA 582 (N), Shaw J said:

The interpretation of the words used in any will in which a trust is established and upon which the valid existence of that trust depends is a matter which to my mind is separate from and independent of the question whether or not in respect of that trust the cy-près doctrine should be applied. In Marks v Gluckman’s Estate 1946 AD 289, TINDALL JA said at p 312:

The passages quoted from Groenewegen and Zoësius and also, as already remarked, Digest (33:2:16.), are authorities in favour of the doctrine by virtue of which our Courts sanction the application of a fund given for one charitable purpose to another analogous purpose, a doctrine which is known as that of cy-près in the English law. Although this practice obviously does not come into play at a stage when (as in the present case) the inquiry is merely whether a trust has been validly established, I refer to the practice because the doctrine underlying it is only an illustration of the wider principle already mentioned that the law will give effect to a trust for charitable purposes as far as legitimately possible.

How it is applied

In Ex Parte Estate Cauvin 1954 (2) SA 144 (C), Ogilvie Thompson J (as he then was) said:

It was suggested to us by Mr Corbett [as he then was] that, on an application of the cy près doctrine, the Court might award this legacy to King Edward’s Hospital Fund for London for the benefit of the Westmoor Home. In my judgment the circumstances of the present case do not permit of any application of the cy près doctrine. Before directing that this legacy be applied cy près the Court must first be satisfied that the testatrix had, in the words of Halsbury, vol 4 para 323 (Hailsham ed), a charitable intention which transcended the particular mode of application prescribed. (See also Breytenbach NO and Ker NO v Rex and Others 1947 (4) SA 220 (T) and In re Denton’s Estate 1951 (4) SA 582 (N) and authorities there cited.) In my opinion, the will shows that the testatrix had no such overriding charitable intention. In clause 6 of her will she bequeathed legacies to named charitable institutions: and in clause 6(f) she was not intending to give £500 for a purpose but to an...
existing institution as such. In this connection I find myself in respectful agreement with FARWELL J’s remarks in Re Harwood 154 (2) 624 at p 625 that where the testator selects as the object of his bounty a particular charity and shows in the will itself some care to identify the particular society which he desires to benefit, the difficulty of finding any general charitable intent in such case if the named society once existed, but ceased to exist before the death of the testator, is, very great. In the present case no overriding charitable intention can, in my judgment, be attributed to the testator..., and there is thus no room for applying the principle of cases like Ex parte Robinson NO 1953 (2) 430 (c). I accordingly hold that the Court cannot direct that this legacy be applied cy près. The conclusion necessarily follows that this legacy to ‘The Convalescent Nursing Home Roehampton’ has lapsed.

174 TSH 2017—September 2017

**Words & phrases: servitudes—praedial and personal**

From the majority judgment of Cameron J and Froneman J in Tswhane City v Link Africa and Others 2015 (6) SA 440 (CC) (footnotes omitted):

In Willoughby Innes J regarded a servitude as a real right carved out of the full dominium of the owner and transferred to another. In Lawsa a servitude is defined as—

a limited real right that imposes a burden on movable or immovable property by restricting the rights, powers or liberties of its owner in favour of either another person (in the case of a personal servitude) or the owner of another immovable property (in the case of a praedial servitude). Put differently, it is a right of one person in the property of another entitling the former to use and enjoy that person’s property or to prevent the latter from exercising certain entitlements flowing from the normal rights of ownership.

Roman-Dutch law infused early stages of the common law on servitudes. It limited the types of servitudal rights to a fairly strictly confined number. Traditional common law rooted in the Roman-Dutch tradition distinguished between two types of servitude—personal and praedial. A praedial servitude is one where there are at least two pieces of land implicated. The servitude confers benefits on one piece of land, the dominant tenement, while imposing corresponding burdens on the other, the servient tenement. A praedial servitude vests in the owner of the dominant land. But neither its benefit nor its burden can be detached from the land. These are passed from one landowner to the next.

By contrast, a personal servitude is a real right that attaches to the burdened land, but is also always connected to an individual. He or she holds the right to use and enjoy another’s property. That right is non-transferable: it cannot be passed on to another. However, personal servitudes are always enforceable against the owner of the property burdened by it—even when that owner changes.

In modern South African law, types of rights and restrictions found in traditional servitudes have been relaxed. This relaxation has been so extensive “that their number is “practically unlimited” although certain general requirements have to be fulfilled’. To determine whether a right in property is a servitude is often a matter of judicial policy. It depends in part on whether the nature of the right is capable of being recognized as a real right:

The essence of a servitude is therefore, that it confers a real right [to use and enjoyment of the property of another], and it is this direct relationship between the holder of the servitude and the property to which it relates that distinguishes it from a mere contractual right against the owner of the property....

The crucial point is this: the common law on servitudes illustrates that property rights have dimension, colour and complexity far beyond any barefaced general proposition about ownership. Servitudes limit the rights of ownership and place certain burdens on property by affording power of use and enjoyment to another. That has been the case for thousands of years, for our law of servitudes, both consensual and non-consensual, is derived from the Roman law.

174 TSH 2017—September 2017

**Words & phrases: praedial servitudes**

Joubert JA in Malan and Another v Ardconnel Investments (Pty) Ltd 1988 (2) SA 12 (A):

In our law servitudes are classified as personal or praedial. In regard to land, a personal servitude is constituted over a servient tenement in favour of a particular individual (res servit personae) whereas a praedial servitude is established over a servient tenement for the benefit of a dominant tenement (res servit rei). It is the existence or non-existence of a dominant tenement which is the decisive factor in differentiating between personal and praedial servitudes. Vinnius Inst 2.3.2:

....

The normal procedure for the registration of servitudes in a transfer of land in the Deeds Office is to embody the terms of the servitude with a description of the servitude holder (personal
servitude) or the dominant tenement (praedial servitude) in the title deed of the servient tenement. As a matter of conveyancing and for convenience the existence of the registered praedial servitude is endorsed upon the title deed of the servient tenement. If the servitude was acquired by means of a notarial deed the latter is registered in the register of servitudes but such registration does not constitute the servitude in law. It is the registration of the servitude in the title deed of the servient tenement that constitutes the servitude in law.

In one very important aspect the registration of restrictive title conditions in the title deed of an erf as a servient tenement in a township differs from the normal procedure for the registration of servitudes over land, viz the title deed of the servient tenement incorporates those restrictive title conditions applicable to it as a servient tenement without any mention of the person or the dominant erf or erven in whose favour they are constituted. Where the registered restrictive title conditions are personal servitudes they will normally be constituted in favour of the township owner. Where the registered restrictive title conditions are, however, praedial servitudes each erf becomes simultaneously both a servient tenement and a dominant tenement. It is a servient tenement encumbered by the restrictive title conditions in its own title deed in favour of all the other erven as dominant erven. But it is also a dominant tenement in respect of the restrictive title conditions inserted in the title deeds of all the other erven as serventien tenements.

174 TSH 2017—September 2017

Words & phrases: ‘cession’

Cession has been defined as a bilateral juristic act in terms of which a right is transferred by agreement between the transferor (cedent) and transferee (cessionary). Generally, no formalities are required for the antecedent obligatory agreement or the act of cession. The parties may agree on the formalities with which the cession is to comply. A cession may thus be either express or tacit, or may be inferred from the conduct of the parties. While the cession does not have to be reduced to writing, the parties may agree that the cession will only be valid if reduced to writing.


175 TSH 2017—October 2017

Words & phrases: ‘exceptional circumstances’

In Khumalo v Twin City Developers (328/2017) [2017] ZASCA 143 (2 October 2017), the case relied upon in the SARS publication ‘Dispute resolution guide’ (first issue) for the meaning of the expression ‘exceptional circumstances’ was strongly endorsed. It is MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas & Another 2002 6 SA 150 (C), in which the judgment was delivered by Thring J. Relying upon several other cases, and in relation to a specific provision of a statute, he agreed that, in order to be exceptional, circumstances must be ‘markedly unusual or specially different’ (140 TSH 2014).

In Khumalo, under an entirely different set of circumstances and in relation to an entirely different statute, Molemela AJA concluded thusly:

For all the(640,852),(989,953) reasons alluded to above, I would find that the circumstances of this case fall within the meaning of ‘markedly unusual or specially different’ circumstances and constitute exceptional circumstances that justify the adjudication of this appeal on costs.

175 TSH 2017—October 2017

Words & phrases: real v personal rights

The judgment of Zondi JA in Absa Bank Ltd v Keet 2015 (4) SA 474 (SCA) (158, 159 TSH 2016) has been extensively cited in eThekwini Municipality v Mounthaven (Pty) Ltd (1068/2016) [2017] ZASCA 129 (29 September 2017) by Tshiqi JA. The case addressed the issue whether a claim for the re-transfer of property from Mounthaven to the eThekwini Municipality constituted a ‘debt’ under Chapter III of the Prescription Act:

This then leads me to whether the reversionary clause constitutes a limited real right or a personal right. In Absa Bank Ltd v Keet 2015 (4) SA 474 SCA the court explained the distinction between a real right and a personal right as follows in para 20:

[Real rights are primarily concerned with the relationship between a person and a thing and personal rights are concerned with a relationship between two persons. The person who is entitled to a real right over a thing can,
by way of vindictory action, claim that thing from any individual who interferes with his right. Such a right is the right of ownership. If, however, the right is not an absolute, but a relative right to a thing, so that it can only be enforced against a determined individual or a class of individuals, then it is a personal right. It then continued in paras 23–25:
The obligation which the law imposes on a debtor does not create a real right (jus in rem), but gives rise to a personal right (jus in personam). In other words, an obligation does not consist in causing something to become the creditor’s property, but in the fact that the debtor may be compelled to give the creditor something or to do something for the creditor or to make good something in [favour] of the creditor.

In the case of extinctive prescription one is more specifically concerned with the relationship between creditor and debtor and prescription serves in the first instance to protect the debtor against claims that perhaps never came into existence or had already been extinguished. The obligation is by its nature and substance a temporary relationship that is destined to terminate through performance and moreover a relationship between creditor and debtor in which third parties are only indirectly involved. A real right, by contrast, is a relationship of a durable nature, that can be maintained against anyone and everyone, and which can impede commerce if outsiders cannot with confidence rely on the appearance thereof.

In the case of acquisitive prescription one has to do with real rights. In the case of extinctive prescription one has to do with the relationship between a creditor and a debtor. The effect of extinctive prescription is that a right of action vested in the creditor, which is a corollary of a ‘debt’, becomes extinguished simultaneously with that debt. In other words, what the creditor loses as a result of operation of extinctive prescription is his right of action against the debtor, which is a personal right. The creditor does not lose a right to a thing,… (See also National Stadium South Africa (Pty) Ltd & others v Firstrand Bank Ltd 2011 (2) SA 157 SCA para 31).

176 TSH 2017—November 2017

‘Emigrants’ for EXCON purposes

I discovered recently that my conception of what is an ‘emigrant’ for exchange control purposes is possibly decades out date. Here is the relevant passage from the latest Currency and Exchanges guidelines for individuals published by the SARB (17 November 2017, para 4.1):

Individuals regarded as residents by the Financial Surveillance Department who are leaving South Africa to take up permanent residence in any country outside the CMA may apply to an Authorized Dealer before departure to be accorded the facilities set out below. Applications must be accompanied by a duly completed Form MP336 signed by the applicant, together with a duly electronically completed ‘Tax Clearance Certificate - Emigration’ obtained via the SARS Tax Compliance Status System.

In other words, you can keep your citizenship.

176 TSH 2017—November 2017

Words & phrases: ‘incorporation by reference’

Incorporation by reference, as the name implies, occurs when one document supplements its terms by embodying the terms of another. Leaving aside for the moment the admissibility of extrinsic evidence that may be necessary to complete the identification of a document whose terms are sought to be incorporated, the first inquiry is whether the terms of a deed of suretyship may be supplemented in this way. Incorporation by reference in the context of contracts for the sale of land was recognized as long ago as 1920 in Coronel v Kaufman 1920 TPD 207 and subsequently adopted by this Court in Van Wyk v Rottcher’s Mills (Pty) Ltd 1948 (1) SA 983 (A) at 990–1. It has also been recognized as applicable to contracts of suretyship governed by s 6 of the General Law Amendment Act 50 of 1956]. (See, for example, Trust Bank of Africa Ltd v Cotton 1976 (4) SA 325 (N) at 329E–H, F J Mitrle (Pty) Ltd v Madgwick and Another 1979 (1) SA 232 (D) at 235B–E.) But in Fourlamel (Pty) Ltd v Maddison (supra at 345E) this Court was only prepared to assume that the principle was applicable to contracts of suretyship and refrained from finally deciding the issue. I am satisfied, however, that, once the principle of incorporation by reference is held to apply in the case of sales of land, there can be no justification for holding the principle not to be applicable in the case of contracts of suretyship.

—Per Scott JA, Industrial Development Corporation of SA (Pty) Ltd v Silver 2003 (1) SA 365 (SCA).
Words & phrases (estate duty): ‘like interest’

Section 3(2)(a) of the Estate Duty Act includes as actual property in a deceased estates ‘any fiduciary, usufructuary or other like interest in property...held by the deceased immediately prior to his death’. Colloquially, it is known as an ‘interest ceasing’, and is included as dutiable property because its cessation improves the value of the underlying property, the full value of which accrues to the so-called remainderman upon the death of the holder of the limited interest.

There is authority for the view that a ‘usufructuary or other like interest’ is an interest ‘enjoyed over the expectation of life of the beneficiary or a lesser period’, and that it would be applicable to a habitatio—Van Winsen J, in Estate Bourke v SIR 1979 (4) SA 240 (C).

There is authority for the view that a ‘usufructuary or like interest’ can exist inside a trust—Schreiner JA, in CIR v Lazarus’ Estate and Another 1958 (1) SA 311 (A).

