IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case Number: 87760/2014

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES/NO.
(2)	OF INTEREST TO OTHER JUDGES: YES/NO.
(3)	REVISED.
DATE	SIGNATURE

In the matter between:

PIENAAR BROTHERS (PTY) LTD APPLICANT

And

COMMISSIONER FOR THE SOUTH
AFRICAN REVENUE SERVICE 1ST RESPONDENT
THE MINISTER OF FINANCE 2ND RESPONDENT

JUDGMENT

Fabricius J,

1.

"Tax legislation is not a promise and a tax payer has no vested right in the Internal Revenue Code". (Justice Blackmun in ***US v Carlton, 512, US 26 (1994***)

Does this dictum apply in South African law?

In this opposed application, the Applicant initially sought the following relief:

1. "Declaring Section 34 (2) of the ***Taxation Laws Amendment Act 8 of 2007*** ("the ***Amending Act***") to be inconsistent with the ***Constitution*** and invalid to the extent that it provides that Section 44 (9A) of the ***Income Tax Act 58 of 1962*** ("the ***ITA"***), which was introduced by virtue of Section 34 (1) (c) of the ***Amending Act***, shall be deemed to have come into operation on 21 February 2007 and to be applicable "to any reduction or redemption of the share capital or share premium of a resultant company, including the acquisition by that company of its shares in terms of Section 85 of the ***Companies Act, 1973 (Act No 61 of 1973)***, on or after that date";
2. <u>In the alternative to paragraph 1 and in any event</u>:

2.1 Declaring that the provisions of Section 44 (9A) of the ***ITA*** did not apply to the distribution by the Applicant on 3 May 2007, to its registered shareholders at that date pro rata to their shareholding, of an amount of R29 500 000 out of Appellant's share premium account;

2.2 Declaring, in consequence thereof, that the First Respondent's assessment of the Applicant on 13 December 2011 to secondary tax on companies ("STC"), in relation to a dividend cycle commencing on 23 September 2005 and ending on 3 May 2007, and to interest calculated from 1 July 2007 to the "date payable" (given as 5 January 2012) ("the STC assessment"), was invalid; and

2.3 To the extent necessary, setting aside the STC assessment;

3 Referring the order sought in paragraph 1 above to the Constitutional Court for confirmation".

At the hearing of the application, Mr M. Chaskalson SC suggested that I could insert a full-stop after the word "invalid" in the first sentence of the first prayer, and that the

remainder of the prayer was not necessary. After the hearing, Applicant's Counsel provided me an amended Draft Order which read as follows:

"It is ordered that:

1. To the extent necessary for the purposes of order 2 below:

1.1 Section 34 (2) of the ***Taxation Laws Amendment Act 8 of 2007*** ("the ***Amending Act***") is declared to be inconsistent with the Constitution and invalid; and

1.2 The order sought in paragraph 1.1 above is referred to the Constitutional Court for confirmation.

2. It is declared that

2.1 The provisions of Section 44 (9A) of the ***ITA*** did not apply to the distribution by the Applicant on 3 May 2007, to its registered shareholders at that date pro rata to their shareholding, of an amount of R29 500 000 out of the Appellant's share premium account;

2.2 In consequence thereof, the First Respondent's assessment of the Applicant on 13 December 2011 to secondary tax on companies ("STC"), in relation to

a dividend cycle commencing on 23 September 2005 and ending on 3 May 2007, and to interest calculated from 1 July 2007 to the "date payable" (given as 5 January 2012) ("the STC assessment"), was invalid; and

3. The STC assessment is declared invalid and set aside".

2.

First Respondent's Counsel Mr W. Trengrove SC, was not in agreement that prayer 2.2 was a competent prayer and as a result thereof further brief Heads of Argument in that context were requested, and supplied. With reference to ***Medox v Commissioner for SARS, 2015 (6) SA 310 (SCA) at par. 13 to 15***, it was contended that no order by this Court should result in precedent whereby taxpayers are permitted to bypass the specialist tribunal of the Tax Court in favour of a direct approach to this Court. I agree.

3.

After the Applicant filed its original Heads of Argument, it was apparently advised to file a further Supplementary Affidavit alleging a new cause of action for the unconstitutionality of Section 34 (2) of the ***Taxation Laws Amendment Act 8 of 2007 ("the Amendment Act")***, on the basis of its inconsistency with Section 25 (1) of the ***Constitution***. (The "property clause")

4.

It was contended that the challenge to the constitutionality of Section 34 (2) would only arise in the event that the Applicant's primary "interpretational argument" was rejected, and that Section 34 (2) was held to have retroactive effect to the Applicant's completed transaction. The challenge to Section 34 (2) was based on the fundamental right to property proceeds on the basis that the retroactive removal of the exemption STC in paragraph (f) of the definition of "dividend" without adequate notice, would have amounted to a deprivation of property that was both procedurally and substantively arbitrary, and thus inconsistent with Section 25 (1) of the ***Constitution***.

5.

In the Founding Affidavit, Applicant says that the primary purpose of this application was to declare unconstitutional and invalid a retrospective amendment to the ***Income Tax Act 58 of 1962*** as amended ("the ***ITA***"). On the basis of such invalidity, and in any event, (i.e. even if invalidity is not established) on a proper interpretation of said amendment, the Applicant sought an order the amendment did not apply to the distribution by it to its shareholders, on 3 May 2007, of an amount of R29 500 000, in respect of which First Respondent assessed it for secondary tax on companies ("the STC assessment"). The Applicant accordingly also sought setting aside of the STC assessment and ancillary relief.

6.

Factual background: The Transaction:

Applicant gave a lengthy explanation of the factual background and the relevant transaction in the Founding Affidavit. I was informed by Counsel for the parties that for purposes of their argument, the motive of the Applicant to enter into the relevant transaction was irrelevant. For present purposes therefore a summary of the facts suffices and this summary is given by Applicant itself in a memorandum by its Chartered Accountants to the First Respondent dated 22 September 2011:

1. "Serurubele Trading 15 (Pty) Ltd ("the Taxpayer") entered into an amalgamation transaction in terms of Section 44 of the ***Income Tax Act 58 of 1962 ("the Act")*** in which it acquired all the assets of Pienaar Brothers (Pty) Ltd on 16 March 2007, which acquisition had effect from 1 March 2007 in terms of the Sale of Business Agreement.

2. As part settlement of the purchase consideration the taxpayer issued shares to Pienaar Brothers at the purchase price less the assumed liabilities, ("equity consideration"), which equity consideration less the par value of the shares was credited to share premium account of the tax payer.

3. On 3 May 2007 the Board of Directors of the Taxpayer resolved, in terms of Section 90 of ***Companies Act No. 61 of 1973*** read with ***Article 21A of the Tax Payers Articles of Association***, to make a distribution to its shareholders pro rata to their shareholding, of an amount of R29 500 000 out of the tax payer's share premium account ("the Distribution"). The applicable law on 3 May 2007 in the context of the definition of a "dividend" in Section 1 of the ***Act*** meant that a "dividend" excluded from its ambit any amount distributed out of the share premium account (not being profits previously capitalised to the share premium account). It was Applicant's submission that as at 3 May 2007 when the distribution was made, the Distribution did not constitute a "dividend" as defined in the ***Act*** and no STC was therefore due and payable by the tax payer on the Distribution as the Distribution was made out of the share premium account of the tax payer which share premium arose from the issue of ordinary shares at a premium over the par value.

7.

In the Founding Affidavit Applicant explained the position as follows:

1. "Applicant was previously known as Serurubele Trading 15 (Pty) Ltd. On 7 August 2007, it changed its name to its current name following the transactions that will be referred to;

2. Applicant operates a business supplying and distributing personal protective clothing for use in various industries and it acquired this business on 16 March 2007 with effect from 1 March 2007 as a going concern from the company then known as Pienaar Brothers (Pty) Ltd ("OLD CO");

3. It was deemed necessary to introduce a Black Economic Empowerment Equity partner into the business and accordingly "OLD CO" sought advice from its Attorneys pertaining to the method to be used to implement a BEE transaction. It was regarded as important that such BEE partner should be able to buy into a new company which would take over business from "OLD CO", so as to ensure that the new shareholders would not be exposed to any unexpected historical liability in "OLD CO". The price of the shares to be acquired by the new partner also had to be affordable;

4. Applicant's Attorneys advised "OLD CO" to apply the group restructure provisions in Section 44 of the ***ITA*** (pertaining to so-called "amalgamation transactions"), which will allow for the achievement of these commercial objectives in a tax efficient manner;
5. In March 2006 the Applicant (then called Serurubele Trading 15 (Pty) Ltd) was acquired with a view to bring a vehicle for the envisaged amalgamation transaction;
6. Based on the advice of the Attorneys, it was envisaged that the Applicant would acquire the business from "OLD CO" in an amalgamation transaction and that the BEE partner would thereupon take up an equity's taken the Applicant;
7. The relevant agreements were drawn, company resolutions were prepared and the final Sale of Business Agreement between "OLD CO" and Applicant was signed on 16 March 2007, with effect from 1 March 2007;

8. All relevant conditions precedent were fulfilled and on 1 April 2007 “OLD CO” transferred the business to the Applicant. Applicant duly discharged the purchase price;

9. In the language of Section 44 (1) of the ***ITA***, in this “amalgamation transaction” “OLD CO” was “the amalgamated company” and the Applicant was the “resultant company”;

10. One of the requirements of an “amalgamation transaction” is that, as a result thereof, the amalgamated company’s existence has to be terminated. To this end, “OLD CO” distributed the consideration shares to its shareholders pro rata to their shareholding where after “OLD CO” was liquidated;

11. At this point, Applicant was the owner of the business. On 3 May 2007, Applicant’s directors resolved to distribute to its registered shareholders, pro rata to their shareholding, an amount of R29 500 000 out of the Applicant’s share premium account (“the Distribution”). This Distribution was duly implemented on 3 May 2007;

12. The BEE shareholder had then to be introduced into the Applicant and accordingly the existing shareholders of the Applicant between them sold 25.1 of Applicant's issued share capital to Naha Properties (Pty) Ltd;
13. The transfer of their shares to Naha Properties was confirmed by the Applicant's directors on 7 May 2007.

8.

The present dispute pertains to the liability of the Applicant to STC on the Distribution that I have referred to.

9.

I will now follow the course of Applicant's submissions and argument contained in the Founding Affidavit read with the written Heads of Argument which were thorough and detailed, gratefully received.

10.

No STC liability at the time of Distribution:

At the time the Applicant's directors resolved to make the Distribution, and when the distribution was effected and finalized, it did not amount to a "dividend" for purposes of the imposition of STC under the ***ITA***. This was so by virtue of paragraph (f) of the definition of "dividend" in Section 1 of the ***ITA*** in that the distribution represented a reduction of the Applicant's share premium count to which the first proviso of the definition of "dividend" did not apply.

Had the distribution been a dividend for purposes of the ***ITA*** at the time it was made, the Applicant would by virtue of Section 64B (7) of the ***ITA*** have been required to pay STC on the amount of the distribution and to render the associated STC return by no later than 30 June 2007, the distribution having been made on 3 May 2007. Despite that, so Applicant says, it has been assessed for STC on the distribution by virtue of a retrospective amendment of the ***ITA***.

11.

The amendment to Section 44 of the *ITA*:

The Applicant refers to the following relevant facts:

1. In the budget speech of 20 February 2007 the then Minister of Finance made reference in general terms, to an intention to pass retrospective legislation to deal with certain anti-avoidance arrangements relating to STC. He provided no further detail as to what arrangements were to be addressed or in what manner;

2. On 21 February 2007 First Respondent issued a press release in terms of which inter alia the STC exemption for amalgamation transactions contained in Section 44 (9) of the ***ITA*** was stated to be withdrawn with immediate effect. The particular statement reads as follows: "21 February 2007:

   The STC exemption for amalgamation transactions contained in **Section 44 (9) of the *Income Tax Act, 1962***, is withdrawn. This exemption permits a permanent loss of STC, rather than a deferral of tax, which is the intent of the amalgamation provisions". I may say at this stage that it is clear from this statement that the "exemption from amalgamation transactions" is the target of the intended reform.

3. Applicant says that this exemption pertained exclusively to the exemption from STC of the disposal of consideration shares by an amalgamated company (such as "OLD CO") to its shareholders. It did not relate in any way to the exemption in paragraph (f) of the definition of "dividend", and therefore had no bearing on any conduct anticipated to be undertaken by the Applicant;
4. On 27 February 2007, SARS and National Treasury released for public comment a ***Draft Taxation Laws Amendment Bill of 2007***;
5. In keeping with the press release, the Bill proposed the amendment of Section 44 of the ***ITA*** by the deletions of Sections 44 (9) and (10) thereof, which amendments would be deemed to have come into operation on 21 February 2007 and would apply in respect of any disposal of an equity share, or any deemed declaration of a dividend, by an amalgamated company (i. e. on the present facts "OLD CO" not the Applicant) on or after the date;
6. The amalgamation transaction, the distribution and introduction of the BEE partner was completed in early May 2007 as I have pointed out;

7. On 7 June 2007, the ***Taxation Laws Amendment Bill*** was published together with an explanatory memorandum. This ***Bill*** no longer proposed deletion of Sections 44 (9) and (10), but instead proposed the insertion of Section 44 (9A). The ***Bill*** also proposed that the amendment be retrospective to 21 February 2007.

   It is convenient at this stage to refer to the Explanatory Memorandum relating to the insertion of Section 44 (9A): "As a theoretical matter S. 44 amalgamations should act as a deferral mechanism. All assets and tax attributes would roll over from the target company to the acquiring company with the acquiring company subsequently bearing these tax benefits and burdens. This same theory holds for the Secondary Tax on companies (STC). The distribution of acquiring company shares in an amalgamation is accordingly free from STC. However, the profits of the target company do not roll over to the acquiring company. The net result is often a complete STC exemption when the acquiring company makes a distribution of former target company assets.

It has come to Government's attention that certain private stakeholders are attempting avoidance transactions that are specifically aimed at exploiting this gap. In these transactions, a pre-existing target company with substantial assets and profits is amalgamated into a newly formed company without assets or profits. The newly formed company then distributes the former target company assets, but this distribution is free from the STC due to the lack of profits within the newly formed acquiring company. From the above anomaly, the proposed amendment inserts Section 44 (9A) which deems resultant company equity share capital (and share premium) arising from the amalgamation to be profits not of a capital nature available for distribution to shareholders to the extent of any profits distributed by the amalgamated company in terms of subsection (9). The result is that the amalgamated company's profits are effectively rolled over to the resultant company, so that STC remains payable when the resultant company makes subsequent distribution".

8. Applicant says that this was the first indication of any amendment that would impact upon the STC position of an entity in the position of Applicant;

9. On 8 August 2007 the ***Taxation Laws Amendment Act 8 of 2007*** was promulgated. Section 34 (1) (c) of the ***Amending Act*** inserted into Section 44 of the ***ITA*** a new Section 44 (9A). The effect of that appears from the Explanatory Memorandum note that I have quoted. Section 34 (2) of the ***Amending Act*** provided that Section 44 (9A) was deemed to have come into operation on 21 February 2007 and would be applicable "to any reduction or redemption of the share capital or share premium of the resultant company, including the acquisition by that company of its shares in terms of Section 85 of the ***Companies Act, 1973 (Act No 61 of 1973)***, upon or after that date".

10. Applicant states that at no stage prior to the conclusion and implementation of this actual amendment was Applicant placed on any guard by any public statement by either of the Respondents to the effect that it might be exposed to an STC liability in relation to the distribution of any amount from its share premium account, whether with retrospective effect or otherwise.

12.

The audit of Applicant and the resultant assessment:

In January 2011, First Respondent commenced with an audit of the Applicant's tax affairs for the 2007 year. On 6 December 2011, First Respondent notified the Applicant in an "assessment letter" that an adjustment would be made in respect of STC, and more particularly that STC in the amount of R3 687 500 (12.5% of R29 500 000) was to be levied on the Applicant. It was also stated that the applicable dividend cycle for STC purposes was the period ending 3 May 2007. A formal notice of assessment of STC was issued by First Respondent on 13 December 2011. This assessment reflected the applicable dividend cycle as commencing on 23 September 2005, ending on 3 May 2007. The assessment included interest calculated from 1 July 2007 to the "date payable" given as 5 January 2012. The First Respondent relied upon Section 64B (9) of the ***ITA*** in imposing the assessed interest. On 20 February 2012, Applicant delivered an objection to the assessment. This objection was disallowed by the First Respondent on 16 March 2012. The Applicant

appealed against the assessment following an unsuccessful attempt to resolve the dispute through Alternative Dispute Resolution process, the parties filed pleadings in the Tax Court. The First Respondent filed a statement of grounds of assessment and Applicant filed a statement of grounds of appeal. One of the grounds of appeal raised by the Applicant was that Section 34 (2) of the ***Amending Act*** was invalid, because it infringed the constitutional principle of legality, insofar as it purports to make Section 44 (9A) effective from a date earlier than that on which it was enacted. The appeal of this dispute was due to be heard during October 2014, but the parties agreed that this appeal would be postponed *sine die* to enable the Applicant to launch the present proceedings in this Court.

13.

Applicant states that it emerged during the relevant correspondence that there was a dispute between the parties as regards the legitimate ambit of the present application. This dispute will arise only if I find that the retrospective amendment is not invalid as being inconsistent with the Constitution. In that event, Applicant still intends to argue that the provisions of Section 44(9A) do not apply retrospectively to the distribution

in the present circumstances. This was the Applicant's so-called "second basis". First Respondent took the view that Applicant's second basis should not be entertained by me, or by this Court, but only by the Tax Court in due course. Applicant's view is that its second basis involves issues of law and the interpretation application of statutes in relation to which did not anticipate any factual disputes arising. Once this Court was seized with the matter pertaining to constitutional validity of the amendment, so it was put, there was no reason either in law or based on convenience, for me not to determine the residual issue between the parties. This involved the interpretation application of statutes and there were numerous examples of the High Court assuming jurisdiction over such disputes involving tax statutes in particular. It would be an exercise in futility and a waste of money, so it was put, to require this dispute to be dealt with piece-meal.

14.

Applicant's legal submissions:

It was said that the crux of the Applicant's complaint was that it relates to the constitutionality of the retrospective amendment in that such retrospective legislation, which *ex post facto* deems the law at a particular time to be what it was not, offends against the principle of legality and the rule of law which lie at the heart of our constitutional dispensation. The prejudice to the subject of such legislation is only heightened where, as here, it purports to attach adverse consequences to transactions which have been completed and arising from which persons have acquired vested rights before such promulgation. To the extent that the Respondents would seek to rely upon the public statements referred to above which preceded the amendment, it would be contended that these are of no relevance in assessing the legality of retrospective amendment. In any event, on the present facts, no such public statements involved an amendment of the nature of Section 44 (9A). Even if the retrospective amendment was not unconstitutional *per se*, the Applicant contended, in accordance with its second basis, that it did not apply to the distribution, either because that transaction was already completed at the time of the amendment or

because Section 44 (9A) was not capable of being applied in a manner that is fair and practically effective in the context of the ***ITA*** as a whole.