There is some slight authority for reading ‘other like interest’ as being ejusdem generis (of a kind) with a usufructuary interest, with the result that a ‘like interest’ must be a real right—Ludorf J, in Gutkin & Lazarus NNO And Another v CIR 1957 (3) SA 165 (T).

But, in Hansen’s Estate v CIR 1956 (1) SA 398 (A), Hoexter JA refused to express an opinion whether an ‘other like interest’ refers to real rights only.

A usufruct, usus, and a habitatio are all personal servitudes, being real rights (174 TSH 2017), and are registrable under s 65 of the Deeds Registries Act. A right of usus is a right of use. A right of habitatio is a right of free residence (102 TSH 2011).

The point is that when an income-flow from a trust, a usufruct, a usus, a habitatio ceases upon the death of the person enjoying the interest, there will be property in the estate.

Words & phrases: when ‘or’ means ‘and’

In Mthembu v Letsela and Another 2000 (3) SA 867 (SCA) Mpati AJA (as he then was) said:

The Intestate Succession Act came into operation on 18 March 1988. Section 1(1) prescribes how the estate of a person who, after the commencement of the said Act, dies intestate, either wholly or in part, shall devolve. Section 1(4)(b) is in the following terms:

(a) …;
(b) ‘intestate estate’ includes any part of an estate which does not devolve by virtue of a will or in respect of which s 23 of the Black Administration Act 38 of 1927 does not apply;
(c) …;
(d) …;
(e) …;
(f) …..

Mynhardt J agreed with counsel’s submission that the word ‘or’ in ss (4)(b) of s 1 means ‘and’. He agreed further that an ‘intestate estate’ is thus an estate which devolves neither under a will nor under s 23 of the Act. In my opinion, this interpretation is correct.

Words & phrases: the parol evidence or integration rule

This subject is covered in 149 TSH 2015 and 155 TSH 2016. Even so, it is worthwhile to add this succinct treatment. Per Van der Merwe JA in Afgri Corporation Ltd v Eloff (20474/2014) [2016] ZASCA 141 (29 September 2016):

In Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd 1941 AD 43 at 47 Watermeyer JA said:

Now this Court has accepted the rule that when a contract has been reduced to writing,
the writing is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added to or varied by parol evidence.

This is referred to as the parol evidence or integration rule. The rule renders statements and negotiations leading up to the conclusion of a written contract irrelevant and therefore inadmissible. Where a document that had not been signed by all the parties to the agreement, was accepted by them as their contract, the rule is of equal application. (See Rielly v Seligson and Clare Ltd 1977 (1) SA 626 (A) at 637C–H.) However, where the parties to an agreement reduced only part of the agreement into writing, the rule does not prevent the admission of extrinsic evidence in respect of the portion of the agreement that was not integrated in the document. (See Affirmative Portfolios CC v Transnet Ltd t/a Metrorail [2008] ZASC 127; 2009 (1) SA 196 (SCA) para 14.)

179 TSH 2018—February 2018

From the case law: terms v conditions

In Design and Planning Service v Kruger 1974 (1) SA 689 (T) verklaar Botha R op 695C–F soos volg:

In the case of a suspensive condition, the operation of the obligations flowing from the contract is suspended, in whole or in part, pending the occurrence or non-occurrence of a particular specified event (cf Thiart v Kraukamp 1967 (3) SA 219 (T) at 225). A term of the contract, on the other hand, imposes a contractual obligation on a party to act, or to refrain from acting, in a particular manner. A contractual obligation flowing from a term of the contract can be enforced, but no action will lie to compel the performance of a condition (Scott and Another v Poupard and Another 1971 (2) SA 373 (A) at 378 in fn). This distinction between a condition and a term is of particular importance in determining the consequences of the non-occurrence of the event postulated in a positive suspensive condition.

Hierdie siening is, met eerbied gesê, suiwier. ‘Term’ word hierby gebruik, roo in Meyer v Barnardo and Another 1984 (2) SA 580 (N) te 584C–F opgemerk het, nie in die sin van ‘n ‘provision’ van die ooreenkoms nie, maar ‘as an exigible part of it’, naamlik ‘an obligation with a corresponding right’. (Vgl ook Locke v Centracom Property Investments (Pty) Ltd 1985 (2) SA 116 (N) te 117I.) Sowel die ‘term’ as die ‘condition’ is bepalings of ‘provisions’ van die ooreenkoms. Waar die bepaling die werklik van ‘n besondere verbintenis (dws die opeisbaarheid van die betrokke prestasie) uitstel tot, en afhanklik stel van, die plaasvind al dan nie, van ‘n toekomstige, onsekere gebeurtenis, is die bepaling in wese ‘n opskortende voorwaarde. (Vgl Tuckers Land and Development Corporation (Pty) Ltd v Strydom 1984 (1) SA 1 (A) te 10D.) Pias dit daarenteen bloot ‘n verpligting op die betrokke kontraksparty om voor of op ‘n sekere tydskryf ‘n bepaalde prestasie te lever, is dit ‘n tydsbepaling ofwel ‘time clause’. (Vgl De Wet en Yeats Kontraktereë en Handelsreg 4de uitg. op 131 ev; Van Heerden v Hermann 1953 (3) SA 180 (T) te 186A–D; Ferndale Investments (Pty) Ltd v DICK Trust (Pty) Ltd 1968 (1) SA 392 (A); Watson v Fintrust Properties (Pty) Ltd 1987 (2) SA 739 (K) te 761H.)....

Per Nienaber WN AR [as he them was] in Jurgens Eiendomsagente v Share 1990 (4) SA 664 (A).

180 TSH 2018—March 2018

All taxes: ‘disposal’ (with suspensive condition)

Stand by for a shock to weak legal nerves (83 TSH 2010). This is what Hoexter JA said in Peri-Urban Areas Health Board v Tomaselli and Another 1962 (3) SA 346 (A):

It is common cause between the parties that the deed of donation was subject to a suspensive condition, viz the approval of the proposed township by the Administrator. It is also common cause that the word ‘disposal’ in the section [s 27(1)(d) of Ordinance 11 of 1931] means, not the actual transfer of ownership, but the granting of the right to acquire ownership. Counsel for the appellant argued that in the case of a contract subject to a suspensive condition, there is no grant of any right at all until the condition has been fulfilled, and that therefore the date on which the condition is fulfilled must be the date on which the one party to the contract disposes of the rights mentioned in the contract to the other party. In the present case, so he argued, no rights to obtain delivery of the property donated came into existence until the date of the [approval] by the Administrator, and the date of such approval was the date on which the donors disposed of the donated erven. In my opinion, however, the fulfilment of a casual suspensive condition can never dispose of any right at all. It is true that the result of such fulfilment is that the contract becomes a negotium perfectum, but it does not
follow that such fulfilment constitutes a disposal of rights. The disposal of a right connotes some legal act on the part of the person of inherence of that right. In the case of a contract disposing of a right by one party to the other, the making of the contract is the legal act which disposes of the right concerned. If the contract is subject to a casual suspensive condition, then it is impossible to say, before the condition is fulfilled, whether or not the making of the contract disposed of the right concerned. If the condition is fulfilled, then the making of the contract was the legal act of disposal, and if the condition is not fulfilled the making of the contract had no legal effect at all; but the fulfilment of a casual condition can never constitute an act of disposal on the part of either party to a contract.

This view is entirely in keeping with what the authorities have to say as to the effect of the fulfilment of a casual suspensive condition (see eg Potheir on Obligations, sec 220; Goudsmit on Roman Law, sec 61; Wessels on Contract, sec 1352).

In other words, if your eyes glaze over at the sight of small print, a donation subject to a casual suspensive condition takes effect not on the date of fulfilment of the suspensive condition but on the date of the preceding donation, even though the contract would fall to the floor in the event of the non-fulfilment of the suspensive condition.

This particular citation scores very, nay, extremely highly in terms of favourable mentions in other judgments. Strikingly, it might possibly have been the reason for the existence of para 13(1)(a)(i) of the Eighth Schedule to the Income Tax Act, which states that, for the purposes of the CGT, the time of disposal of an asset by means of a change of ownership effected or to be effected from one person to another because of an event, act, forbearance or by operation of law is, under an agreement subject to a suspensive condition, the date on which the condition is satisfied. I have always felt that such an outcome is self-evident. Black’s says that a casual condition is one that depends upon chance; that is not within the power of either party to an agreement.

The CGT makes no distinction between types of suspensive condition; they all delay a ‘disposal’.

And ‘acquired’, as used in s 2(1) of the Transfer Duty Act, ‘does not include the purchase of property under a contract of sale which is subject to an unfulfilled suspensive condition’ (per Melinsky j in ciri v Viljoen and Others 1995 (4) SA 476 (C)). Again, any type of suspensive condition delays acquisition.

A ‘supply’ under the Value-Added Tax Act requires either so-called complete performance by the supplier (170, 171 TSH 2017) or a deemed supply, neither of which will ever come about while any type of suspensive condition remains unfulfilled.

Section 55(3) of the Income Tax Act effectively deems a donation to take effect for donations tax purposes on the date determined under the common law. A common-law or immediate donation cannot be subject to any suspensive condition, since it takes place upon delivery. A so-called statutory or executory donation (152 TSH 2015, 123 TSH 2013), promising delivery in the future, must be in writing (s 5 of the General Law Amendment Act 70 of 1968). Donations tax is ordinarily payable by the end of the month following the month in which the donation takes effect.

An executory donation, upon acceptance, immediately creates a personal right in favour of the donee to demand delivery of the promised property on the promised date. But not if it is subject to a suspensive condition. The personal right cannot come into existence until fulfilment of the condition, and that, you might have thought, would be the date of donation under both the common law and the donations tax.

But say I promise you, in writing, and you accept, also in writing, half of my winnings at the next Durban July, undertaking both to attend and bet a stipulated sum. Of what use would it be to you to know that, if I win, your share was due on the date of signature? SARS, on the other hand, might start jumping up and down. In response, I would claim that any interest payable to SARS from the date of signature is a result of circumstances beyond the control of the taxpayer, and claim remission (s 89quat(3) of the Income Tax Act, s 187(6) of the Tax Administration Act). Being stupid enough to bet on horses (not in fact one of my vices), I could not possibly know whether or not I had made a donation under the Tomaselli doctrine.

Almost all of the rest of the Income Tax Act relies upon ‘accrual’, that is, dies cedit (a claim arises), to trigger accountability for tax. The property-development industry, to name just one sector, must make innumerable transactions subject to administrative approval of one type or another, and so subject to casual suspensive conditions.

I have spent most of my lifetime getting to grips with the law of property, the law of contract, and the concept of dies cedit, as opposed to dies venit (the time for enjoyment). I am not prepared at this late stage to recalibrate my thinking so as (a) to make fine distinctions between types of suspensive conditions, (b) accept that, effectively, under a casual suspensive condition, upon fulfilment, dies cedit moves back to the date of signature, while dies venit takes place upon fulfilment.

Oddly, our courts have adopted a similar approach in relation to insolvent deceased estates, in complete disregard for their own approach to solvent deceased estates (163 TSH 2016). The difference is that it does not matter at all—for the creditors and beneficiaries—whether you backdate dies cedit to the date of death. It is merely a mental exercise.
By contrast, the Tomaselli doctrine would upend most of our tax system.

182 TSH 2018—May 2018

Normal tax: what, really, is ‘gross income’?

In a disturbing trend, which I hope in time to document, SARS, having long been coy about the true extent of the burden of proof resting upon it, especially since the advent of the pathetic Tax Administration Act, is currently finessing the issue on an ever-expanding scale. Its brazenness is remarkable, but is encouraged by widespread lack of appreciation of what it means, in a constitutional democracy, for the tax Acts to indulge, even if only to a limited extent, a reverse onus—guilty unless proved innocent. (Imagine what Mr Zuma would say!)

Unless you understand how shocking such a state of affairs is, and tolerate it only insofar as it makes the collection of taxes practicable, and not a millimetre more, you will help to deliver an entire population further into the hands of a bunch of ruthless gangsters.

‘Amounts’ and the normal tax—SARS

Among taxpayers and, sadly, the great majority of their advisers, there are very few who know, for example, that, while it is for the taxpayer to prove why an amount is not taxable or should attract the imposition of one particular tax rather than another, it is for SARS to prove the existence of an amount.

How the gangsters at SARS get around this little obstacle is—to refer to just one of several such matters I am familiar with, and have been working on, on and off, for at least four years—to descend upon a taxpayer with no trade, and no assets, other than a bare piece of land, carry out an ‘audit’, and emerge with assessments for R100 million—and more.

How do they do it? They simply go through the cash books and journals and assess every credit entry they find, while ignoring every debit entry. If related parties are involved, they then go to the counterpart and ‘audit’ and assess the credits corresponding to the debits in the first victim’s books.

So, for example, if your shareholder lends you money, that is a credit in your books, and is taxed, even if, the next week, you repay it, which will give rise to a credit in the shareholder’s books, which is then also taxed.

Undoubtedly, in each instance, there is an amount. Under the law, it is for you to prove that it is not taxable.

Unsighted ‘amounts’—tax entrepreneurs

At the same time, to look at another bunch of gangsters, there are purveyors of tax products who undertake to process amounts on behalf of their clients, claiming that these, once so processed, do not fit anywhere in the tax Acts and so are tax free.
Normal tax: what, really, is ‘gross income’?

I am circulating to those present my ‘without prejudice’ memorandum at ADR proceedings involving assessments in an amount of about R100 million, raised by SARS upon a company with no trade, no income, and no assets, barring a bare piece of land that looks, from the photographs offered a little earlier as ‘evidence’, pretty woebegone to me (182 TSH 2018).

Three of the SARS officials present are old hands, probably having been recently rehired, after successive purges of the competent by various commissioners, ad seriatim, starting with the press’s lovable darling, You-Know-Who.

In fact, I had previously interacted with one of these officials, perhaps twenty years ago, or even longer—a real professional, as ‘assessors’ these officials, perhaps twenty years ago, or before been presented (in part based on my ad seriatim, starting with the press’s lovable darling, You-Know-Who).