15.

Applicant's argument on the interpretation issue:

It was submitted that Applicant's attack was not on the content of Section 44 (9A), but on the purported retroactivity of the amendment. The prime relief sought was an order of constitutional invalidity. The second order, couched as an alternative to the first, was to the effect that the provisions of Section 44 (9A) of the ***ITA*** did not in fact apply to the distribution when it was made. The second order was based on statutory interpretation. Since I would strictly speaking not be required to decide the constitutional issue if I were to find that the ***Amendment Act***, on a proper construction, did not apply to the transactionary retrospectively, it would be convenient to deal first with the interpretation issue.

In ***Zantsi v Council of State, Ciskei and Others 1995 (10) BCLR 1424 (CC)***, the Court decided that where it was possible to dispose of a case without addressing any

potential constitutional issue, that course should be followed. It was also submitted that whether Applicant succeeded on the constitutional or interpretation issue, it would not ask this Court to actually set aside the disputed assessment. That was for the Tax Court to do in accordance with its powers under Section 129 (2) of the ***Tax Administration Act 28 of 201.***

16.

In the context of retrospectivity of legislation, it was pointed out that South African case law distinguishes between retrospectivity of legislation in the "weak" and "strong" sense. A statutory provision is retrospective in the weak sense if it prospectively effects, or changes the consequences for the future of, pre-existing transactions and matters. An enactment is retrospective in the strong sense if the provision is deemed to have been in force from an earlier date than that on which it was in fact enacted. See: ***National Director of Public Prosecutions v Carolus and Others 2000 (1) SA 1127 at 1138 to 1139, par. [33] to [36].***

Applicant is of the view that in the present case we are concerned with retrospectivity in the strong sense, or retroactivity, inasmuch as Section 34 (2) of the ***Amendment Act*** stated that a new Section 44 (9A) would be deemed to have into operation on 21 February 2007, even though the Amendment Act was only promulgated on 8 August of that year.

17.

The Court's power to grant declaratory relief (in the context of the interpretation argument):

It was submitted that there is ample authority to the effect that the High Court has a power to determine tax cases pertaining to issues of law.

See: ***Metcash Trading Ltd v C:SARS 2001 (1) SA 1109 (CC) at par. 44***, where Kriegler J stated: "Indeed, it has for many years been settled law that the Supreme Court has jurisdiction to and determine income tax cases turning on legal issues…".

The determination of the proper meaning and ambit of a statute is a question of law.

It was submitted in the present context, that the crucial question is whether the statute

that applies to the facts is "sufficiently clear", and that is a question of law. It was submitted that there is no material dispute of fact in relation to any issue that could impact upon the interpretation question. The nature, content and timing of the distribution is common cause. The date of promulgation of the ***Amendment Act*** is clear. The legal and financial impact of the amendment on taxpayers in the position of the Applicant and its holding company is also not in dispute. The Applicant's BEE motivation for the transaction is not relevant to the interpretation of the ***Amendment Act***. The submission was therefore that there is no impediment to this Court determining the legal issue of interpretation. Relief sought in this context is limited to a declaratory order, and once the ambit of the law has been established, the Tax Court will be asked to address the merit of the assessment in that light. I would therefore not be impinging unjustifiably on the jurisdiction and powers of the Tax Court. On ordinary principles, a Court will always retain a discretion whether or not to entertain an application for declaratory relief.

See: Section 21 (1) (c) of the ***Superior Courts Act 10 of 2013*** and ***Herbstein and Van Winsen, The Civil Practice Of The High Courts Of South Africa, 5TH Edition at p. 1430***.

18.

The merits of the interpretation issue:

It was submitted that the ***Amendment Act*** had to be interpreted in the same way as any other statutory provision, and that the question was whether, on a proper interpretation, the introduction of Section 44 (9A) actually had retroactive effect so as to render the distribution subject to STC. Reference was made to ***National Director of Public Prosecutions v Carolus supra***, where the following was said: "An important legal rule forming part of what may be described as our legal culture provides that no statute is to be construed as having retrospective operation (in the sense of taking away or impairing a vested right acquired under existing laws) unless the legislature clearly intended the statute to have effect: see: ***Peterson v Cuthbert and Company Ltd 1945 AD 420 at 430***".

In ***Bellairs v Hodnett and Another 1978 (1) SA 1109 A***, it was said that not only is there a presumption against retrospective activity, but "even where a statutory provision is expressly stated to be retrospective in its operation it is an accepted rule that, in the absence of contrary intention appearing from the statute, it is not treated as affecting completed transactions ..." (at 1148 F – G).

The basis of this presumption was stated in ***Carolus (supra at par. 36)*** to be elementary considerations of fairness which dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly.

Reference was also made to ***Du Toit v Minister of Safety and Security 2009 (1) SA 176 SCA in par. 10*** with reference to an English decision that "generally there is a strong presumption that a legislature does not intend to impose a new liability in respect of something that has already happened, because generally it would not be reasonable for a legislature to do that…".

In ***Carolus (par. 42)*** the Court also referred to the position in English Law and in particular to ***House of Lords in L'Office Cherifien Des Phosphates and Another v Yamachita-Shinnihon Steamship Company Ltd: The Boucraa [1994] 1 AC 486***

([1994] 1 ALL ER 20). In that case the main opinion was delivered by Lord Mustill who … referred with approval to the following statement by Staughton LJ in ***Secretary of State for Social Security and Another v Tunnicliffe [1991] 2 ALL ER 712 (CA) at 724 f to g***: "In my judgment the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree – the greater the unfairness, the more it is to be expected that Parliament will make clear if that is intended".

Lord Mustill continued (at 525 F to H (AC) and 30 e to g (ALL ER): "Precisely how the single question of fairness will be answered in respect of a particular statute will depend on the interaction of several factors, each of them capable of varying from case to case. Thus, the degree to which the statute has retrospective effect is not a constant. Nor is the value of the rights which the statute effects, or the extent to which the value is diminished or extinguished by the retrospective effect of the statute. Again, the unfairness of adversely affecting the rights, and hence the degree of unlikelihood

that this is what Parliament intended, will vary from case to case. So also will the clarity of the language used by Parliament, in the light shed on it by consideration of the circumstances in which the legislation was enacted. All these factors must be weighed together to provide a direct answer to the question whether the consequences of reading the statute with the suggested degree of retrospectivity are so unfair that the words used by Parliament cannot have been intended to mean what they might appear to say". In that context reference was made to the dictum of Wallis J in ***Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 SCA***, where the Judge said the following in par. 18: "Interpretation is a process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production.

Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or un-business-like results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used. Do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation…"

Thereafter, and in ***Bothma-Batho Transport (Pty) Ltd v S. Bothma en Seuns (Edms) Bpk 2014 (2) SA 494 (SCA)***, the following was said (par. 2): "Whilst the starting point remains the words of the document which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being".

19.

In that context it was submitted on behalf of Applicant that while Section 34 (2) of the ***Amendment Act*** expressly makes Section 44 (9A) retrospective to 21 February 2007, it does not expressly state that it affects completed transactions. It is common cause that all the elements of the amalgamation transaction, including the distribution, were completed before the ***Amendment Act*** was passed. It was therefore submitted that the mentioned presumptions should prevail, and that Section 34 (2) should be interpreted as not applying Section 44 (9A) to this completed distribution. It was contended that I should also have regard to the wider consequences of an interpretation that purports to render a Section 44 (9A) retrospectively operative.

The very fact of imposing tax *ex post facto* tax on a completed transaction, is prejudicial and unfair to the taxpayer, who has a well-established right to know what the law is, and to conform his or her conduct accordingly, and to arrange his or her affairs in a manner that attracts the least tax within the context of existing legislation. In this case, the prejudice extended to the BEE shareholder who could not have known that the Applicant had an STC liability when it agreed to purchase the shares. The

Courts have endorsed the mentioned principle and I was referred to ***CSARS v NWK Ltd 2011 (2) SA 67 (SCA) par. 42***.

It was further contended that a Court must pay particular close attention to the practical impact of retrospectivity on the legislative scheme as a whole. The legislator was most unlikely to have intended a provision to operate retrospectively where, apart from purportedly altering the law in the particular respect, it does not at the same time make the consequential modifications, and establish the practical legislative machinery, that will allow the retrospective rule to be practically, fairly and sensibly implemented. The present amendment fails this test according to Applicant, in that the provisions of Section 64B (which deals with STC) in various respects could not sensibly accommodate the introduction of Section 44 (9A) on a retrospective basis.

20.

Payment of STC:

Section 34 (2) of the ***Amendment Act*** had the effect that on 8 August 2007, a distribution by a resultant company (the Applicant), would retrospectively be deemed

to have been a dividend attracting STC. Section 64 B (7) requires that STC must be paid by not later than the last day of the month, following the month in which the "dividend cycle" relevant to such dividend ends. Section 64 B (7) stipulates further that the payment must be accompanied by a return in prescribed form. Failure to comply with this obligation is a criminal offence in terms of Section 75 (1) (a). The effect of Section 34 (2) in relation to a resultant company which was deemed by the new Section 44 (9A) to have declared a dividend on 3 May 2007 was that the company's dividend cycle would have ended on 3 May 2007. It would follow from Section 64 B (7) that the resultant company was obliged by 30 June 2007 to pay the STC and to file the prescribed return. However, as at 30 June 2007 there was no law in force which imposed STC on the distribution and it would thus have been impossible for the resultant company to comply with Section 64 B (7). It was therefore submitted that it was clear that Section 64 B (7) could not apply to the retrospective deemed dividend. This meant that it was necessary for the Amendment Act to have contained provisions to deal with the date for payment and the rendering of returns in respect of retrospective deemed dividends, but it did not. The effect of this was,

according to Applicant, that as at 8 August 2007, the resultant company was immediately both in default of a statutory obligation to pay STC by 30 June 2007, and guilty of a criminal offence for not filing a return on time. This sort of unfair and anomalous consequence could not have been intended and it supports the contention that it was not intended to apply Section 44 (9A) to distributions completed prior to the promulgation of the legislation.