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Anyway, so I hand the thing out. As her eyes light on it, the quondam assessor says: ‘But we know the law.’ ‘Yet’, I replied, ‘I am currently seriously discussing this very issue with colleagues, and it’s not at all simple’, or words to that effect, bearing in mind that such proceedings are ‘without prejudice’, and may neither be recorded nor cited in subsequent proceedings.

In expanded form, what I handed out is reproduced in this very issue—a structural representation of the definition of ‘gross income’.

‘Gross income’: a structural representation

And here it is, the definition of ‘gross income’ in s 1(1) of the Income Tax Act, as it has never before been presented (in part based on my SA Taxation of Foreign Income 2015 ed):

‘[G]ross income’, in relation to any year or period of assessment, means—

(i) in the case of any resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such resident; or

(ii) in the case of any person other than a resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such person from a source within the Republic, during such year or period of assessment, excluding receipts or accruals of a capital nature, but including, without in any way limiting the scope of this definition, such amounts (whether of a capital nature or not) so received or accrued as are described hereunder, namely—

para (a)—[Annuities]
para (b)—[Alimony]
para (c)—[Services]
para (ca)—[Labour brokers, personal service providers]
para (cb)—[Restraint of trade]
para (d)—[Service termination awards]
para (e)—[Lump-sum retirement fund awards]
para (ea)—[Retirement fund special awards]
para (f)—[Commutation of service awards]
para (g)—[Leasehold premiums]
para (ga)—[Know-how]
para (h)—[Leasehold improvements]
para (i)—[Fringe benefits and share-incentive schemes]
para (j)—[Mining]
para (ja)—[Manufactured trading stock]
para (k)—[Dividends and foreign dividends]
para (l)—[Farming subsidies and grants]
para (la)—[Sporting bodies]
para (lc)—[Government grants]
para (m)—[Key-employee insurance]
para (n)—
(n) any amount which in terms of any other
 provision of this Act is specifically
 required to be included in the taxpayer’s
 income and that amount must—
 (i) for the purposes of this paragraph be
deemed to have been received by or to
have accrued to the taxpayer; and
(ii) in the case of any amount required to
be included in the taxpayer’s income in
terms of section 8(4), be deemed to
have been received or accrued from a
source within the Republic
notwithstanding that such amounts
may have been recovered or recouped
outside the Republic:
Provided that where during any year of assessment
a person has become entitled to any amount which
is payable on a date or dates falling after the last
day of such year, that amount shall be deemed to
have accrued to the person during such year;

Paragraph (n) of the definition effectively
includes in the definition a long list of amounts
and deemed amounts. Here is the full, current list:

Section 6quat(1C)(b)—refund of foreign tax derived
by resident.
Section 7(8)(a)—act of liberality by resident in
favour of nonresident.
Section 8(4)(a)—recoupments.
Section 8(4)(f)—recoupment.
Section 8(4)(n)—recoupment.
Section 8(5)(a)—recoupment.
Section 8A(1)(a)—gains on rights to acquire
marketable securities.
Section 8A(5)(b)—gains on rights to acquire
marketable securities.
Section 8A(6)—gains on rights to acquire
marketable securities.
Section 8B—taxation of amounts from broad-based
employee share plan.
Section 8C—taxation upon vesting of equity
instruments.
Section 9C(5)—proceeds from disposal of shares
deemed to be of a capital nature.
Section 9D(2)—controlled foreign companies.
Section 11(j)—inclusion of previous year’s doubtful
debt allowance.

Section 11(A)—inclusion of previous year’s IFRS
allowance.
Section 12J(3A)(c)—withdrawal of approval under
venture-share provisions.
Section 12J(8)—withdrawal of approval under
venture-share provisions.
Section 13ter(7)(a)—failure under allowance for
residential units.
Section 22(8)—trading stock adjustments.
Section 22B(2)—dividends treated as income.
Section 23F(2A)—acquisition or disposal of trading
stock.
Section 23F(3)—acquisition or disposal of trading
stock, recoupment.
Section 24I(4)(b)—add-back of losses on foreign
exchange transactions.
Section 24J(4A)—incurred and accrual of interest.
Section 24JB(6)(a)—taxation of financial assets and
liabilities.
Section 24P(3)—inclusion of previous year’s
allowance for future repairs to ships.
Section 25B(2A)—resident acquiring vested right to
capital of nonresident trust.
Section 27(2)(g)—inclusion of previous year’s
allowance of agricultural co-operative.
Section 28(2)(e)—amounts recoverable by short-
term insurer.
Section 28(4)(10)—inclusion of previous year’s
deductions by short-term insurer.
Section 29A(11)(d)(j)—inclusion of amount
transferred to corporate fund by long-term insurer.
Section 29A(13A)(b)—inclusion of amount in risk
policy fund of long-term insurer.
Section 37C(4)—inclusion upon contravention of
deductions for environmental conservation and
maintenance.
Section 37D(5)—termination of agreement on land
conservation.
Section 46(4)—inclusion upon unbundling of
shares.
Paragraph 3(1) of the First Schedule—distribution
of farmer’s closing stock of livestock or produce.
Paragraph 11 of the First Schedule—farming
livestock and produce adjustments.
Paragraph 12(1D) of the First Schedule—termination
upon breach or violation of agreement to conserve
or maintain land.
Paragraph 12(6) of the First Schedule—termination
upon cessation of allowed usage of buildings.

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‘Gross income’: the little head of the tadpole

Presented like this, the definition of ‘gross
income’ in s 1(1) of the Income Tax Act looks
like a tadpole with a very small head, compared
with a very long tail. Yet everyone focuses on the
head, so let’s get that out of the way, at least for
the time being.

What the preamble to the definition (its
‘head’) says is, in essence, very simple:

‘Gross income’ is the amount received by or
accrued to or in favour of a resident, excluding
receipts or accruals of a capital nature.

An ‘amount’, no matter what rubbish might have
been spouted by those who really should know
better, is ‘money or money’s worth’. Broadly, it is
property, in any of its forms. And an amount is
‘received by or accrues to you’ if you ‘acquire’ it,
whether as real property (it belongs to you,
outright), a jus in personam ad rem
The opening gambit of the normal tax, then, is: ‘You acquire property, you pay tax’. Very seldom do we pause long enough to consider the enormity of the potential reach of the tax. Obviously, it must be limited in some way, and we all think we know how it is so limited—until called upon to spell out the limitation in words or, a hundred thousand times worse, an operational algorithm.

The specific exclusion of ‘capital’ amounts is the most well-known limitation yet not necessarily one that is well understood. At the most superficial level, it is apparent that amounts (or property) are to be divided between capital and non-capital amounts, and that capital amounts are excluded from gross income, unless specifically included, somewhere along the tadpole’s long tail.

The most fundamental understanding of what is ‘capital’ comes to us from ancient English law—it is the ‘tree’ from which springs the ‘fruit’, the ‘fruit’ being what is best called ‘revenue’, so as not to muddy the waters with the part-time term of art ‘income’.

So, at a first approximation, ‘gross income’ is property acquired of a revenue nature.

What is a ‘tax’ (cf ‘user fee’)?

Following what I imagine to be the lead of The Economist, I regard any governmental charge exceeding the cost of supply as a tax, rather than a user fee. What a pleasant surprise, then, to stumble across the endorsement by the SCA of this passage from the judgment of Ramsbottom J in Permanent Estate and Finance Co Ltd v Johannesburg City Council 1952 (4) SA 249 (W):

“When the Provincial Council enacted that the conditions upon which an owner of land could be offered permission to establish a township might include a condition which, if accepted, would oblige him to contribute towards the cost of the financial burden which would be imposed on the local authority, it clearly did not impose a tax upon him. I do not propose to attempt to give a definition of the word tax. Though difficult to define, I think that a tax can be recognized with reasonable ease. To require any person who carries on a business or who owns a dog or a motor-car to pay a prescribed fee is, I think, to impose a tax. The money paid is taken into general revenue and is used for general purposes; the person who pays receives no specific service in return for his payment. Endowment money paid by a township owner is quite a different thing; it is an agreed payment for services which are to be performed for the improvement of the township and from which the township owner will derive financial benefit. To require the township owner himself as a condition for the grant of permission to establish a township to make the township habitable by an urban community would not be to impose a tax upon him, and where that work is to be performed by a local authority, to require him to pay for, or to contribute towards the cost of, the work is likewise not to impose a tax.

—Cited with approval by Heher JA in Municipality of Stellenbosch V Shelf-Line 104 (Pty) Ltd 2012 (1) SA 599 (SCA).

See also Barnard NO v Regspersoon van Aminie en ‘n Ander 2001 (3) SA 973 (SCA).

‘Gross income’: the ejusdem generis rule

If the preamble to the definition, in s 1(1) of the Income Tax Act, states that ‘gross income’ is property acquired of a revenue nature, what does the rest of it say?
in income marshalled under para (n) and so capable of being regarded as a list.

These are both genuinely disjunctive (‘or’) lists, meaning that an amount needs to fall only on a single item for the IED to be triggered, including the amount in your gross income.

A very powerful rule of interpretation applying to lists nevertheless has to be used with caution, according to authority (R v Noite 1928 AD 377 at 382). It is the *ejusdem generis* (of the same kind) or *noscitur sociis* (known by his associates) rule or maxim. More colloquially, it is the ‘birds of a feather flock together’ rule.

The most commonly cited explanation of the rule is this extract from Craies Statute Law 7 ed (also to be relied upon with caution—Santam Verkeringmaatskappy Bpk v Kruger 1978 (3) SA 656 (A)): To invoke the application of the *ejusdem generis* rule there must be a distinct *genus* or category. The specific words must apply not to different objects of a widely differing character but to something which can be called a class or kind of objects. Where this is lacking, the rule cannot apply.

The most valuable insight available, I reckon, is offered by this extract from the judgment of Botha JA in S v Wood 1976 (1) SA 703 (A):

> ... In order to apply the principle one has to find some common quality or common denominator which is common to each of the words referred to by which the meaning of the word of wider import may be restricted. (Cf Colonial Treasurer v Rand Water Board 1907 TS 479 at p 484) or, as it has also been put in Alli v Pretoria Municipal Council 1908 TS 1120 at p 1124:

> It must be possible to ascribe the special words to some one *genus* before the general words can be limited in their meaning to things of the same *genus*. Otherwise any restriction of the literal meaning of the general words would be founded not on principle but on caprice.

In the definition of ‘gross income’ the words of ‘wider import’ are to be found in the preamble—in fact, it is a single word: ‘amount’. All we know about it is that it must be of a revenue nature. Can the ‘specific words’—the listed items, which might be either of a revenue or a capital nature—throw any light on the *genus* to which ‘amount’ belongs?

But, even if they do, is this a legitimate application of the *ejusdem generis* rule? I don’t know. All I do know is that, if I am unable to pin down with certainty what would be a capital amount, I am going to need some sort of conception of what might be a revenue amount.

Take the R100 million fake ‘tax debt’ I have described. If you enjoyed a classical tax education, think of all the so-called tests you might remember for distinguishing revenue form capital amounts. Is there one that says an amount you deposit, having borrowed it, is capital?

It so happens that I was personally and solely responsible for elevating, over a period of some years, an *obiter dictum* from Genn’s case to the status of a quasi-tenet of our law, to the effect that a borrowing is not a receipt, since, simultaneously with its receipt you are saddled with the obligation to repay the borrowing (79 *TSH* 2009). This was rubbish, since no obligation can extinguish an antecedent receipt. With that copout demolished, how would you prove that SARS is wrong to tax a borrowed amount?

By the same token, the next time some fiscal entrepreneur identifies an offshore amount that he claims to be tax free, how do you prove that SARS ought to be taxing it?

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‘Gross income’: the special inclusions

If the preamble to the definition of ‘gross income’ in s 1(1) of the Income Tax Act includes ‘revenue’ amounts while excluding ‘capital’ amounts, I cannot, in logic, claim that ‘revenue’ is the residue of all amounts once ‘capital’ amounts have been excluded, while at the same time claiming that ‘capital’ is the residue of all amounts once ‘revenue’ amounts have been excluded.

Yet that is more or less what the courts have effectively implied, all the while repeatedly asserting that it is impossible to define exactly what is ‘capital’ in this context. That’s a helluva way to run a tax system! If I cannot find an exact precedent (Yet look what happened after Natal Estates!), I have no way of knowing whether a particular amount is capital.

The purpose of the present exercise is to see whether it is possible positively to identify an amount as being revenue, by application of the *ejusdem generis* rule, starting with the so-called special inclusions in ‘gross income’, paras (a) to (m) of the definition, para (n) effectively constituting an entirely separate list of amounts, to be included in ‘income’ and, by that route, in ‘gross income’.

Here the special inclusions are listed once again, but sorted:

**Fruits of performance (even if capital)**

para (c)–[Services]
para (cA)–[Labour brokers, personal service providers]
para (cB)–[Restraint of trade]
para (d)–[Service termination awards]

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98—An irreverent newsletter designed to keep you up to date—
Another McAlpine v McAlpine NO and me. The case is which my imperfect education has yet to expose the import of ‘pactum successorium’ for a definitive view on a topic, such as the expenditures with a deduction but expects any “seal” the system, which rewards privileged once they spring from the buying and selling of property for the purpose of resale in a profit-making scheme, they are indelibly stamped with the nature of revenue. So much so that, in my opinion, it is a waste of time to ask whether any form of property represents ‘capital’. The correct and simpler question is to ask: ‘Is this property trading stock?’ All else is a residual—assuredly to be called ‘capital’. What about the fruits of trade? These are so obviously the fruits of performance that they cannot conceivably form part of capital, and so have no need for especial mention.

Not too early to see where this is going 

Even before considering as well the para (n) amounts, the conclusion seems inescapable that a gross income ‘amount’ represents the fruits of endeavours, including investment and dealing in trading stock. If an amount presents lacking this ‘revenue’ characteristic, it is unlikely to be gross income. And, if it plays the role of ‘revenue’, it is just as likely to be gross income.