21.

Payment of interest:

The same concerns applied to the payment of interest as contemplated in Section 64 B (9). Section 64 B (9) refers to Section 64 B (7) and imposes interest if the STC is not paid by the required date, i. e. 30 June 2007. Applicant submitted that there could be no obligation to start paying interest as from 1 June 2007 in respect of an STC liability which did not exist at that date. It was thus necessary for the Amendment Act also to introduce provisions regarding interest on unpaid STC arising from retrospective deemed dividends, but it did not contain such provisions.

Corporate shareholders of the resultant company:

If a resultant company was deemed by Section 44 (9A) to have declared a dividend on 3 May 2007, any corporate shareholder of that company that received the dividend would be entitled to an STC credit for such dividend in terms of Section 64 B (3). At the time of receiving the dividend, the holding company would clearly not have recognized the STC credit, since the resultant company was not liable for STC. If the holding company, having received a distribution from the resultant company on 3 May 2007, which was at not that time a dividend, then paid a dividend to its own shareholders shortly thereafter, say on 31 May 2007, the holding company's dividend cycle for STC purposes would have ended on 31 May 2007. If the amended Section 44 (9A) had actually been in force as from 21 February 2007, the holding company would have been able to claim an STC credit in respect of the dividend received by it. But, because no such law was enacted on 8 August 2007, the holding company would have been required to pay STC by 30 June 2007, without any STC credit for the amount received from the resultant company.

It would not be a solution to say that the deemed dividend could simply be claimed by the holding company as an STC credit at a later time. First, the holding company may in fact never be in a position to declare further dividends. Second, only dividends accruing to the holding company during the relevant dividend cycle may be claimed as an STC credit. It follows that if the holding company did not claim the STC credit in respect of the dividend cycle ending on 31 May 2007, it could not claim such credit in respect of any later dividend cycle.

It was therefore contended that in these circumstances the anomalous and patently inequitable situation arises that by virtue of the retroactive introduction of Section 44 (9A), both the resultant company and the holding company, would pay STC on their full respective distributions. One could not suppose that the legislature intended such an anomalous outcome. If it had, one would have expected the amending legislation to contain provisions in its machinery to enable the holding company retroactively to claim the STC credit in respect of the relevant dividend cycle.

23.

<u>Capital gains tax consequences</u>:

Under the law at the time of the distribution, the person receiving a distribution from a company share premium account, would have been deemed to have received a "capital distribution" under par. 76 of the ***Eighth Schedule to the ITA*** dealing with capital gains tax ("CGT"). This would have amounted to a part-disposal of shares under par. 33 of the ***Eighth Schedule***, activating the provisions of that ***Schedule*** and leading to a capital gain or a capital loss, depending on the base cost of the shares. Under the new Section 44 (9A) the distribution was deemed to be a distribution of a profit not of a capital nature. It follows that it would not have constituted a capital distribution for CGT purposes, and would not have given rise to a capital loss or gain in the hands of the shareholder.

The Amendment Act provides no machinery to reverse the capital gain or loss that accrued at the time of the original distribution. This meant that a shareholder who was liable for CGT in respect of the distribution could not receive its capital gain, but must at the same time accept the diminution in value in its shares as a result of the resultant company having to pay STC retrospectively. It was therefore submitted that the

absence of such mechanism in the Amendment Act was another important contextual factor in favour of an interpretation to the effect that the new Section 44 (9A) was not intended to apply to completed distributions.

24.

It was submitted that these concerns were real, and went to the heart of the practical functioning of the STC regime and arise from the plain language of the Act. The consequences of the retrospectivity led to unfair and anomalous results, and it can therefore not be accepted that Parliament intended the new provision to apply to completed distributions. No such anomalies or difficulties arise if the new Section 44 (9A) applies only to transactions and distributions that occurred after its promulgation. In the context of the interpretative challenge it was accordingly submitted that Section 34 (2) should be interpreted to limit the retroactive application of Section 44 (9A) to transactions or distributions that were not complete before 8 August 2007.

It will be noticed from Applicant's argument and certain authorities and dicta relied-upon, that considerations of "fairness" and "unfairness" are sought to be introduced onto the centre-stage.

25.

First Respondent's argument:

First Respondent gave a broader background and explained that in late 2006 and early 2007, the Respondents became aware of a loop-hole in the Income Tax Regime. Section 64 B of the Income Tax Act, levied a tax (STC) on the net dividends declared by companies. Section 44 (9A) created a loop-hole in the STC regime in that it allowed companies engaged in amalgamations to avoid paying STC. This loop hole created a real risk that the National fiscus would suffer extensive and permanent harm as it was put. Accordingly, in the budget speech on 21 February 2007, the Minister announced that legislation was being prepared to close the loop-hole and

that it would be made retrospective to that day. I have referred to the process that followed thereafter.

26.

<u>The loop-hole</u>:

STC was introduced by Section 64 B and 64 C of the ***Income Tax Act***. It was the tax on net dividends, that is, on a company's distribution of its profits to its shareholders. It was not meant to tax capital distributions. That was why par. (f) of the definition of a "dividend" in Section 1 of the ***Act*** excluded any distribution that represented "a reduction of a share premium account of a company".

Section 44 of the *Income Tax Act* facilitates amalgamations. Section 44 (1) defines an amalgamation as a transaction by which a company (the "amalgamated company") disposes of all of its assets to another company (the "resultant company") as a result

of which the amalgamated company is terminated. Section 44 (9) catered for amalgamations, such as the Pienaar Brothers' amalgamation, where the resultant company ("NEW CO") issued shares to the amalgamated company ("OLD CO") which the latter then distributed to its shareholders as a dividend in specie. Such a dividend would ordinarily have attracted STC. Section 44 (9) however exempted it from STC by deeming the distribution not to be a dividend for purposes of STC.

The purpose of this exemption was to render an amalgamation STC neutral by exempting the distribution by the amalgamated company ("OLD CO") of its shares in the resultant company ("NEW CO"). Parliament assumed that the distributable income previously held by the amalgamated company ("OLD CO"), would be rolled over into the resultant company ("NEW CO") and thus attract STC, as it would have done in the amalgamated company ("OLD CO"), if and when distributed by way of dividend declared by the resultant company ("NEW CO").

The assumption however overlooked the fact that distributable income in the hands of the amalgamated company ("OLD CO") may change character and become share

premium in the resultant company ("NEW CO") as happened in the Pier Brothers' transaction. The parties to such a transaction may then avoid STC altogether.

The amalgamated company ("OLD CO") surrenders its distributable income to the resultant company ("NEW CO") in return for new co shares. Its distribution of the new co shares to its own shareholders is a dividend but, exempt from STC by Section 44 (9).

The resultant company ("NEW CO") receives the assets of the amalgamated company ("OLD CO") but, in its hands, they represent share premium and not distributable income. Any distribution to shareholders by the resultant company ("NEW CO"), from its share premium, does also avoid STC because, it is a capital distribution and not a "dividend" as defined.

The amalgamation accordingly allows the parties to avoid STC that would otherwise have been payable by the amalgamated company ("OLD CO") on its distributable income. This is the loop-hole that gave rise to the amendment of the Act in 2007.

26.

The amendment:

In the light of the authorities referred to in par. 17 above, it is necessary and important to look at the circumstances that existed at the time the topic of closing the loop-hole arose, and the Second Respondent's reasons for doing so.

1. SARS was first alerted to the loop-hole by a proposed take-over by Brait of Shoprite in late 2006. This proposed transaction did not materialize but, it meant that SARS became aware of the loop-hole and realized that it could be exploited to avoid STC on a massive scale. SARS accordingly issued a public statement on 10 January 2001 and this, according to Mr W. Trengrove SC on behalf of the First Respondent was the first in a series of seven relevant notifications or warnings to interested taxpayers that the Treasury was intent of closing the particular loop-hole. The public statement said that certain corporate transactions were "structured in such a way that they show complete and reckless disregard for tax morality and South African Tax Law". It gave notice that it intended "to carefully examine these transactions in order to ensure that no impermissible tax loss occurs", and let it be known that "the

architects of certain tax aggressive structures will not be permitted to abuse South African tax provisions in ways clearly unintended by the legislature". The second notification occurred on 21 February 2007 when the Minister of Finance delivered his budget speech. He said that the Government would enact "standard anti-avoidance measures that will commence on conclusion of this speech". This intimation was repeated in the budget review published later that same day. The next notification by way of an elaboration occurred when a press statement was published on 21 February 2007. The statement made it reasonably clear that SARS planned to seek the repeal of the exemption in Section 44 (9) with retrospective effect from 21 February 2007. This would indeed have closed the particular loop-hole. The fourth notification occurred when a ***Draft Bill*** was published on 27 February 2007 that provided for the repeal of Section 44 (9) with retrospective effect from 21 February 2007. SARS made presentations on the ***Draft Bill*** to the Parliamentary Portfolio Committee on Finance on 28 February and 9 March 2007. This was at least the fifth relevant notification to taxpayers. There then followed a process of

public consultations and representations on the ***Draft Bill***. This was the sixth relevant notification in this process.

This was the process during the period March to May 2007 when the Pienaar Brothers' transactions were made and implemented. The seventh relevant notification occurred on 7 June 2007 when the ***Amendment Bill*** was tabled in Parliament. The Amendment no longer sought the repeal of Section 44 (9), because SARS and the Minister had been persuaded by representations on the ***Draft Bill*** to retain the exemption under Section 44 (9) but, to plug the loop-hole in a different way. This was done by enacting a new Section 44 (9A) that rendered a distribution by the resultant company ("NEW CO") of its share premium that previously constituted divisible income in the hands of the amalgamated company ("OLD CO"), subject to STC. The motivation for this amendment was set out in the Explanatory Memorandum that I referred to in par. 11.7 above.

27.

The ***Amendment Bill*** was adopted and then promulgated as the ***Amendment Act*** on 8 August 2007. Section 34 (1) (c) of this ***Act*** introduced a new Section 44 (9A) of the ***Income Tax Act***. Section 34 (2) gave retrospective effect to the amendment and read as follows:

1. "(c) shall be deemed to have come into operation on 21 February 2007 and applies to any reduction or redemption of the share capital or the share premium of a resultant company including the acquisition by that company of its shares in terms of Section 85 of the ***Companies Act, 1973 (Act 61 of 1973)*** on or after that date".

In my view this Section is clear and it applies to "any reduction…" (I underline). On Applicant's argument it must be read to mean that it does not apply to a completed action.

28.

The proper interpretation of the amendment:

Mr W. Trengrove SC agreed that there was a strong presumption against the retrospective operation of legislation, and referred me to a number of decisions in this regard, one of them being ***Veldman v TPP, Witwatersrand Local Division 2007 (3) SA 210 (CC) at par. 26***. This was but a mere presumption and had to yield to the clear intention of the legislature. In ***Du Toit v Minister of Safety and Security supra***, it was explained that this presumption "may be rebutted, either expressly or by necessary implications, by provisions or indications to the contrary in the enactment under consideration". The same approach was adopted by the Constitutional Court in ***Veldman supra*** at par. 48 and 68. It endorsed the position of Innes CJ in ***Curtis v Johannesburg Municipality 1906 TS 308 at 311*** where the following was said: "The general rule is that, in the absence of express provision to the contrary, statutes should be considered as affecting future matters only; and more especially that there should if possible be so interpreted as not to take away rights actually vested at the time of their promulgation. The legislature is virtually omnipotent, but the Courts will not find that it intended so inequitable a result as to the destruction of existing rights unless forced to do so by language so clear as to admit of no other conclusion".

In this case the relevant amendment was clearly retrospective and applied "to any reduction … of the share capital or share premium of a resultant company … on or after that date" (21 February 2007). It was submitted that the clear language of this amendment indicated expressly that it applied to completed transactions.

"Any" ordinarily means "no matter which". It does in itself not suggest exceptions.

See: ***Shorter Oxford English Dictionary, 6th Edition***.

29.

It was contended that in an effort to overcome this, the Applicant pointed to "un-businesslike" and "impractical" consequences that would flow from a retrospective application of the amendment. With reference to the argument that it was impossible to file the relevant return and pay the STC by no later than 30 June 2007, it was submitted that this argument overlooked that, even when a legislation operates retrospectively, the Court "will not give greater retrospective operation to an ***Act*** than its language renders necessary".

See: ***Incledon (Welkom) v Qwa-Qwa Development Corporation 1990 (4) SA 798 (A) 804***.

In this case, Section 34 of the ***Amendment Act*** made it clear that he knew Section 44 (9A) must be deemed to have come into operation on 21 February 2007. It was however silent on the knock-on effect of the amendment on the provisions of Sections 64 B and 64 C. Parliament clearly did not intend to criminalise the failure of a resultant company to render a return for, and pay the STC retrospectively imposed on it before the ***Amendment Act*** came into force. I may at this stage interpose and refer to S. 35 of the Constitution which states that an accused person has the right not to be convicted of an act or omission that was not an offence at the time of the commission or omission. The obvious answer would be to interpret the amendment to mean that the tax payer has duty to file a return and pay the STC, only arose on 8 August 2007 when the amendment came into force. This interpretation would give effect to the purpose of the amendment while, at the same time, observing the rule that the Court should not give greater retrospective operation to the amendment than was necessary.

30.

Such an interpretation was adopted by Innes CJ in ***Curtis v Johannesburg Municipality supra***.

31.

As far as the question of interest was concerned, it was submitted that this was readily overcome by a similar interpretation that the tax payer's duty to pay the STC only came into effect on promulgation of the ***Amendment Act*** on 8 August 2007, which meant that interest would only run from that date.

32.

As far as the debate around the STC credit was concerned, it was submitted that this concern was not well-founded. Once it is understood that the amendment had retrospective effect, it meant that, as a matter of law, there was never any capital gain or loss. Moreover, the amendment came into operation well before the end of the tax

year concerned, meaning no capital gain or loss would have been declared or assessed.

In any event, it was contended that what all of these points have in common, is that they argue against the retrospectivity of the amendment because parliament would have addressed these issues if it intended to render the amendment retrospective. But this overlooks the clear and express language of the amendment, as one cannot, by a process of inference, argue that the legislature intended the amendment to have meaning incompatible with its express and clear language.

33.

Applicant's reliance on cases for "contextual" interpretations, citing ***Natal Joint Municipal Pension Fund v Endumeni Municipality supra, paragraphs 18, 25 and 26***, ***Bothma-Batho Transport (Edms) Bpk v S. Bothma en Seun Transport supra, paragraphs 10 to 15***, do not assist the Applicant's argument. The relevant dicta make it clear that important parts of the context of the statute are the "circumstances intendant upon its coming into existent", the "background to the preparation production

of the document" and the "apparent purpose to which it is directed and the material known to those responsible for its reduction".

In this case, the history of the amendment makes it plain that the Minister, SARS and Parliament were determined to close the loop hole with effect from the Minister's budget on 21 February 2007.

34.

I agree with these submissions by Mr Trengrove SC. It is clear that this was what the Respondents intended to do. They obviously could not commit themselves on the day of the budget speech, as to the exact manner in which this would be done, inasmuch as a public participation process and a parliamentary process had to be followed subsequently. At the date of the parliamentary speech, and shortly thereafter neither of the Respondents could have given a promise or indeed had made a promise that the loop-hole would be addressed in a certain manner only. Such an approach would defeat the whole purpose of a parliamentary debate and all the processes preceding it.

35.

With reference to applicant's complaint that the effect of the amendment is "prejudicial and unfair" to taxpayers, it was said that this submission was unfounded for the following reasons:

1. Section 44 (9) created a loop-hole that taxpayers could exploit to avoid STC. That was unfair to the bulk of taxpayers and the public at large.
2. The effective collection of revenue was essential to the provision of services to ordinary South Africans.

   In ***Metcash Trading Ltd v Commissioner South African Revenue Service and Another 2001 (1) SA 1109 (CC) par. 60***, it was said that the fiscus plays a vital role in the public interest of collecting taxes for the economic well-being of the nation as a whole.
3. The amendment also did not place amalgamating companies in any worse position than other companies or treat them unfairly. On the contrary, it simply ensures that they – like all other companies – pay STC on the distribution of income to their shareholders.

36.

In a recent decision of the Supreme Court of Appeal of South Africa, in ***New Adventure Shelf 122 (Pty) Ltd v The Commissioner of the South African Revenue Service [2017] ZASCA 29 (28 March 2017)***, and with reference to the particular facts before that Court, Leach JA said the following in par. [28]: "In any event, even if in certain instances it may seem "unfair" for a taxpayer to pay a tax which is payable under a statutory obligation to do so, there is nothing unjust about it. Payment of tax is what the law prescribes, and tax laws are not always regarded as "fair". The tax statute must be applied even if in certain circumstances a taxpayer may feel aggrieved at the outcome". In that case the taxpayer was assessed for a capital gains tax arising from the sale of immovable property where the sale was cancelled more than three years after the assessment of capital gains tax, but before the purchase price had been paid in full.

There are of course degrees of "unfairness" and such conceptual reasoning may also become involved in statutes that are prospective in operation. Prospective legislation may, and often does, affect vested rights as well. Such statutes may be tax statutes,

they may relate to property, they may relate withholding tax on dividends as well as to Customs and Excise statutes, by way of example only. Apart from ***Bill of Rights*** considerations, I agree with what was said by the Supreme Court of Canada in ***Gustavson Drilling (1964) Ltd v M.N.R. [1977] 1 S.C.R. 271 at 283***, where Dickson J said: "No one has a vested right to continuance of the law as it stood in the past; in tax law it is imperative that legislation conform to changing social needs and governmental policy. A taxpayer may plan his financial affairs in reliance on the tax laws remaining the same; he takes the risk that the legislation may be changed".

In ***United States v Carlton supra***, the United States Supreme Court, by way of Justice Blackmun said the following, and I agree with due respect in the context of the present debate that "Tax legislation is not a promise, and a tax payer has no vested right in the Internal Revenue Code". It was also pointed out, quite logically, that prospective changes in law may be "unfair" to certain persons or institutions. In the context of tax statutes specifically, rigidity is not to be expected and the fiscus must be able to function effectively taking into account changing demands of society. It must act lawfully of course, but I do not hold that general considerations of "fairness", which is

in any event a relative term, can be the over-riding consideration in the present instance.

If, as in the present context, companies are treated equally in the context of having to pay STC on the distribution of income to their shareholders, it is indeed difficult to argue one particular company resulting from an amalgamation process is being treated so unfairly that a Court would able to say that a retrospective tax statute could not have been intended to be applied to its factual circumstances.

37.

In the light of all of the above mentioned considerations, I therefore hold that the amendment is clear, its purpose is rational and that it applied to all transactions including completed transactions.

The result is that prayer 2 of the Notice of Motion cannot be granted.

38.