Wills: what is a ‘pactum succesorium’?

Once you find a decision of the Appellate Division, with the judgment of the majority delivered by Corbett CJ, you can stop searching for a definitive view on a topic, such as the import of ‘pactum successorium’, a term to which my imperfect education has yet to expose me. The case is McAlpine v McAlpine NO and Another 1997 (1) SA 736 (A):

The pactum successorium occupies a somewhat shadowy position between contract and testament. It is frowned upon by the law because it tends to inhibit freedom of testamentation and because, if allowed, it would result in the circumvention of the rules relating to the formal execution of wills. But for these reasons it is only a contractual disposition which, like a testamentary one, vests the right in the promissor that should fall foul of the rule which invalidates pacta successoria. Accordingly, it seems only logical that vesting should be the litmus test for identifying a pactum successorium. What is the ‘vesting’ test?

.... This test is applied by asking in a particular case whether the promise disposing of an asset in favour of another (whether by way of donation or other form of contract) causes the right thereto to vest in the promisee only upon or after the death of the promissor (which points to a pactum successorium); or whether vesting takes place prior to the death of the promissor, for instance, at the date of the transaction giving rise to the promise (in which case it cannot be a pactum successorium).

The locus classicus

The meaning of the term is to be found in the ‘leading judgment on the pactum successorium’, that of Rabie JA in Borman en De Vos NO en ’n Ander v Potgietersrusse Tabakkorporasie Bpk en ’n Ander 1976 (3) SA 488 (A):

‘n Pactum successorium (of pactum de succedendo) is, kort gestel, ‘n ooreenkomst waarin die partye die vererwing (successio) van die nalatenskap (of van ‘n deel daarvan, of van ‘n bepaalde saak wat deel daarvan uitmaak) van een of meer van die partye ná die dood (mortis causa) van die betrokke partye of partye reël…. ‘n Ooreenkomst van hierdie aard drau in die algemene reël van ons reg dat nalatenskappe ex testamento of ab intestato vererf, en word as ongeldig beskou…. behalwe in die geval waar dit in ‘n huweliksoorwaardekontrak beliggaam is.... Said Corbett CJ:

.... I am of the opinion that the classic form of pactum successorium, as described by the Roman-Dutch authorities, included the reciprocal...
appointment of heirs of the indirect type, ie where in terms of the contract itself and without reference to wills A and B agree to appoint one another as heir to their respective estates.

On a *donatio mortis causa* (112 *TSH* 2012), he said:

185 *TSH* 2018—August 2018

**Wills: incorporation by reference**

The doctrine of incorporation by reference is illustrated by the common-law rule that a will may not incorporate anything by reference but must be complete in itself (139 *TSH* 2014, 176 *TSH* 2017).

The doctrine is set out by Schreiner JA in *Moses v Abinader* 1951 (4) *SA* 537 (A):

This argument must be rejected. It rests upon the notion, referred to in *Re Estate Marks*, *supra*, at p 201, that documents not executed at the same time as a duly executed will or codicil can, by appropriate language in the latter, be given the same effect as if they had been executed in accordance with the statutory provisions as part of the duly executed instrument. I think that it is clear that whatever may be the position under other statutes, it is not possible under Ord 14 of 1903 (1) or similar statutes to incorporate the terms of a document, not executed in terms of the statute, in a duly executed instrument, so as to make the former an effective part of the latter. Whatever language were used in the duly executed instrument it could not be shown that the earlier document was executed on every sheet by the testator and the attesting witnesses all present at the time when the later instrument was executed. It seems to me that the same difficulty presents itself when the question is raised whether an earlier duly executed but revoked will can be incorporated in a later duly executed instrument. No doubt where such incorporation is attempted the later instrument will ordinarily prove the intention to revive the revoked will and the latter will be revived. But in the absence of such established intention it seems to me that the mere form of incorporation would, in view of the terms of the statute, be ineffective. In other words the only principle to which effect can be given under the Transvaal Ordinance is revival and not incorporation.

I may add that in this case what the codicil did was not to take the existing clause 4 into itself but to add to it a provision; although the term incorporation may be loosely used in this connection it does not seem to me to furnish a proper description of the real nature of such an act. Even, therefore, if the notion of incorporation could be resorted to consistently with the provisions of the Transvaal Ordinance, there was in fact no incorporation in this case.

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**Wills: what is a *fideicommissum*, a *fideicommissum residui*?**

The minority in *Kinloch NO and Another v Kinloch* 1982 (1) *SA* 679 (A) comprised Jansen JA and Holmes AJA (as he then was). They said:

In *Brits v Hopkinson* 1923 *AD* 492 at 495 Wessels JA said:

Before a Court can Construe a testamentary disposition to be a *fideicommissum* it must be satisfied beyond a reasonable doubt that the testator intended to burden the bequest with a *fideicommissum*.

To impose a *fideicommissum* for the benefit of succeeding generations, the words employed must not be vague and indefinite, but must be sufficiently clear to show an intention on the part of the testators that the heirs are not free to deal with the property either during their lifetime or after their death, and that they must allow the property to go to their heirs (*Van Heerden v Van Heerden’s Executors* 1909 *NS* at 291).

(Our italics.)

This is where the words ‘as his own property absolutely’ in the present case are so relevant and potent. See also *Ex parte Jagger and Another* 1973 (2) *SA* 721 (N) at 725 where Kriek J decided that a certain clause did not constitute a *fideicommissum*.

Furthermore, as was said by Steyn J in *Ex parte Kock NO* 1952 (2) *SA* 502 (C) at 513D:

Now it is a recognized rule of construction that bequests should, if possible, be construed in a manner so as to leave the legatee as unburdened as possible.

In general, the essence of a *fideicommissum* is that it places on the fiduciary the burden of passing on the property to a specified person. This means that the fiduciary (save in circumstances which will be mentioned in a moment) cannot alienate the property, *inter vivos* or by will. As to that, in the present case, under clause 2 Victor could do both of these things. And clause 5 specifically contemplates his disposing of the property by will, for it provides that, if he does not, Alexander shall
The applicant's claims.

Excep
tio non adep
tem
ti contractus

As has already been pointed out elsewhere in this judgment, the first respondent withholds payment in respect of royalty and advertising fees. This is because, so the first respondent alleges in its answering affidavit, the applicant has failed to fulfil its multiple obligations in terms of the franchise agreement. Contending that the parties' obligations arising from the franchise agreement are reciprocal, the first respondent invokes exceptio non adep
tem
ti contractus as a defence in resisting the applicant's claims.

In authorities such as Thompson v Scholtz 1999 (1) SA 232 (SCA) at 238 C–D, the defence of exception non adep
tem
ti contractus is stated as a defence that is available to a party where the principle of reciprocity arises. It entitles the one party (the party from whom performance is demanded) to withhold such performance until the other party (the party demanding performance) has either rendered or tendered its own performance. It arises in circumstances where the performance and counter performance are so closely linked that the one was undertaken in return for the other. (See BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk 1971 (1) sa 391 (a) at 418). Whether or not obligations are reciprocal, in the sense required, involves an interpretation of the agreement in order to determine whether or not the obligations are sufficiently closely linked with one another, so that the finding can be made that the one was undertaken in return for the other. Obligations that arise in bilateral contracts are presumed to be reciprocal unless a contrary intention appears from the terms of the contract and/or the relevant circumstances.

As stated in the preceding paragraph, in bilateral contracts, the exceptio is available as a defence in those circumstances where the parties' obligations are reciprocal. The issue to determine, therefore, in the determination of the question as to whether the first respondent can invoke the exceptio as a defence is the question as to whether, based on a proper interpretation of the contract, the parties' obligations are closely linked with one another to justify a finding that the one obligation has to be undertaken in return for the other. In short, the question to be answered, based on a proper interpretation of the contract, is whether the parties' obligations are reciprocal to justify the invocation of the exceptio as a defence against the applicant's claims. This, invariably, will involve an analysis of the parties' obligations in terms of the contract.

In the matter before me the point at issue is the franchisor's obligations which he undertook to perform at all times and the franchisee's obligation to pay royalty and advertising fees in consideration of those services which the franchisor undertook to perform at all times and, arising therefrom, whether the parties' obligations, in the circumstances of this matter, are reciprocal. In my view, the parties' obligations with regards to the issue of rendering services contemplated in the franchise agreement and payment for such
services, based on the interpretation of the franchise agreement, are reciprocal despite there being a ‘without deduction or set-off’ clause contained in the franchise agreement.

186 TSH 2018—September 2018

‘Gross income’: the other shoe falls (capital)—I

I have been examining the intrinsic nature of ‘gross income’ as defined in s 1(1) of the Income Tax Act (182, 183, 184 TSH 2018) in order, first, to develop a response to the unlawful (and possibly criminal) tendency of SARS, when the mood so takes it, to tax all incomings, regardless of their provenance, and, secondly, to help fiscal entrepreneurs see the error of their ways when they proclaim that some foreign-sourced amount is free of the so-called income tax.

So far, what I have achieved from an analysis of the definition in its extended form is the development of the following precept:

The conclusion remains inescapable that a gross income ‘amount’ represents the fruits of endeavours, including investment and dealing in trading stock. If an amount presents lacking this ‘revenue’ characteristic, it is unlikely to be gross income. And, if it plays the role of ‘revenue’, it is just as likely to be gross income.

Since you receive this newsletter free, you probably see little reason to value this achievement but, I assure you, it runs contrary to all the training I enjoyed as a beginner in the field of tax. And, to the extent that my current professional equivalents are ‘trained’ at all, other, that is, in sloth, recklessness and crime, it will come as shock, too, to their legal nerves (83 TSH 2010).

By default, everyone treats and has been trained to treat ‘gross income’ as a residue of amounts remaining out of all amounts derived that are not ‘of a capital nature’:

‘[G]ross income’, in relation to any year or period of assessment, means...the total amount, in cash or otherwise, received by or accrued to or in favour of such resident...during such year or period of assessment, excluding receipts or accruals of a capital nature...;

This is how it goes: Is this amount ‘gross income’? No, it’s of a capital nature. Yay!

If that is your line of thinking, you had better be sure that you can recognize, flawlessly, an amount of a capital nature. Alas, a little more is required than simply neglecting to report the amount concerned to SARS, or presenting it under the capital gains tax (CGT) section of your normal tax return, although such popular expedients appear to be both wildly and widely successful.

You may report a transaction as being susceptible to a CGT charge only if it is excluded from gross income in the first place. There is your true residual—the CGT system looks at and, more often than not, taxes amounts excluded from gross income.

It follows that you cannot say that an amount unspoken for in the CGT system is free of tax. The issue is: Is it excluded from gross income?

186 TSH 2018—September 2018

Learning the law with your PC: set-off—I

Under the common law, set-off is automatic, as long as the debts concerned, on either side, are due and payable, and constitute liquidated debts. It so happens that Sutherland J has set out the common law on set-off in some detail, traversing nearly all the relevant authority, in Standard Bank of South Africa Ltd v Renico Construction (Pty) Ltd 2015 (2) SA 89 (GJ). This is both the most recent decision on the issue to be found in SALR and the most informative and comprehensive in recent decades. The headings and comments are mine.

The defence of set-off

The defence of set-off to a claim for payment of a debt is what Roman-Dutch lawyers called compensatio. What is it? Gerard Noordt Commentarius in Digesta 16.2 articulated compensatio to mean that obligations are expunged brevu manu [delivery to one already in possession], a formulation applauded by Trollip J in Joint Municipal Pension Fund (Transvaal) v Pretoria Municipal Pension Fund 1969 (2) SA 78 (T) at 86B.

The essentialia of set-off

What attributes must each debt possess to qualify for set-off? The elements are:

- Both debts must be due to and owed by the same pair of persons.
- Both debts must be liquidated.
- Both debts must be due and payable.

In a case where a cessionary steps into the shoes of the creditor, element 1 remains satisfied. Usually the difficulties arise with efforts to establish the existence of elements 2 and 3.

In other words, a creditor on either side may be replaced by a cessionary without disturbing the defence. The relationship between the cessionary and the original counterparty is what
must then be considered. (For a relevant case dealing with a cessionary in securitatem debiti, see Porterstraat 69 Elendomme (Pty) Ltd v PA Venter Worcester (Pty) Ltd 2000 (4) SA 598 (C),)

The Ackermans case—mutually indebted
Cloete JA remarked in Ackermans Ltd v Commissioner, South African Revenue Service; Pep Stores (sa) Ltd v Commissioner, South African Revenue Service 2011 (1) SA 1 (SCA) in para 8 that:
It is trite that set off comes into operation when two parties are mutually indebted to one another and both debts are liquidated and fully due.
(It is plain that the use of the word ‘mutually’ in this context is in its popular sense of ‘reciprocally’.)

This was the controversial case in which the seller of a business, together with its contingent liabilities, was denied a deduction on account of the contingent liabilities, since they represented no discharge of an obligation owed by the seller to the purchaser, which is to say, they were not ‘incurred’.

Due and payable
The importance of determining when the debts are due and payable is especially acute in cases of insolvency or liquidation. The critical moment must precede concursus creditorum [creditors enjoy rights as a group]. (Thorne and Another NNO v The Government 1973 (4) SA 42 (T) AT 45.)
The words ‘due’ and ‘payable’ can separately have many meanings, depending upon the context. When used together in the expression ‘due and payable’ they usually indicate, tautologically, that both dies cedit (a claim arises) and dies venit (the time for enjoyment has arrived) have occurred.
In rational disciplines of the law (thus excluding taxation), dies cedit precedes dies venit, so (outside, especially, the law of prescription), it is sufficient to say that a debt is ‘payable’, since it could not possibly be payable unless, perforce, either earlier or simultaneously, it was ‘due’.