The constitutional challenge:

Applicant's argument:

On the assumption that prayer 2 is refused and it is held that the legislature intended the Applicant to pay STC *ex post facto* on the distribution, Applicant submitted that the ***Amendment Act*** was invalid on the grounds of being inconsistent (to the extent of its retrospectivity) with the foundational constitutional value, the rule of law.

39.

Before dealing with this argument, a preliminary issue was referred to. Applicant says the challenge was brought because it had been made subject to a retroactive tax assessment subjecting it to a substantial and unexpected STC bill. Any other taxpayer in the same position would have been equally prejudiced and this prejudice is inherent in having to pay tax that was not payable at the time. The prejudice also extends to the shareholders of the Applicant, including the BEE shareholders whose purchase price was based on the net asset value of the Applicant which did not take account of the additional STC burden at the time.

40.

The Rule of Law and the Constitution:

I was referred to a number of academic writings in this context and it was quite correctly submitted that not only must Government act in accordance with laws, but also that the laws must have a certain essential quality, namely, in the present context, that laws should be reasonably clear, accessible and prospective in their operation. See: ***B. Beinart, (1962) Acta Iuridica 99***, where the following was said at 106: "Several of the attributes or tendencies of law outlined above are not only its natural consequences which explain why the Rule of Law that is preferable to the rule of discretion; they at the same time indicate what are the desirable features in the formulation of legal rules. To these attributes legal rules should therefore as far as possible conform, and if they do not, then, even if they have been lawfully enacted, they would infringe the principles of the Rule of Law. Of such features the prime one is that of certainty; which has rightly been addressed by modern authors … It is an element of certainty which enables persons to know and predict their rights, and

therefore the Rule of Law postulates that law should not be formulated in wide general term but should be reasonably clear and precise; otherwise a decision by discretion is imported. It also postulates that laws should not be applied retrospectively to the disadvantage of individuals, for retrospective laws give the individual no fair chance of knowing and predicting his rights and of knowing how to regulate his conduct unless he be remarkably prescient …"

Section 1 (c) of the Constitution and read with Section 2, provides that the Rule of Law is one of the founding values of the Constitution and that any law of conduct, inconsistent with the Constitution, is invalid. Given this status, all arms of Government are bound by the fundamental value of the Rule of Law, so it was correctly submitted.

41.

With reference to ***Dawood and Another v Minister of Home Affairs 2000 (2) SA 936 (CC) at par. 47***, where it was said that "an important principle of the Rule of Law (is) that rules be stated in a clear and accessible manner", it was submitted that in the

present context the fundamental premise is that persons subject to the law must be able to find it, and understand it, so that they can regulate their affairs accordingly. A tax payer is also entitled to organise his financial affairs in such a way as to pay the least possible tax, and in this context I was referred to ***CSARS v NWK Ltd 2011 (2) SA 67 (SCA) at par. [42]***. As a general rule this is of course so, although a Court will in appropriate instances carefully look at the form of a particular transaction and examine its true nature and substance. It is clear that the general principle that a taxpayer may organise his financial affairs in such a way as to pay the least tax permissible is not cast in stone, and the power of a Court to examine any particular transaction as to its true nature and substance does not mean that this power would be in conflict with the mentioned principle. This was clearly formulated in ***Erf 3183/1 Ladysmith (Pty) Ltd and Another v Commissioner of Inland Revenue 1996 (3) SA 942 (A) at 953 A - F***.

I was also referred to ***President of the Republic of South Africa and Another v Hugo 1997 (4) SA 1 (CC) at par. [102]***, the minority judgment of Mokgoro J. In the same vein one can refer to ***Pharmaceutical Manufacturers Association of South Africa: In***

re Ex parte President of the Republic of South Africa 2000 (3) SA 674 (CC) at par. [39]. In ***Veldman v Director of Public Prosecutions: Witwatersrand Local Division 2007 (3) SA 210 (C)***, Mokgoro J, writing for the minority said the following at par. [26], with reference to ***Calder v Bull 3 US 386 (1798) at 388 and 396***: "Generally, legislation is not to be interpreted to extinguish existing rights and obligations. This is so unless the statute provides otherwise or its language clearly shows such a meaning. That legislation will affect only future matters and not take away existing rights is basic to notions of fairness and justice which are integral to the Rule of Law, a foundational principle of our Constitution. Also central to the Rule of Law is the principle of legality which requires that law must be certain, clear and stable. Legislative enactments are intended to "give fair warning of their effect and permit individuals to rely on their meaning until expressedly changed".

As it stands, this exposition is generally accepted, but it must be said that context is everything in law, and obviously one needs to examine the particular statute and all the facts that gave rise to it. This principle applies expressly in Criminal Law. See: Section 35 (3) (l) of the ***Constitution***, but our Courts have yet to consider definitely

whether outside the Criminal Law context, retrospective legislative amendments can be constitutionally valid.

It was therefore submitted in the light of the mentioned constitutional imperative, the Courts must vindicate the Rule of Law by setting aside legislation which contravenes that principle. No longer are the Courts limited to techniques of strict statutory interpretation in the light of presumptions to express their disapproval of breaches of the Rule of Law. Such legislation is contrary to the ***Constitution*** and therefore invalid.

42.

I was also referred to the provisions of Section 172 (1) (a) of the ***Constitution*** for which obliges Courts in determining constitutional matters to declare that any law which is inconsistent with the ***Constitution*** to be invalid to the extent of its inconsistency.

43.

Foreign law:

It was submitted that foreign law could provide some guidance, although ultimately the matter would have to be decided on the basis of our own constitutional requirements. It was also not strictly required to take account of International Law in terms of Section 39 (1) (b) of the ***Constitution*** as the Applicant herein did not rely directly on a right in the ***Bill of Rights***. (Apart from the fact that at a later stage a further point was raised that the retrospective amendment unlawfully infringed the Applicant's rights to property.)

I was then referred to the position in the United States, where retrospective amendments to tax laws have been held to be constitutional permissible where they meet a "due process" test, which is linked to the rationality of the legislative purpose of the amendment.

See: ***United States v Carlton supra***.

I have already referred to the ***Carlton decision*** and the fact that the "detrimental reliance principle" is not limited to retroactive legislation, an observation which is in my opinion entirely logical.

The rationality principle that must underlie a legislative purpose is of course also part of our constitutional reasoning, and the ***Pharmaceutical Manufacturers Association decision supra*** makes this abundantly clear.

In the context of the United Kingdom, it was submitted that those Courts have not been required to decide a challenge to retroactive amendments on the basis of the Rule of Law principle, which does not have formal constitutional status, but that retroactive tax laws have instead been challenged on the basis that they infringe the right of tax payers to peaceful enjoyment of their positions under the European Convention of Human Rights. It is true that the United Kingdom does not have a Bill of Rights, which expressly, such as in the South African Constitution, states that the Rule of Law is a foundational principle.

It is in my view abundantly clear that the Rule of Law principle applies in the United Kingdom. See for instance: ***R (Evans) v Attorney General [2015] UKSC at par. 52***.

In ***Halsbury's Laws of England, 5TH Edition 2014, Vol. 20***, reference is made to this principle as being part of the legal system. The ***Constitutional Reform Act 2005***, also

declared in S. 1 (a) that nothing in its provisions adversely affects the existing constitutional principle of the Rule of Law.

In the context of the position in the United Kingdom, I was referred to ***National Westminster Bank plc (Respondents) v Spectrum Plus Ltd and Others (Appellants) [2005] UKHL 41***.

In the present context it is worthwhile to refer to certain *dicta* of Lord Nicholls of Birkenhead. It was amongst others argued that the decision in ***Siebe Gorman and Co Ltd v Barclays Bank Ltd [1979] to Lloyds Rep 142*** was wrong and should be overruled. The Judges were in agreement with that contention, but it was similarly submitted to them that they should overrule that decision for future purposes only. In that context, Lord Birkenhead made some relevant observations: "

4. The starting point is to note some basic, indeed elementary features of this country's judicial system. The first concerns the essential role of Courts of law. In the ordinary course the function of a Court is adjudicative. Courts decide the legal consequences of past happenings. Courts make findings on disputed

questions of fact, identify and apply the relevant law to the facts agreed by the parties or found by the Court, and award appropriate remedies.

5. The second feature concerns the wider effect of a Court decision on a point of law. To promote a desirable degree of consistency and certainty about the present state of "the law", Courts in this country have all adopted the practice of treating decisions on a point of law as precedents for the future. If the same point of law rises in another case at a later date the Court will treat a previous decision as binding or persuasive, depending on the well-known hierarchical principles of "*stare decisis*".

6. The third feature is that from time to time Court decisions on points of law represent a change in what until then the law in question was generally thought to be. This happens most obviously when a Court departs from, or an Appellate Court overrules, a previous decision on the same point of law. The point of law may concern the interpretation of a statute or it may relate to a principle of "a judge-made" law, that is, the common law (which for this purpose includes equity). A change of this nature does not always involve departing

from or overruling a previous Court decision. Sometimes the Court may give a statute, until then free from judicial interpretation, a different meaning from that commonly held.

7. The fourth feature is a consequence of the second and third features. A court ruling which changes the law from what it was previously thought to be operates retrospectively as well as prospectively. The ruling will have a retrospective effect so far as the parties to a particular dispute are concerned, as occurred with the manufacturer of the ginger beer in ***Donahue v Stevenson [1932] AC 562***.

8. People generally conduct their affairs on the basis of what they understand the law to be. This 'retrospective' effect of a change in the law of this nature can have disruptive and seemingly unfair consequences. 'Prospective overruling', sometimes described as 'non-retroactive overruling', is a judicial tool fashioned to mitigate these adverse consequences. It is a shorthand description for Court rulings on point of law which, to greater or lesser extent,

are designed not to have the normal retrospective effect of the judicial decisions.