‘Gross income’: the other shoe falls (capital)—II
So now, at last, I can turn to the only ‘textbook’ behind my desk—the 1994 edition of Silke on South African Income Tax (11th Memorial Edition) co-authored by Michael Stein and, ahem, myself but hugely based upon the labours over many years of our late partner, Dr Aubrey Silke (and his earlier collaborators).
I reckon that no more recent source of the famous cases establishing the so-called tests of ‘capital’ is needed, although if anyone cares to send me a more recent citation of a ‘test’ worthy of inclusion, I promise to add it to the list.

Amounts that are capital
Generally speaking, an amount will be of a capital nature if it springs:
- From the disposal of an asset acquired and held with the intention of holding and keeping it (as opposed to disposing of it in a profit-making scheme).
- From a fortuitous accretion to capital, such as a lump-sum legacy or an isolated lottery win.

My personal ambition for that edition was, modestly, that it should be the best textbook in the world. Reading it even now, I would not want to change even a comma.

Learning the law with your PC: set-off—II
If, like me, you have only a hazy idea exactly what a ‘liquidated’ debt might be when it is at home, the rest of the judgment of Sutherland J in Standard Bank of South Africa Ltd v Renico Construction (Pty) Ltd 2015 (2) SA 89 (GJ) on set-off is unlikely to enlighten you, although not through any fault of his.

Liquidated debts
How to detect the condition of liquidity is a topic of some agitation. The scx in Thoroughbred Breeders’
**Essentia** and termination of a partnership


A partnership is *stricto sensu* not a *persona iuris*. The courts have over a period of time accepted Pothier’s formulation of three essential elements for the existence of partnership to be a correct statement of our law. I propose to deal with [Pothier’s] three elements *seriatim* as follows: first, each of the parties brings something to the partnership or bind themselves to bring something into it, whether it be money or labour or skill. The second element is that the partnership business is to be carried for the joint benefit of both parties. The third is that the object should be to make profit. Each partner’s contribution in a partnership forms part of the assets of the partnership that are held by co-owners in undivided shares. This is so because a partnership, unlike a company or a close corporation, does not have an existence distinct and separate from its constituent members. In *Lawsa 2nd* ed, paragraph 285, the following is stated:

Before realization and distribution of the partnership assets among the partners, a partner is not entitled to treat any particular asset as being his own, nor is any partner entitled to any specific portion of the partnership assets as a whole. Regardless of the question who the owner of the partnership asset is, every partner is contractually bound towards his co-partner not to appropriate partnership for his own purposes or to regard them as part of his private assets.

In *Shingadia Bros v Shingadia*, the court quoted what Warrington L, concurring with the exposition laid down by Lord Sterndale MR, relative to legal personality of partnerships, said, namely:

A partner cannot be a creditor or debtor to his firm or sue his firm or be sued by it in as much as the English law does not recognize the existence of a firm as distinct from the members of it, and further in an action by one or more partners, whether using the name of the firm under Order 48 or not, against a co-partner alleging that money is due from the defendant to the plaintiffs in connection with the affairs of the firm, whether the claim arises in respect of transactions during the continuance of the partnership, or in the course of the winding up of its affairs after dissolution, the only relief which the plaintiff could obtain could be an account of the dealings and transactions of the partners.

Morton J in *Shingadia* above opined:

These observations of the learned LORD JUSTICE, based as they are on a principle...
which is identical to the principle of our own
law, are applicable to the present case.
It is clear in my mind that the plaintiff’s claim of his
contributions to the partnership before the
partnership is dissolved is like putting the cart
before the horse. By analogy the application for
summary judgment by the plaintiff to claim his
contributions before the partnership has been
liquidated is premature. It is impermissible in law.
In Olivier v Stoop the court said:
... although the partnership is dissolved but
concerning the accounting between them and
the world at large, the partnership will remain
in force until it has been finally liquidated.
Before the partnership is liquidated there
must first be accounting by each partner to
the partnership. If the parties cannot agree,
then there must be a liquidator appointed
who, once the assets of the partnership have
been made liquid, will first pay the debts of
the partnership and if there is anything
remaining then divide this proportionately to
their remaining shares.
The court in Robson v Theron held that for the
purpose of distribution of the partnership assets an
account must first be framed of what each partner
owes the partnership and of what is due to each
partner by the partnership. The amount of the sum
for which a partner is a debtor to the partnership
should be set off against those for which he is a
creditor. The above is the case after the
partnership has been liquidated and it is a fortiori
the correct legal position. We are not there yet.
However, it hammers the last nail in the plaintiff’s
case.

On the acceptance of Pothier’s formulation as a
correct statement of our law, Toni Aj cited Bester
v Van Niekerk 1960 (2) SA 779 (A) at 783 H–
784A; Muhrmann v Muhrmann 1981 (4) SA 632 w
at 634 C–F; Pezutto v Dreyer 1992 (3) SA 378
(A) 390 A–C. See also 146 TSH 2015, for Joubert
v Tarry & Co 1915 TPD 277 and Purdon v Muller
1961 (2) SA 211 (A) at 218C.

Words & phrases: ‘gross negligence’

Per Scott JA in MV Stella Tingas; Transnet Ltd t/a
Portnet v Owners of the MV Stella Tingas and
Another 2003 (2) SA 473 (SCA):

Gross negligence is not an exact concept capable
of precise definition. Despite dicta which
sometimes seem to suggest the contrary, what
is now clear, following the decision of this Court in S v
Van Zyl 1969 (1) SA 553 (A), is that it is not
consciousness of risk-taking that distinguishes
gross negligence from ordinary negligence. (See
also Philotex (Pty) Ltd and Others v Snyman and
Others; Braitex (Pty) Ltd and Others v Snyman and
Others 1998 (2) SA 138 (SCA) at 43C–J.) This must
be so. If consciously taking a risk is reasonable
there will be no negligence at all. If a person
foresees the risk of harm but acts, or fails to act, in
the unreasonable belief that he or she will be able
to avoid the danger or that for some other reason it
will not eventuate, the conduct in question may
amount to ordinary negligence or it may amount to
gross negligence (or recklessness in the wide
sense) depending on the circumstances. (Van Zyl’s
case supra at 557A–E.) If, of course, the risk of
harm is foreseen and the person in question acts
recklessly or indifferently as to whether it ensues or
not, the conduct will amount to recklessness in the
narrow sense, in other words, dolus eventualis; but
it would then exceed the bounds of our modern-day
understanding of gross negligence. On the other
hand, even in the absence of conscious risk-taking,
conduct may depart so radically from the standard of
the reasonable person as to amount to gross
negligence (Van Zyl’s case supra at 559D–H). It
follows that whether there is conscious risk-taking or
not, it is necessary in each case to determine
whether the deviation from what is reasonable is so
marked as to justify it being condemned as gross.
The Roman notion of culpa lata included both
extreme negligence and what today we would call
recklessness in the narrow sense or dolus eventualis. (See Thomas Textbook of Roman Law
at 250.) As to the former, with which we are
presently concerned, Ulpian’s definition,
D50.16.213.2, is helpful: ‘culpa lata is extreme
negligence, that is not to realize what everyone
realizes’ (culpa lata est nimia neglegentia, id est
non intelligere quod omnes intelligant). Commenting
on this definition, Lee in The Elements of
Roman Law 4th ed at 288 describes gross
negligence as being ‘a degree of negligence which
indicates a complete obtuseness of mind and
conduct’. Buckland in A Textbook of Roman Law 3rd
ed at 556 suggests that what is contemplated is a
‘failure to show any reasonable care’. Dicta in
modern judgments, although sometimes more
appropriate in respect of dolus eventualis, similarly
reflect the extreme nature of the negligence
required to constitute gross negligence. Some
examples are: ‘no consideration whatever to the
consequences of his acts’ (Central South African
Railways v Adlington & Co 1906 TPD 172 at 973); ‘a
total disregard of duty’ (Rosenthal v Marks 1944
TPD 172 at 180); ‘nalatigheid va ‘n baie ernstige
aard’ or ‘`n besondere hoë graad van nalatigheid’
(S v Smith en Andere 1973 (3) SA 217 (T) at 219A–
B); ‘ordinary negligence of an aggravated form
which fails short of wilfulness’ (Bickle v Joint
Ministers of Law and Order 1980 (2) SA 764 (r)
at 770C); ‘an entire failure to give consideration to
the consequences of one’s actions’ (S v Dhlamini
1988 (2) SA 302 (A) at 308D). It follows, I think, that
to qualify as gross negligence the conduct in
question, although falling short of dolus eventualis,
must involve a departure from the standard of the reasonable person to such an extent that it may properly be categorized as extreme; it must demonstrate, where there is found to be conscious risk-taking, a complete obtuseness of mind or, where there is no conscious risk-taking, a total failure to take care. If something less were required, the distinction between ordinary and gross negligence would lose its validity.

Words & phrases: ‘hold’—hold what (trading stock)?

I last took a (lengthy but nevertheless very tentative) look at this word, in the context of the Income Tax Act, in 90 TSH 2010. Since then, I have tended more and more to approach the tax law on what I call a ‘patrimonial’ basis, which focuses on property (widely understood) and contract law.

By a current count, ‘hold’ appears seventeen times in the Income Tax Act, ‘holds’ ninety-six times, and ‘held’ a whopping 306 times. In 90 TSH 2010, while identifying all sorts of problems with understanding these forms of the same verb, I could not conclude that ‘to hold’ means, simply, ‘to own’. In any event, such a conclusion would beg the question: Own what? On the other hand, I doubt whether anyone would argue with my actual conclusion, that ‘to hold’ means ‘to enjoy a patrimonial right to or in property’.

I return to the vexed subject because it now occurs to me that some provisions of the Income Tax Act might require a particular form of patrimonial right to be enjoyed in order for them to come into operation. Read, for example, this extract from the preamble to s 23F(1), an anti-tax-avoidance provision aimed primarily at so called trading stock on the water (essentially, ordered but not yet delivered):

Where any taxpayer has during any year of assessment incurred expenditure for the acquisition of trading stock which was neither disposed of by him during such year nor held by him at the end of such year....

- What does ‘acquisition’ mean? On its own, nothing definite. It’s too soon to say.
- By contrast, in the context, ‘incurred expenditure for the acquisition of trading stock’ means ‘acquired property in the form of a personal right against the counterparty concerned to deliver trading stock’. No real right in the trading stock itself is required, otherwise the rest of the preamble would be meaningless.
- What does ‘disposed of’ mean in the context? ‘Give rise to an amount includable in gross income, through the disposal either (a) of the personal right (as long as the relevant contract permits it; technically, this would amount to a cession of the personal right, not the sale of the trading stock itself); or (b) after acquisition of a real right in it, of the trading stock itself.’
- So what must ‘hold’ mean? In the context, it can only mean: ‘Enjoyment of a real right in the trading stock itself.’

The upshot is that you may claim the cost of trading stock as a s 11(a) deduction if

- you have turned the stock or your right to its delivery to account through a disposal, leading to an inclusion in ‘gross income’; or
- you enjoy full ownership of the trading stock by the end of the relevant year, leading to its inclusion in closing stock and thus in ‘taxable income’ (para (b)).

In this way, you will either establish a profit or loss on the particular transaction or break even, deducting the cost of the stock while accounting for its cost as part of your so-called closing stock. The mischief at which s 23F is aimed will thus be remedied—you will have been prevented from creating an artificial, self-serving mismatch between your outgoings and incomings, boosting deductions while delaying income.

Thus, while ‘accrual’ and ‘incurred’ are established by the acquisition by the parties concerned of personal rights, whether for delivery, performance or payment (see elsewhere in this issue), s 23F(1) conjures with real rights, which is to say, full ownership.

Ordered trading stock at year-end

How to treat it:

- Is it already sold? Claim its cost as a deduction.
- Did full ownership pass to you at any stage before the year-end (check the contract, the invoice, international law, INCOTERMS, and the like)? Claim its cost as a deduction. Add its cost to closing stock.
- Other? Show the cost as a prepayment (asset), not as closing stock. Do not claim it as a deduction.
**Words & phrases: ‘subject to’ (ss 24(1) and s 24J)**

This is how s 24(1) of the Income Tax Act reads:

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

In *Milnerton Estates Limited v CSARS* (1159/2017) [2018] ZASCA 155 (see the Monthly Listing), Willis JA said:

In support of this argument [that s 24(1) of the Income Tax act ‘is not concerned with cash sale agreements of this type, but only with agreements for the sale of immovable property on credit’] counsel drew attention to the opening words ‘subject to the provisions of s 24J’. That section deals with contracts under which interest may accrue to the creditor as part of the transaction and provides for the method by which the accrual of interest in any accrual period is to be determined. It is true that this is not a provision applicable to the sales in issue here, but I do not think that suffices to remove them from the ambit of s 24(1). The effect of the insertion of the reference to s 24J in s 24(1) was to bring the latter section fully into line with the former, so that, in the case of agreements falling under both, the determination of the accrual in respect of interest would take place under s 24J.

**Words & phrases: ‘stare decisis’**

It is surprising in the light of this submission that we were not referred to any of the cases dealing with the circumstances in which this Court will depart from its previous decisions on a matter of law. The basic principle is stare decisis, that is, the Court stands by its previous decisions, subject to an exception where the earlier decision is held to be clearly wrong. A decision will be held to have been clearly wrong where it has been arrived at on some fundamental departure from principle, or a manifest oversight or misunderstanding, that is, there has been something in the nature of a palpable mistake. This Court will only depart from its previous decision if it is clear that the earlier court erred or that the reasoning upon which the decision rested was clearly erroneous. The cases in support of these propositions are legion. The need for palpable error is illustrated by cases in which the court has overruled its earlier decisions. Mere disagreement with the earlier decision on the basis of a differing view of the law by a court differently constituted is not a ground for overruling it.

The doctrine of stare decisis is one that is fundamental to the rule of law. The object of the doctrine is to avoid uncertainty and confusion, to protect vested rights and legitimate expectations as well as to uphold the dignity of the court. It serves to lend certainty to the law....


**Words & phrases: ‘shall’**

The approach that the use of the word ‘shall’ in a statutory provision means that anything done contrary to such a provision is a nullity is neither rigid nor conclusive. The same can be said of the use of the word ‘must’. Many factors must be considered to determine whether a thing done contrary to such a provision is a nullity. There are cases where the performance of an act in breach of a statutory obligation does not necessarily result in the act being invalid and of no force and effect. When the question arises whether something that was done contrary to a statutory provision is invalid and of no force and effect, the proper approach is to ascertain what the purpose of the legislation is in this regard. Sometimes the purpose of the legislation will be to render it a nullity. At other times the purpose will not be to render such a thing a nullity. In each case the legislation will need to be construed properly to establish its purpose. Some of the factors that should be taken into account in the construction of the statute to establish its purpose are the following: the purpose of the legislation as a whole, the
purpose of the relevant section of the Act, the mischief sought to be addressed, whether the statute makes provision for remedies for its breach, or whether, if the act were not held to be null and void, it would mean that the provision may be breached with impunity. Where the statute does make provision for remedies for the breach of the relevant provision, the court would also have to take into account whether the remedies provided are adequate. Where they are adequate, there seems to be no justification for the conclusion that the purpose of the legislation is to visit an act committed in breach of the provision with nullity. It would be a different case where the remedies provided by the statute are not adequate, particularly if they are substantially inadequate or where such remedies cannot be easily obtained.

Per Zondo J in Steenkamp and Others v Edcon Ltd 2016 (3) SA 251 (CC) (footnotes suppressed).

Words & phrases: the ‘prescribed rate’

How I struggle every time the SARB’s monetary policy committee changes the rate of interest!

For the time being, the ‘prescribed rate’ is independently defined in both s 1(1) of the Income Tax Act and s 1 of the Tax Administration Act, read with s 189(3).

It is the wording of the Income Tax Act that is so confusing:

Provided that where the Minister fixes a new rate in terms of that Act [the PFMA], that new rate applies for purposes of this Act [the ITA] from the first day of the second month following the date on which that new rate came into operation;

As is shown in the Monthly Listing, the new Standard Interest Rate was fixed under the PFMA as from 1 January 2019. The first month from that date ends on 1 February 2019; the second, on 1 March 2019. The second month is therefore March, and the new prescribed rate, equal to the Standard Interest Rate, must run from 1 March 2019.

Only now have I noticed that the wording of s 189(4) of the Tax Administration Act is subtly different:

(4) If the Minister fixes a different interest rate referred to in [s 189(3)] the new rate comes into operation on the first day of the second month following the month in which the new rate becomes effective for purposes of the Public Finance Management Act, 1999.

Under this formulation, the effective month for PFMA purposes is January. The first month following is February, and the second is March. Again, the new prescribed rate—still equal to the Standard Interest Rate—must run from 1 March 2019. Snap!

Words & phrases: ‘due or payable’

Weirdly, you find the expression ‘due or payable’ used twice in the Income Tax Act, in definitions of retirement funds. Weirdly, because, ordinarily, an amount cannot become payable before it is due. At best, an amount might simultaneously be both due and payable.

Almost equally inexplicably, it is used in the Unemployment Insurance Contributions Act, in ss 7(5) and 9(4). Dies cedit (a debt arises) is set by s 5(1), which calls for contributions to be made to the UIF. And dies venit (the time for payment arrives) is set by s 8(1).

The confusion arises, perhaps, because what SARS regards as the charging provision, s 6(1), which in truth is a rating provision, refers to the amount due under s 5(1) as the ‘amount of the contribution payable’. Sloppy drafting is self-sustaining.

The Estate Duty Act, in the now-repealed s 25, used to refer to ‘due or payable’, in relation to unpaid duty or interest. Dies cedit is set by s 2, read with s 9(1). Dies venit has migrated to the Tax Administration Act (s 187(3)(c)), although its traces in the Estate Duty Act may still be discerned in s 10(2). (You have twelve months in which to pay estate duty.)

The expression ‘due or payable’ achieves its greatest glory, however, in the Tax Administration Act, where its usage sustains the whole rotten pile of cruddy drafting and egregious inroads into constitutional rights constituting this childish statute. Without it, the whole edifice would crumble.

Here is its most critical deployment:

169. (1) An amount of tax due or payable in terms of a tax Act is a tax debt due to SARS for the benefit of the National Revenue Fund.

Geddit? Pay now, argue later. Under this crazy act, a ‘tax debt’ is unique, perhaps across the entire globe—it is recoverable before it is due! Imagine Raymond Ackerman standing outside one of his supermarkets demanding payment from the customer even before she enters the store! It’s exactly the same principle.
On this basis, too, s 163(1), on preservation orders, is (madly) correct, in referring to an ‘amount of tax that is due or payable’. (The draftsperson is incapable of referring consistently throughout the act to a ‘tax debt’, preferring instead a variety of elegant variations. Even when he recently set out to try and be consistent, the effort quickly exhausted his meagre attention-span.)

But when it ventures into the real world, the Tax Administration Act is on shakier ground: A costs order in favour of SARS will in fact be recovered by the State Attorney not when its is ‘due or payable’ (s 11(3)) but when it is payable.

**Words & phrases: ‘due or payable’ (2) (pay now, argue later)**

*Singh v CSARS* (500/2001) [2003] ZASCA 31 (31 March 2003) (107 *TSH* 2012) was decided under the Value-Added Tax Act at a time when s 40(1) of the act provided that an amount of tax, additional tax, penalty or interest, ‘when it becomes due or is payable’, is a debt due to the state and is recoverable by SARS.

Olivier JA said:

The ordinary meaning of ‘due’ is that ‘...there must be a liquidated money obligation presently claimable by the creditor for which an action could presently be brought against the debtor. Stated another way, the debt must be one in respect of which the debtor is under an obligation to pay immediately.’ ....

The word ‘payable’ can have at least two different meanings, viz ‘...(a) that which is due or must be paid, or (b) that which may be paid or may have to be paid….. The sense of (a) is a present liability—due and payable—...(b) ...a future or contingent liability.’ …. Depending on the context of the statute involved, the word payable may refer to ‘...what is eventually due, or what there is a liability to pay’ ‘payable at a future time’, or ‘in respect of which there is liability to pay’....

The Act does not couple the word ‘due’ and payable, in s 40, with ‘and’. They are distinguished by or. It follows that a separate meaning must be given to the two terms. From what has been stated above, ‘due’ must be given, in s 40 of the Act, the meaning of ‘...a liquidated money obligation presently claimable by the creditor for which an action could presently be brought against the debtor’. ‘Payable’ in order to distinguish it from ‘due’ must be given the meaning of ‘...future or contingent liability’.

He went on to answer the question he posed, ‘When does the obligation to pay VAT become “due or payable”?’, in a manner that, I fear, no true student of VAT would be happy with:

Section 16(1) of the Act obliges the vendor to calculate, in the manner set out in that section, the tax ‘payable’ by the vendor, and s 28(1) requires the vendor to furnish the respondent with a return ‘...and pay the tax payable’ to the respondent. It is clear that the word ‘payable’ in these two provisions cannot mean anything more than a future or contingent liability to pay an amount as later finally assessed by the respondent. Thus: the amount reflected in the return must be paid immediately because it is, in the sense described above, ‘due’; however, there may be a future or contingent liability to pay more than that reflected in the return depending on the final decisions of the respondent or a court. Such contingent liability is not ‘due’, because it is not yet liquidated by a court or by agreement; nor is it payable because it is uncertain whether the vendor is liable for the future payment of any amount.

This answer is all horribly wrong. Right from the get-go, VAT was a self-assessment tax, even though we didn’t call it by that name then. Section 31 called for an assessment to be made by SARS, primarily, when the taxpayer failed to furnish a return. Section 1 defined ‘tax’ as the tax chargeable. Section 28(1) required the rendition of a return, in which the tax to be calculated under s 16 was to be reflected, in relation to each tax period. It also required the payment of the tax payable (or refund due). The date for payment was elaborately fixed.

The tax ‘due’ was the tax chargeable under s 16 for a particular tax period, establishing *dies cedit* (the date a claim arises, in favour of SARS). On the date fixed for payment, the tax was ‘payable’, establishing *dies venit* (the time for enjoyment, by SARS).

If confirmation is needed, simply read the opening words of s 39(1)(a) as it read at the time:

If any person who is liable for the payment of tax [*dies cedit*] and is required to make such payment in the manner prescribed in section 28(1) [*dies venit*], fails to pay any amount of such tax within the period for the payment of such tax specified in the said provision....

Section 31(1) allowed the Commissioner, in the absence of a return, to make an assessment of the tax payable, which had to be paid by the taxpayer.

That is the reason why s 40(1), on the recovery of tax by the Commissioner, referred to tax ‘due’ (under a submitted return) or ‘payable’ (under an assessment). It represented, after all, the birth of the ‘pay now argue later’ doctrine. Maybe, then, for so, so many years, I have been unfair to Kriegler J, of Metcash fame (and many other accomplishments).
Words & phrases: ‘exceptional circumstances’

Section 21(1) of the now-repealed Rents Act 43 of 1975 allowed a court effectively to prohibit the eviction of a tenant ‘on good cause shown and in exceptional circumstances’. Said Milne J in IA Essack Family Trust v Kathree IA Essack Family Trust v Soni 1974 (2) SA 300 (D):

From a purely factual point of view, therefore, the reason for the non-payment of the rent was the forgetfulness of Pillay and (to some extent) his illness since it seems probable that, as he says, had he not fallen ill he would have found the letter and delivered it to the applicant’s attorneys on Monday, 6th August.

Can it be said that in these circumstances the respondent has shown good cause and exceptional circumstances such as to justify the Court allowing an extension of time for payment at least to the date when the tender was made. (The Afrikaans version refers to ‘bewys van grondige redes en onder buitengewone omstandighede’).

The interpretation of the relevant provisions of sec 22(1) is not free from difficulty. Compare the comments of HERBSTEIN J, on the same provisions in sec 21(1) in St Johns Mansions (Pty.) Ltd v Van der Zee 1953 (2) SA 35 (N) at p 38, HOLMES J (as he then was) agreed with the statement in Prins v Carstens 1953 (4) SA 107 (C) at p 111, to the effect that when the Act refers to ‘exceptional circumstances’ it contemplates ‘something out of the ordinary and of unusual nature’. In Docrat’s case it was also held that it was not necessary or desirable to define ‘good cause shown’ and that each case must turn on its own facts.

It was common cause, as I understood it, that, in order to determine whether or not the Court should allow an extended period up to 10th August, 1973, the Court should have regard to all the relevant facts, considered not individually but as a whole and should determine whether, on those facts, the applicant has shown satisfactory reasons involving ‘something out of the ordinary and of unusual nature’ why payment was not made timeously and why the time for payment should be extended to the time when it was tendered.

What follows is the effective resolution of the matter:

In any event, while it is obviously an important consideration the question at issue here is not solely whether or not the late delivery was occasioned by Pillay’s negligence. The question is whether there is a satisfactory explanation for such late delivery involving exceptional circumstances. From the respondent’s point of view the particular combination of circumstances which combined to cause the late delivery were exceptional. The exceptional circumstances if I may summarize them were as follows:

(a) The respondent himself was not only not at fault personally but had been actively diligent in taking all reasonable steps to ensure that the rent was paid punctually.

(b) The respondent’s attorney and the respondent’s attorney’s secretary had, equally, not been personally at fault but actively diligent in seeking to ensure that the rent was paid punctually.

(c) Although the messenger Pillay was the weak link in the chain neither the respondent, nor the respondent’s attorney, nor the latter’s secretary could reasonably have foreseen that this would be so and although the messenger was negligent a substantial contributing cause to his failure to deliver the rent timeously was a genuine illness.

(d) But for such illness there was a strong probability that the rent would have been delivered well in advance of the final date for payment.

…. It seems to me that, in giving the Court power to extend the period for a further seven days, the Legislature appreciated that despite all reasonable precautions on the part of a lessee, there might be circumstances in which through no fault of his own the rental was not paid within seven days after the due date. The lessee’s own conduct, therefore, seems to me to be one of the most important considerations in deciding whether a further extension should be allowed. It is not perhaps totally irrelevant that there is no suggestion that the lessor suffered the slightest prejudice by reason of the rent being tendered two days late.

Tax Administration Act

‘Exceptional circumstances’ are critical to the operation of s 104(5)(a), 107(2)(b), 113(13), 124(2), 145(a)(ii), and 218(1) of the Tax Administration Act, the first two provisions having to with the condonation of a late objection or appeal, respectively.
Words & phrases: ‘negligence’

In Atwealth (Pty) Ltd & others v Kernick & others (116/2018) [2019] ZASCA 27 (28 March 2019), Davis AJA set out the law on this topic in the following terms (footnotes suppressed):

These provisions [of the General Code of Conduct for Authorized Financial Service Providers and Representatives] are clearly congruent with the common law duties of a professional investment advisor. These were analysed in Durr v Absa Bank Ltd & another. In his judgment, Schutz JA cited with approval a passage from Joubert (ed) The Law of South Africa:

The reasonable person has no special skills and lack of skill or knowledge is not per se negligence. It is, however, negligent to engage voluntarily in any potentially dangerous activity unless one has the skill and knowledge usually associated with the proper discharge of the duties connected with such an activity.

Referencing to an investment advisor employed by a bank who had given financial advice, Schutz JA said:

The Durs accepted his advice and relied on it. He knew that. It was what he had intended should happen. This, to my mind, defined his duty to the Durs. He had advised them to invest upon what was in effect moneymaking. Lending money is a potentially dangerous activity. He had investigated the debtor and found it sound, he said. Mrs Durr was entitled to see him as a man skilled to advise her on such matters and as one backed by a major bank: not as one devoid of skill in assessing creditworthiness and unready to seek help. The duty is established.