9. Prospective overruling takes several different forms. In its simplest form prospective overruling involves a Court giving a ruling of the character sought by the bank in the present case. Overruling of this simple or 'pure' type has the effect that the Court ruling has an exclusively prospective effect. This ruling applies only to transactions or happenings occurring after the date of the Court decision. All transactions entered into, or events occurring before the date continue to be governed by the law as it was conceived to be before the Court gave its ruling.

10. Other forms of prospective overruling are more limited and 'selective' in their departure from the normal effect of Court decisions. The ruling in its operation may be prospective and, additionally, retrospective in its effect as between the parties to the case in which the ruling is given. More the ruling may be prospective and, additionally retrospective as between the parties in the case in which the ruling was given and also between the parties in any other cases

already pending before the Courts. There are other variations on the same theme".

The process described by the learned Judge is almost the same in the South African legal system. The South African ***Constitution*** gives this process a constitutional blessing inasmuch as Section 172 (1) (b) states that, when a law is declared inconsistent with the ***Constitution*** and thus invalid, a Court may make an order that is just and equitable including an order limiting the retrospective effect of the declaration of invalidity.

The learned Judge also referred to the general practice that had been adopted in the United Kingdom with reference to the decision by Lord Reid in ***West Midland Baptist (Trust) Association Incorporated v Birmingham Corporation [1970] AC 874, 898 - 899***, where the following was said: "We cannot say that the law was one thing yesterday but is to be something different tomorrow. If we decide that [the existing rule] is wrong we must decide that it always has been wrong, and that would mean that in many completed transactions owners have received too little compensation. But that often happens when an existing decision is reversed".

44.

It is clear from this incisive summary that not only do certain statutes affect rights or vested rights retrospectively, but that decisions of Courts do so in many cases. I am not aware of any authority, and none has been provided to me that those results would mean that any such statute or decision is unconstitutional *per se*, irrespective of the reason for the adoption of the statute or the facts of a particular case before a Court of law, and irrespective of its wording.

In ***Deutsche Morgan Genfell Group Plc v HMCIR [2006] UKHL 49***, Lord Hoffmann again pointed out (at par. 23) that it is a common occurrence that judicial decisions change the law retrospectively inasmuch as rulings will have a retrospective effect as far as the parties to a particular dispute are concerned at the very least.

45.

In ***THE QUEEN on the application of R. HUITSON v HMRC [2010] EWHC 97***, (Admin) the debate concerned an employment arrangement that sought certain tax

advantages. It was accepted by the High Court that the particular arrangement had no genuine commercial purpose and could be described as artificial. A particular statute had the effect of changing fiscal legislation regarding double taxation relief with a retrospective effect and the question before the Court was whether such retrospective amendment struck a fair balance as required by ***Article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms***, with reference to the material jurisprudence of the European Court of Human Rights. In the context of the particular legislation that was given retrospective effect in the interest of public policy Parker J said the following at par. 33: "It seems to me that these two features emphasized the importance Parliament attached to the public policy to which I have referred. In my view, these events sent out a clear signal to taxpayers and their advisors that the legislature would be very likely to take effective and decisive steps to count, even with retrospective measures, any attempt, through artificial arrangements, to take advantage of a double taxation arrangement …"

Dealing with Article 1 to the mentioned Protocol which read as follows: "Every natural legal person is entitled to the peaceful enjoyment of his possessions. No one shall be

deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of International Law.

The preceding provision shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties", the learned Judge referred to certain general propositions:

1. In securing the payment of taxes, a national authority must strike a "fair balance" between the demands of the general interest of the community and their requirements of the protection of the individual's fundamental rights, including the right that a person enjoys to "the peaceful enjoyment of his possessions";
2. In framing and implementing policies in the area of taxation, the State will enjoy "a wide margin of appreciation and the Court will respect the legislature's assessment in such matters unless it is devoid of reasonable foundation". The domestic analogue of the margin of appreciation is the

discretionary area of judgment and is especially wide in the field of social and economic policy;

3. The more the subject matter of legislation concerns matters of broad social policy, the less ready will be a Court to intervene;
4. Nonetheless the Court will carefully examine all the relevant circumstances including the history of the challenged provisions, to determine whether a fair balance has been struck;
5. These principles apply to tax legislation that is retrospective;
6. With reference to ***Article 1 of Protocol No. 1***: retrospective legislation is not as such prohibited. The question to be answered is whether in the Applicant's specific circumstances, the retrospective application of the law imposed an unreasonable burden on them and thereby failed to strike a fair balance between the various interests involved;
7. The imposition of a tax is not devoid of reasonable foundation by reason only that it may have some retrospective effect.

I also regard these propositions as being particularly instructive in the present context, although the 'fair-balance' test is not the test in our constitutional dispensation.

46.

I was provided with a very lengthy report on "Retroactivity of Tax Legislation by ***Gribnaw JLM, and Pauwels, MRT (EDS.) (2013) (EATELP International Tax Series; Number 9) Amsterdam***, published in 2013. This report summarizes the position in most European countries in the context of the national reports presented to the Congress in 2010. It refers to the position in Germany where the Constitutional Court held in principle that there was a ban on retroactivity, but subject to exceptions. It stated that the first exception is the situation in which a reasonable taxpayer cannot claim trust or confidence in the still prevailing legal situation, which is the case from the date of adoption of a Bill in Parliament, or in the case of an evidentially unclear or unconstitutional legal situation. A second exception would be the situation in which the confidence in the prevailing legal situation has to be subordinated to the interest of the legislator to change the law retroactively. This applies for instance if the

disadvantage to the taxpayer is negligible in the context of the principle of proportionality, and also where the legislator can claim overriding, urgent or compelling public interest. In Chapter 2.2, the observation is made that the principle of legal certainty is a fundamental principle of law, but it is also beyond discussion that the legislator should be able to change its legislation, including tax legislation. There are various justified reasons to change tax legislation, such as a change of tax policy and social and technical developments.

The Congress document comprises more than 500 pages and further reference thereto would be beyond the scope of this judgment, but one could easily write a doctoral thesis on this topic. It was also pointed out that an important consideration was whether there are constitutional limitations to retroactivity of these tax statutes. Although one is reminded that tax statutes should be interpreted in the same way as any other statute, it is important to take into account the policy behind the legislation as well as the wording of the legislation itself. I have briefly dealt with these two considerations.

Application to South Africa:

It was submitted by Applicant that as in Germany, the Rule of Law compels a conclusion that strongly retrospective tax statutes should be presumed to be constitutionally invalid. It was however expressly not suggested that our constitutional dispensation would never allow the legislature to expressly introduce retrospective legislative amendments. There could well be exceptional cases where this could be done without attracting constitutional sanction. The touch-stone would however always be whether the retrospectivity amounts, in the particular circumstances of their case, to a contravention of the Rule of Law.

In that context I was referred to the Bozoleck J in ***Robertson v City of Cape Town 2004 (5) SA 412 (C) in par. [135]***. It was said therein that "retrospective legislation contravenes the Rule of Law where it unreasonably or unfairly impairs the ability of those bound by the law to regulate their conduct in accordance therewith". I may just add at this stage there are obviously degrees of unfairness and not all laws are "fair" and the real question would be whether a law is "unjust" i. e. whether it passes

constitutional muster, i. e. was the law, accepting its language is clear, passed for a rational reason? I do not agree, if that was suggested, that “unfair impairment” is the appropriate test in our constitutional dispensation.

48.

It was then submitted that given further facts to be discussed below it was unnecessary for me to make far-reaching statements of principle as to when exactly exceptional circumstances will exist to justify retrospectivity, although I may choose to do so. It was submitted that this case could be decided on a simple factual basis.

49.

It was contended that knowledge of proposed retrospective amendments to the law is fundamental to the Rule of Law, and essential for taxpayers to be able to regulate their conduct in accordance with those amendments. Hence, it was submitted that unless there was adequate warning of the intention to implement the change retrospectively, such that the taxpayer cannot be said to have been entitled to rely on

the law continuing to apply, a retroactive amendment could never pass constitutional muster. No authority was given for this proposition and I will deal with it when I consider the Respondents' arguments in this particular context. One can at this stage obviously ask what is the extent of the knowledge that one is entitled to have, and what does amount to an adequate warning in each particular case? It was argued that assuming that the Courts were to conclude that the issue of adequate warning can justify a retroactive tax amendment, the precise level of warning that would meet the standard, and how it would have to be publicly communicated, would remain an issue. The formal adoption of a Bill by Parliament would be easier to defend than less formal public communications at an earlier stage of the process, given the numerous changes which can arise in the course of the pre-legislative and legislative processes. It was said that the requirements of accessibility and forewarning are not achieved by speeches made in Parliament, press statements and the like. Such documents may or may not come to the attention of persons affected by the matters with which they deal. Furthermore, even if a person learns of a proposed legislative change, he cannot be expected to regulate his affairs in accordance with a position which may or may

not be enacted in the future, nor can he fairly be expected to refrain from economic activity until the law is passed. This applies to the present facts, where the Applicant had a compelling business-need to proceed with the BEE transaction (of which the distribution was a necessary element) so as to position itself to acquire future business. Indeed, in this case, it was said, as at 21 February 2007, being the date of the retrospective operation, not even the Commissioner himself had conceptualized how Section 44 (9) of ***ITA*** would be amended, let alone communicated to the public how it would ultimately operate.

50.