In order to lay a foundation for an attack on Ms Moolman’s abilities as a financial advisor and on the advice she gave it was essential in the first instance to establish as clearly as possible what she told the Kernicks in regard to these investments. That was not done and the topic was not explored with Ms Moolman. Secondly, it called for evidence on behalf of the Kernicks to identify what a reasonably skilled financial service provider would know about products in the market place; what due diligence they would have done before making a presentation to a prospective client and what sources of information they would have consulted.

No evidence was led to show that any information provided by Ms Moolman to the Kernicks was in any respect untrue or factually incorrect.

The consequences of the deficiencies in the evidence presented, by the Kernicks are best illustrated by reference to the well-established test for negligence as set out by the court in Mukheiber v Raath & another as follows:

The test for culpa can, in the light of the development of our law since Kruger v Coetzee 1966 (2) SA 428 (A), be stated as follows (see Boberg The Law of Delict at 390):

For the purposes of liability culpa arises if—

(a) a reasonable person in the position of the defendant—

(i) would have foreseen the general kind that actually occurred;

(ii) would have foreseen the general kind of causal sequence by which that harm occurred;

(iii) would have taken steps to guard against it, and

(b) the defendant failed to take those steps.

What then is the standard of the reasonable person in this case? The test for negligence must inevitably be grounded upon the factual matrix of the dispute requiring adjudication. Schutz JA in Durr v Absa Bank Ltd cited with approval the following dictum from Van Wyk v Lewis at 444:

And in deciding what is reasonable the Court will have regard to the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs. The evidence of qualified surgeons or physicians is of the greatest assistance in estimating that level.

Whatever the evidence regarding Ms Moolman lacking the requisite knowledge to conduct a due diligence of the very product she sought to market and sell, her lack of skill and knowledge, was insufficient to find her negligent, except in the abstract sense that she was negligent in embarking on the presentation without properly informing herself about the products. Whether such negligence was actionable depended on the further question whether, had she undertaken the necessary research, her presentation would have been materially different to the one she in fact made and whether the respect in which it might have differed from the one she actually made would have caused the respondents to react differently to the way they did. To put the matter more plainly, a person who embarks on a dangerous activity without having the requisite skill may nevertheless, albeit fortuitously, ‘get it right’.

As this Court held in Sea Harvest Corporation v Duncan Dock Cold Storage (Pty) Ltd 2000 (1) SA 827 (SCA) at 837, in the final analysis the true criterion for determining negligence is whether in the particular circumstances the conduct complained of falls short of the standard of the reasonable person.
Words & phrases: *fideicommissum residui*

In hierdie Hof het die betoë ook hoofsaaklik verband gehou met die vraag of die testament 'n gewone fideikommis dan wel 'n *fideicommissum residui* geskep het. Soos egter in *Estate Smith v Estate Follett* 1942 AD 364 op 380 opgemerk is, omskryf die tipering van 'n *fideicommissum residui* nie noodwendig die bevoeghede van die *fiduciarius* met betrekking tot die bemakte goed nie, en moet sodanige bevoeghede in eerste instansie bepaal word met verwysing na die testateur se bedoeling soos dit uit die testament blyk. Die term is nietemin 'n convenient form of words to express the idea that a testator has bequeathed property to a fiduciary heir subject to a condition that so much of the 'bequeathed' property as may be left on the fiduciary's death (or at some other appointed time) shall devolve upon the fideicommisary heirs.

(Op 380.) In so 'n geval het die *fiduciarius* dan in die reël die reg om voor die plaasvind van die gebeurtenis (hierna verwys ek gerieflikheids-halwe net na die dood van die *fiduciarius*) die goedere vryelik te vervreem. 'n Hibridiese situasie sou egter kon ontstaan indien die testateur beoog het dat die *fiduciarius* slegs in beperkte gevalle of vir beperkte doeleindes 'n vervreemdingsreg sou hê.

Per Van Heerden AR, in *Cronje v Kruger en 'n Ander* NNO 1985 (2) SA 812 (A).

Words & phrases: ‘novation’ (trusts)

Among the fraternity of professionals selling trusts, often wholesale, it is popular to replace the entire deed with a fresh one. Nervous commentators, like me, worry in case what is achieved is not the mere amendment of the original deed but novation—the creation of an entirely new trust arrangement (not necessarily valid). The applicable branch of law involved is the law of contract, although that fact might come as a surprise to the fraternity concerned.

**The leading case—*Swadif***

Beyond question, the leading case on this topic is *Swadif (Pty) Ltd v Dyke*, N0 1978 (1) SA 928 (A), where Trengove AJA (as he then was) said (footnotes suppressed):

In our law there are two forms of novation, namely *novatio voluntaria* and *novatio necessaria*. *Novatio voluntaria*, voluntary novation, has its origin in contract. Novation, in this sense, is essentially a matter of intention and consensus. When parties novate they intend to replace a valid contract by another valid contract. *Novatio necessaria*, compulsory novation, on the other hand, takes place by operation of law, it arises out of judicial proceedings between parties whose rights and obligations are in issue between them.

Another much-cited case is *Acacia Mines Ltd v Boshoff* 1958 (4) SA 330 (A), in which Beyers JA said:

Novation is essentially a question of intention: when parties novate they intend to replace a valid contract by another valid contract. On the facts of the present case the conclusion is irresistible that the company gave no thought to the question of novation. As far as the company was concerned the first prospecting contract was a dead letter. It did not regard it as a valid contract and could therefore not have intended ‘to replace one valid contract by another valid contract’. It is noteworthy that there is no reference in the second prospecting contract to the first prospecting contract. It is also significant that in entering into the second prospecting contract the company commenced proceedings de novo and used the same machinery as is ordinarily used for entering into new contracts. This involved the re-introduction of Rickard. It is difficult—if not, indeed, impossible—to reconcile this step with an intention to novate an existing obligation. Rickard had already ceded his rights under the first prospecting contract. It is true that he had some connection with the company, but if the second prospecting contract had been intended as a novation of the first, one would in the normal course of events have expected the company, as creditor, to have come to terms with the respondent personally.

The subsequent conduct of the company is in every respect consistent with complete abandonment of the first prospecting contract. In the first place the option monies which subsequently fell due were paid under the new contract.

**Dhooma***

Usually cited in the same breath as are these cases is *Trust Bank of Africa Ltd v Dhooma* 1970 (3) SA 304 (N), where Fannin J said:

Voluntary novation is the result of a contract, and it can thus come about either by express agreement...
or by implication.... However, as in a question of waiver, an intention to novate an existing right is not readily inferred, and, where such an intention is sought to be established by implication, the intention must be ‘clear and unequivocal’—this, it seems, is because it is more likely that a creditor who has an existing enforceable right, will intend, when he enters into any new arrangement in regard thereto, to reinforce rather than to destroy that right and accept something else in its place..... In the absence of express agreement to novate, the intention to do so will be inferred, therefore:

(a) where the terms of the new arrangement are inconsistent with the continued existence of the original right....

(b) where the admissible evidence as to the circumstances in which the new arrangement was made lead to the necessary inference that the parties intended that the original right should be novated and be replaced by the new....

In this the question does not, so it seems to me, differ in principle from the question which arises when one party to a contract alleges an implied term in such contract. In such cases, the alleged term may be implied if its existence is a necessary consequence of the express terms or if, in the light of the admissible evidence, such a term is necessarily to be implied. The onus of proof is, in each case, upon the person setting up the novation or the implied term and the case will have to be decided, as in all civil cases, upon a balance of probabilities, the only difference being what I have stated above, that there is some degree of inherent improbability in the proposition that a creditor has agreed to give up a vested right and accept something else in its place, it being more likely that his intention is to reinforce or strengthen rather than change his position. The nature of the alleged new obligation, and the differences between it and the old obligation, will, of course, have a bearing upon the probability or otherwise that the parties intended the new to be a substitute for the old.

National Health Laboratory Service
In National Health Laboratory Service v Lloyd-Jansen van Vuuren 2015 (5) SA 426 (SCA), Mhlantla JA said (footnote suppressed):

There is a presumption against novation because it involves a waiver of existing rights. When parties novate they intend to replace a valid contract with another valid contract. In determining whether novation has occurred, the intention to novate is never presumed. In Acacia Mines Ltd v Boshoff the court held that novation is essentially a question of intention. ....

It follows that in order to establish whether novation has occurred, the court is entitled to have regard to the conduct of the parties, including any evidence relating to their intention....

A funny thing happened on my way to a trust
You are not to suppose that the concept of novation is a mystery to the professional fraternity. On the contrary, they are firmly on top of it (and of their game), carefully, after replacing a deed holus bolus, inserting a critical clause (hopefully backward-reflecting):

Should this deed be replaced in its entirety, its replacement will be deemed not to be a novation.

The Constitutional Court on payment

Generally, payment is a bilateral act—one that, in the absence of agreement to the contrary, requires the co-operation of payer (usually the debtor) and payee (the creditor). Equally generally, discharge of a debt requires an agreement between the debtor (or party acting in the name of the true debtor) and creditor to that effect. But even assuming that the debt-discharge agreement was between the Bank, as the Moores’ creditor, and Mr Kabini, who, acting on their behalf, paid off their bond debt, it does not follow that the discharge was ineffectual because Mr Kabini was a crook.

This is because, in contrast to some other systems, our law is extraordinarily generous in how a debt may be paid. It allows payment of a debt without the consent—and even without the knowledge—of the debtor. This contrasts with the position of the creditor, whose knowledge of and assent to payment are required. It is well established in both our common law, jurisprudence and case law that a debt owing by A to B ‘may be extinguished by a payment made by a stranger to B in discharge of that debt even if A is unaware of such payment’. This proposition is supported by long-standing common law authority in the Roman-Dutch sources. These hold that a debt paid by a third party in the name of the debtor extinguishes the debt, even when payment is unauthorized, or even if the debtor opposes it. The debtor is discharged, willy-nilly. This does not apply to the discharge of an obligation which by its nature can be properly performed only by the debtor in person.

In our law, even a deposit into an account of a fraudster is effectual to transfer ownership in the money. The victim is left with only a personal claim against the fraudster—and a concurrent claim against the fraudster’s curators in the case of a sequestration. Consistent with this position is also that a debt is paid when the creditor/payee receives the money from the bank, whether payment was authorized or not.
Indeed, a thief who pays her own debts with stolen funds extinguishes those debts, provided the creditor who receives and accepts payment is innocent. Thus, an employee who steals money and deposits it for her own benefit in various accounts that are in debit, effectually extinguishes those debts, although the amounts that remain in credit can be recovered by the victim. Our law goes further. Provided the payee/creditor is innocent, payment of another’s debt, even by a thief, with stolen funds, operates to extinguish the debt. In short, payment is a bilateral act requiring the co-operation of the payer and the payee—but not the debtor. The payer is usually the debtor, but doesn’t have to be. If A owes money to B, and C decides to pay off the debt, then C (payer) must intend to pay, and B (payee/creditor) must intend to accept the payment. But A (debtor) does not have to know of or consent to the payment.

—Per Cameron J in Absa Bank Limited v Moore and Another [2016] ZACC 34 (footnotes suppressed)

Income tax Act: ‘connected person’

After years of being free of any concern about the precise meaning of ‘connected person’ in s 1(1) of the Income Tax Act, I seem to have hit a bad patch. The first problem I have encountered involved an old-fashioned ‘tax-planning’ idea, which never ever worked (although enjoying support even from deservedly prestigious quarters), involving a R1 preference share imbued, although not necessarily in writing, with astonishing powers of control, certainly exceeding the 20% threshold for voting rights set, these days, by the definition. Not to mention the wretched problem of relatives entwined in the family business. I always say that business folk should decide whether to be rich or have a family—the two mix really badly.

But that was a doddle compared with trying to understand para (d)(iv) of the definition:

’[C]onnected person’ means—

(d) in relation to a company—

(iv) any person, other than a company as defined in section 1 of the Companies Act that individually or jointly with any connected person in relation to that person, holds, directly or indirectly, at least 20 per cent of—

(aa) the equity shares in the company; or

(bb) the voting rights in the company;

What does ‘jointly’ mean? Does it require co-ownership or mere conspiracy?

197 TSH 2019—August 2019

Words & phrases: ‘subject to’

No a priori meaning

The definitive word on this subject comes from the judgment of Farlam JA in Premier, Eastern Cape, and Another v Sekeleni 2003 (4) SA 369 (SCA):

It is clear that the expression ‘subject to’, with which s 15(1) [of the Public Service Act 43 of 1978 (Transkei)] commences, means no more than if a decision to extend an official’s period of service is taken under s 15(2), then such decision will override the cut-off point in s 15(1): it does not mean that unless a decision is taken under s 15(2), s 15(1) never comes into operation. As Mr Kemp correctly contended the expression ‘subject to’ has no a priori meaning (see Pangbourne Properties Ltd v Gill & Ramsden (Pty) Ltd 1996 (1) SA 1182 (A) at 1187J–1188A). While it is often used in

114—An irreverent newsletter designed to keep you up to date—
statutory contexts to establish what is dominant and what is subservient its meaning in a statutory context is not confined thereto and it frequently means no more than that a qualification or limitation is introduced so that it can be read as meaning ‘except as curtailed by’ (cf Hawkins v Administration of South West Africa 1924 SWA 57 and Crook and Another v Minister of Home Affairs and Another 2000 (2) SA 385 (T) at 389A–D). This was clearly what is meant here, as is evident from the fact that s 15(1) is expressly made subject not only to ss (2) but also to ss (5) which, as has been seen, provides for early retirement. It is thus clear that ss (2) and (5) contain exceptions to the general rule that one retires automatically at the age of 60.

202 TSH 2020—January 2020

Words & phrases: ‘may’ v ‘must’

It is not only SARS that annoys by insisting that, in a statute, ‘may’ indicates a discretionary power, while ‘shall’ or the more modern but ugly ‘must’ conveys a duty. The latest candidate to be rudely brought to my attention is s 31(2) of the Income Tax Act, on international transactions, which currently states that taxable income ‘must’ be recalculated according to its dictates, while, before 1 April 2012, it said that the Commissioner ‘may’ perform the recalculation.

By clicking on the appropriate spot on this very newsletter or by going to the Bsp Seminars website, or even, I dare say, by searching Google, you can download ‘Words & Phrases 2009 to Date’, where you will find ‘may’ dealt with in 83 TSH 2010, 111 TSH 2012, and 137 TSH 2014. Several cases are cited there, to the effect that ‘may’ confers an authority or a duty, which must be exercised in the circumstances indicated. Under the principle of legality, after all, is it reasonable to expect a statute to give an official a pure discretion? Even so, more ancient cases rule out altogether a discretion of a purely personal or arbitrary nature.

Now, using a slightly different search string, I have found two decisions of the Constitutional Court on the issue. One is Saidi and Others v Minister of Home Affairs and Others 2018 (4) SA 333 (CC). The other is cited there. Per Madlanga J (footnotes suppressed):

The parties are in agreement that ss (1) and (3) of s 22 [of the Refugees Act] must be read together with the effect that the word ‘may’ in s 22(3) does not grant the RRO any discretion over the issuing of permits. They interpret ‘may’ to grant the RRO the power to extend permits, coupled with an obligation to exercise it; that is an obligation to extend the permit pending the outcome of an application for refugee status.

203 TSH 2020—February 2020

Words & phrases: ‘is satisfied’

Although the words ‘is satisfied’ used in s 79(1) of the Income Tax Act, and now in s 92 read with s 99(1) and (2) of the Tax Administration Act, confer a subjective discretion on SARS, I accept that the discretion is not unfettered, and an objective approach must be adopted to that subjective discretion. SARS, therefore, must show that its subjective satisfaction was based on reasonable grounds. The raising of an additional assessment in the case of income tax, as was
said by Ponnan JA in CSARS v Pretoria East Motors (Pty) Ltd 2014 (5) SA 231 (SCA) ([2014] ZASCA 91) para 11 [135 TSH 2014; disgraceful behaviour by SARS], ‘must be based on proper grounds for believing that there is undeclared income or a claim for a deduction or allowance that is unjustified’. But, given the wording of s 79(1) of the Income Tax Act, and presently of s 92 of the Tax Administration Act, and the subjective nature of the discretion conferred on SARS, the scope for judicial review is limited. (See Laingville Fisheries (Pty) Ltd v Minister of Environmental Affairs and Tourism [2008] ZAWHC 28 (30 May 2008) paras 74–76.)


204 TSH 2020—March 2020

**Words & phrases: ‘minor’**

For those reasons, and whatever the precise scope of the ‘always speaking’ principle in our law of statutory interpretation ['The relevant principle of interpretation is that the statute is not fixed at a point in time but is “always speaking”.'], it seems to me that it requires us to say that the word ‘minor’ in s 13(1)(a) of the [Prescription] Act now means a person under the age of 18 years, and to that extent to depart from the decision in Roux [Santam Versekeringsmaatskappy Bpk v Roux 1978 (2) SA 856 (A)]. However, I do not go so far as to say that it is confined to meaning any person who in law has not attained their majority. It was not argued that this aspect of the decision in Roux was clearly wrong, and I prefer to leave open the question whether a person under 18 who enters into a lawful marriage, or who by virtue of their life circumstances would be regarded under the common law as having been tacitly emancipated from their minority, is no longer to be regarded as a minor for the purposes of the Act. That is not the situation before us and it would be preferable to leave it for decision on an appropriate occasion when it arises pertinently.

*Per Wallis JA in Malcolm v Premier, Western Cape Government 2014 (3) SA 177 (SCA).*

204 TSH 2020—March 2020

**Words & phrases: ‘signature’**

In Global & Local Investments Advisors (Pty) Ltd v Nickolaus Ludick Fouche (71/2019) [2019] ZASCA 08 (18 March 2020) Mojapelo AJA said (footnote suppressed):

The appeal turns on a proper interpretation of the written mandate and whether Global acted in breach thereof. In construing the mandate, the context must be taken into account. In the commercial and legal world signatures serve established purposes. Signatures are used as a basis to determine authority and can be checked for authenticity. When money is paid out on a cheque it is done on the basis of an authorized signatory whose signature can be verified.

The *Concise English Oxford Dictionary* defines ‘signature’ as ‘a person’s name written in a distinctive way as a form of identification or authorization.’ *Black’s Law Dictionary* (5th ed 1239) gives the definition of ‘sign’ and ‘signature’, which read together bring us close to the legal meaning of signature. ‘To sign’, it explains, is ‘to affix one’s name to a writing or instrument, for the purpose of authenticating or executing it, or to give it effect as one’s act; To attach a name or cause it to be attached to a writing by any of the known methods of impressing a name on paper; To affix a signature to…. To make any mark, as upon a document, in token of knowledge, approval, acceptance, or obligation’. ‘Signature’ is defined as ‘the act of putting one’s name at the end of an instrument to attest its validity; the name thus written…. And whatever mark, symbol or device one may choose to employ as representative of himself is sufficient.’

Lord Denning stated the following in Goodman v J Eban Ltd [1954] 1 QB 550 (CA) at 561 where the question was whether a signature by means of a rubber stamp was a good signature:

In modern English usage, when a document is required to be ‘signed by’ someone, that means that he must write his name with his own hand upon it. It is said that he can in law ‘sign’ the document by using a rubber stamp with a facsimile signature. I do not think this is correct…. [A facsimile] is the verisimilitude of his signature but it is not his signature in fact. If a man cannot write his own name, then he can ‘sign’ the document by making his mark, which is usually the sign of a cross.

In Van Vuuren v Van Vuuren (1854) 2 Searle 116 at 121, the court held that: To sign a document means to authenticate that which stands for or is intended to represent the name of the person who is to authenticate. If an illiterate person is to sign, he would put a cross. If a person cannot use his hands as normal due to some disability, it will suffice to put the initial, in capital letters, of his name and surname.
Words & phrases: the contra fiscum rule

I turn to consider the contra fiscum rule. In NST Ferrochrome (Pty) Ltd v Commissioner for Inland Revenue 2000 (3) SA 1040 (SCA) para 17, the rule was described in the following terms:

An alternative argument advanced on behalf of the appellant was that subpara (d)(iv) was at least reasonably capable of the construction which the appellant sought to place upon it. Accordingly, so it was contended, the contra fiscum rule required that the subparagraph be so construed. Where there is doubt as to the meaning of a statutory provision which imposes a burden, it is well established that the doubt is to be resolved by construing the provision in a way which is more favourable to the subject, provided of course the provision is reasonably capable of that construction.... But, where any uncertainty in a statutory provision can be resolved by an examination of the language used in its context, there is no rule of interpretation which requires that effect be given to a construction which is found not to be the correct one merely because that construction would be less onerous on the subject.

CI Miller The Application of a New Approach to Interpreting Fiscal Statutes in South Africa (2016) para 6.4, in a limited-scope dissertation submitted in January 2016 as part fulfilment of the requirements for the degree of Master of Commerce, at the University of Johannesburg, states the following, with which I agree:

It is submitted that the contra fiscum rule still applies in South African law and that it would be incorrect to conclude that the contra fiscum rule has no application in the context of an interpretation of a fiscal provision, anti-avoidance or otherwise. The rule is clearly consistent with the values underlying the Constitution. It is conceded that in the modern era of a purposive approach to interpretation, this rule may have a reduced application when compared to the previous era which favoured a strict literal approach to
interpretation which more easily appeared to lead to ambiguity. However, to the extent that following analysis, a purposive approach ultimately yields two constructions which are both equally plausible, it is submitted that the contra fiscum rule should apply and the court should ultimately conclude in favour of the taxpayer.

Counsel for Telkom submitted that the contra fiscum rule should be applied at the outset, as part of the interpretive technique to be utilized in establishing the meaning of words, contained in a fiscal statute. I, however, agree with the submission by counsel for the Commissioner, that the rule should only be invoked, after an interpretational analysis results in an irresolvable ambiguity as to the meaning of the particular provision in the fiscal statute.

As regards the issue of whether any general distinction should be drawn between the interpretation of fiscal statutes and other statutes, the following dictum in Secretary for Inland Revenue v Kirsch 1978 (3) SA 93 (T) at 94D, sets out the correct approach:

There is no particular mystique about ‘tax law’. Ordinary legal concepts and terms are involved and the ordinary principles of interpretation of statutes fail to be applied.


Words & phrases: ‘good cause’

‘Reasonable cause’
‘Reasonable cause’, an expression SARS no longer refers to in its publications, looks, as I once put it, in a cryptically attributed crib (140 TSH 2014), ‘to the nexus between the action or inaction and its consequences’.

‘Good cause’
To my surprise, ‘good cause’ is used in ss 60(3), 66(3), 115(1), 127(5) and 134(1) of the Tax Administration Act, and rules 29(5), 52(1) and 56(2)(a) of the ‘rules’ applying in the context of Chapter 9 (dispute resolution) of that act (17 TAW 2020). As an avid collector of such things, I cannot fathom how I missed such a heavy usage, in an act I use every day. Knowledge, after all, is pattern-recognition.

The Rogers J judgment
It is thanks to that rotten SARS publication the second issue of ‘Dispute resolution guide: guide on the rules promulgated in terms of section 103 of the Tax Administration Act, 2011’ (20 March 2020; 204 TSH 2020)–which purports to be up to date but is rancidly obsolete in its rendition of Chapter 9 of the Tax Administration Act—that I know that Rogers J (as he then was) has pronounced upon this issue. The case cited by SARS is TC IT 12013 (13 February 2014).

Oddly neither SARS nor I have listed the case in our respective databases. Even more oddly, in TC IT 0122/2017, Cloete J cited the case as South African Revenue Service v Muller Marais Yekiso Inc, in apparent breach of the confidentiality rule to be found in s 132 of the Tax Administration Act.

The run of oddities simply does not stop: I have recently re-won access to the SATC reports published by LexisNexis (197 TSH 2019), and so can read the judgment for myself. Except that this service does not include the case, and it is unavailable anywhere else. As SARS says in its rotten guide, it is truly ‘unreported’.

Since it is clear from Cloete J’s account that the Rogers J judgment was scathing on the conduct on the part of both parties to the dispute, TC IT 12013 is perhaps one of those case reports that SARS used to suppress, despite its clear duty to publish all such judgments, under s 132 (199 TSH 2019).

No option is left then but to reproduce what the SARS Guide includes in its glossary, sv ‘good cause’ (footnote suppressed):

In the context of delay in complying with time periods under the old rules, it was held in an unreported Tax Court case, that the good cause that is required does not have to be a good cause which shows that the defaulting party acted, in every respect, as soon and as promptly as it should have done, but merely that one can understand the reason why a particular procedural step was not taken.]

‘Good cause’, ‘sufficient cause’
A search of SALR yielded two good hits, despite the sparse population identified by the search string I chose, the more authoritative of which comes from the judgment of Majiedt AJA (as he then was) in Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd 2010 (4) SA 109 (SCA) (footnotes suppressed):

In general terms the interests of justice play an important role in condonation applications. An applicant for condonation is required to set out fully the explanation for the delay; the explanation must cover the entire period of the delay and must be reasonable.

‘Good cause’ within the meaning contained in s 3(4)(b)(ii) of the Institution of Legal Proceedings against certain Organs of State Act] has not been defined, but may include a number of factors which will vary from case to case on differing facts.
Schreiner JA in dealing with the meaning of ‘good cause’ in relation to an application for rescission, described it thus in Silber v Ozen Wholesalers (Pty) Ltd:

The meaning of ‘good cause’ in the present sub-rule, like that of the practically synonymous expression ‘sufficient cause’ which was considered by this Court in Cairn’s Executors v Gaar 1912 10 AD 181, should not lightly be made the subject of further definition. For to do so may inconveniently interfere with the application of the provision to cases not at present in contemplation. There are many decisions in which the same or similar expressions have been applied in the granting or refusal of different kinds of procedural relief. It is enough for present purposes to say that the defendant must at least furnish an explanation of his default sufficiently full to enable the Court to understand how it really came about, and to assess his conduct and motives.

Thus far we have discussed blood-relationship. Relationship arising from marriage is called affinity; it is so called because two different cognations are coupled together, and the one stretches to the confines (ad fines) or limits of the other. (1.4. sec 3 ff de grad et affin). It exists between the husband and the blood-relations of his wife, and likewise between the wife and the blood-relations of her husband; but not between the blood-relations of husband and wife (d 1.4, sec 3). So that there is no affinity between the husbands of two sisters or the wives of two brothers; nor between me and my wife’s brother’s wife,...'. (Censura Forensis, Bk I, chap V, p 48 (Schreiner’s translation).)

The common law concept of affinity as stated by the authorities referred to, has not been altered by any legislation and it is therefore clear that the intercourse between the accused and his wife’s brother’s wife does not amount to incest.

- Is your grandmother-in-law—your spouse’s mother’s mother—related to you by affinity?

There is a marriage; yours to your spouse. Your spouse’s mother’s mother (her grandmother) is related to your spouse by blood. Thus your grandmother-in-law is related to you by affinity.

- Is your step-grandmother related to you by affinity?

Your step-mother would be your father’s second (or further) wife’s mother. His wife’s mother, your step-grandmother, is related to your father’s wife (his wife for the time being) by blood, so your father and step-grandmother are related by affinity. As between you and your
father, there is no marriage and thus no way anyone other than his blood-relative might be your blood-relative.

Thus your step-grandmother is not related to you by affinity. Sadly, she cannot benefit by reason of affinity, unless the relevant will or deed includes your blood relatives plus those related to them by blood or affinity.

Presumably, it is not just in the event of incest that ‘the relationship by marriage creating affinity’ would be unbroken by divorce (again) or death.
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