It was also submitted that to the extent that a "warning" of retrospective legislation may be potentially relevant as justification for retrospectivity, that warning must self-evidently pertain to the actual amendment that is implemented. It does not help to warn of a specific change, and then to implement something different with retrospective effect. This is however precisely what happened in this case and this is fatal to the validity of the statutory provision. No authority was given that would support

this approach and I am certainly not aware of any. In any event, I do not agree that a "precise" warning is required, if any at all. Economic circumstances generally will demand a degree of fluidity. Rigidity does not belong to a modern jurisprudence, and even less in tax legislation.

51.

The Commissioner contended that the reasons for adopting the retrospective approach would be relevant as to whether the legislation offended the ***Constitution***. It was argued that whether this is correct, and whether revenue interest would qualify as public interest considerations, need not be decided here. I may interpose to say that I do not agree and am of the view that this is indeed a relevant consideration and I will deal with that topic. Applicant's Counsel continued to argue that before the State can attempt to rely on such an argument, it would be incumbent upon it to demonstrate the relevant and compelling public interest considerations that justify the departure from the underlying norm of the Rule of Law. Such justification must relate not only to

the decision to amend the law *per se*, but also to why the change had to operate with retrospective effect. In the absence of such justification the amendment cannot stand. It was then submitted that in the present case, the Respondent had failed to provide any, let alone adequate, justification for the retrospective insertion of Section 44 (9A).

52.

The amendment differs from the "warnings":

It was argued that for purposes of understanding the Applicant's submissions, it was necessary to be aware of two types of distribution to shareholders that can take place in the context of Section 44 amalgamation transactions. The first would be a distribution of the consideration shares which are received by the amalgamated company. Distribution of such shares is a compulsory part of an amalgamation transaction as the amalgamated company had to be liquidated in order to comply with the provisions of Section 44. The second distribution is not an essential requirement. Where the resultant company has paid for the assets with an issue of par-value shares, the shares are usually issued at a premium which is reflected in the share

premium account. That constitutes capital available for distribution to shareholders as a dividend by the resultant company. The two types of distribution differ in at least the following fundamental respects: the first is a compulsory part of a Section 44 transaction, whereas the second is not, and, the first is made by the amalgamated company, whereas the second is made by the resultant company.

53.

The facts pertaining to the process of an amendment of Section 44 and the public statements made in this regard are common cause.

The starting point was a press statement released by the Commissioner on 21 February 2007. Shortly after the budget speech, Treasury released a ***Draft Taxation Laws Amendment Bill*** for public comment. It was not formally introduced as a Bill in parliament at that stage. It proposed that Sections 44 (9) and 44 (10) be deleted. The proposal that Section 44 (9) be deleted had apparently been identified by the Commissioner and National Treasury as a “simple solution” to the concern that the amalgamation transactions involved potential tax free distributions. The Minister had in fact testified that a legislative amendment was necessary in order to align the

wording of Section 44 (9) with what he alleged to be the intention of the legislature. Thus, he identified as the "problem" the provisions of Section 44 (9), which was ultimately not amended, and not the definition of "dividend" which was ultimately amended. Since this proposed amendment would have applied only to the compulsory distribution of consideration shares by an amalgamated company, it had no bearing whatsoever on the tax position of a resultant company such as the Applicant. The repeal of Section 44 (9) would not have caused the Applicant's distribution of share premium to be treated as a dividend.

The ***Draft Bill*** was introduced for public comment, and then followed a process of public submissions within the Parliamentary Portfolio Committee. The ***Draft Bill*** was not cast in stone and it did not emanate from the legislature, but the Executive which does not make laws. In those circumstances, the public could not be expected to view the ***Draft Bill*** as a firm indication of the likely intent of the legislature, so it was argued. The process of public hearings before the Portfolio Committee, and the receipt of public comment, cannot amount to a firm statement of specific legislative intent of which the public should have been aware. Moreover, there was substantial public

resistance to the proposed amendment to Section 44, with a number of Respondents not accepting that there was any need for a change at all.

54.

A revised Draft Legislation was then prepared and submitted by SARS to the Treasury on 18 April 2007, but this is not before me.

55.

The communication by the Commissioner to Treasury of certain proposals does not amount to a public “warning” as to the specific changes to the law so it was contended.

56.

The matter then returned to the Portfolio Committee. There were further public hearings on 4 May 2007. Representatives of SARS and Treasury presented a draft response document which had not been approved by either the Commissioner or the Minister. This addressed the resistance to the original proposal.

57.

It was only after the 4 May 2007 meeting that approval was sought from the Commissioner and the Minister (which was granted), to alter the original remedy proposed. The Minister states that “after consulting with the relevant stakeholders and the public in terms of the legislative process, the matter was reconsidered, and a compromise was reached, taking into regard the concerns raised during the consultative process. It was contended that this is hardly an unusual situation where legislation is subject to public participation processes, and therefore subject to significant change before the final path is set.

The formal introduction of the Bill into parliament occurred on 7 June 2007 and this was the first public indication of a firm intention to introduce legislation to would subject a distribution of share premium by a resultant company to tax, let alone that that

particular solution was intended to operate retrospectively. This occurred more than a month after the Applicant's distribution took place.

58.

The Bill was then put before Parliament and accepted. It was argued that it is entirely feasible that the legislature, exercising its constitutional powers, would amend or alter the Bill, in accordance with the necessary parliamentary processes. This was a further reason why even legislation proposed in a formal Bill in parliament has limited significance when assessing the extent to which members of the public should anticipate the possibility of the law being amended retrospectively.

59.

It was submitted that on no basis does the process followed by the Respondents justify the conclusion that adequate warning of the legislative change that was actually implemented was given, let alone that it would operate retrospectively. It therefore

could not be said that when the Applicant made its long-planned distribution, taxpayers in South Africa knew, or should have known, that the law affecting the “dividend” status of such a distribution might change with retroactive effect.

60.

Applicant then dealt with the argument of Respondents in this particular context, namely that the amendment that was eventually introduced was sufficiently linked to the original proposal to deprive tax payers of the right to rely on the existing law in regard to Section 44 as a whole. The First Respondent said the following in his Affidavit: “At no stage … was there any doubt that the Treasury and SARS regarded the pre-amendment wording of Section 44 as fundamentally problematic, the Treasury and SARS would continue to pursue a change to the existing legislation, and that such legislation would be retrospective in operation”.

It was argued that on no basis was this good enough to justify the obvious infringement of the Rule of Law caused by making an unannounced amendment to legislation applicable to a taxpayer. The Commissioner suggested that as a result of the proposal to do away with Section 44 (9) retrospectively, all taxpayers ought to have lost any

confidence in any part of Section 44 continuing in force. It seems to me that this "confidence" argument applies equally in German Law to a large extent, but the correct question may well be, and that is the one asked in the American context, namely whether tax laws do make a promise irrespective of the demands of the fiscus? The answer there was a resounding "no". The ***Carlton decision supra*** made this clear, amongst others.

61.

It was submitted that I ought to adopt a rigorous approach towards infringements of the Rule of Law. Just as the Courts have extended themselves to the maximum in applying the presumption against retrospective legislation, so to should they require a very high level of correlation between the changes to the law of which taxpayers were notified, and the actual legislative amendments that follow, before being satisfied that taxpayers must suffer the consequences of the change retrospectively. The vague notion that taxpayers should reasonably anticipate some change to the law, whether or not it is the one that is originally announced, is clearly incompatible with the

warranted rigorous approach. It was submitted as a result that Respondents could not argue that the amendment gave effect to what was warned of.

62.

With reference to the Minister's suggestion that following the announcement of 21 February 2007, the Applicant and others would have been placed on guard to arrange their tax affairs in a manner that does not produce the loss of the STC which the intended legislation was to address, it was argued that what the intended legislation was to address, was the loss of STC by virtue of Section 44 (9) distribution, not a distribution of share premium by the resultant company. The Applicant could not be expected to arrange its tax affairs in relation to intended legislation which does not pertain to its situation at all. For these reasons, it was submitted that a sufficient public advance warning of a retrospective change was missing in this case. This would make it unnecessary for me to decide whether a prior public warning would in fact suffice in principle to validate retrospective legislation, or what the precise nature of an effective warning would be. In this case there was, in effect, no warning at all.

63.

For these reasons it was submitted that retrospective introduction of Section 44 (9A) without prior and precise warning, fatally infringes the Rule of Law and justifies the constitutional relief sought.

I am not aware of any authority or legislative provision that provides that a fairly precise warning need to be given before the legislature can pass retrospective legislation, whether in general, or in the case of a tax statute. In the latter instance, economic demands must be considered in the context of the purpose and effect of an intended statute. If the tax statute is rationally connected to a legitimate purpose, no precise warning is required, if one at all.

64.

Justification for retrospective addition of Section 44 (9A):

It was submitted that faced with a clear breach of the Rule of Law, the Respondents presumably intend to argue that public interest considerations come to the rescue in justifying the breach. The Commissioner stated in the Answering Affidavit that he accepts that there may be circumstances in which retrospective legislation will offend the ***Constitution***. Whether this is the case will depend on the nature of this legislation concern, the effect on members of the public and the reasons for adopting the retrospective approach. This is especially the case in the context of tax legislation which is enacted for the benefit of the fiscus and thus the country and the public as a whole. The Commissioner then gave detail as to why it was considered that there was a real risk that the national fiscus would suffer extensive and permanent harm if the particular legislation was not made retrospective. The Commissioner then gave details as to why, during November 2008, SARS officials were alerted to a legislative defect that had existed since November 2002, but that was then at risk of coming to be exploited in the context of a possible Brait / Shoprite transaction. If that transaction had proceeded the loss to the fiscus would have been R 1.5 billion plus. It is not necessary to refer to any detail in this regard as it was argued, at the level of principle,

that it is not competent to describe existing legislation as somehow being “defective”. The law as it stood at the time was a due product of the legislative process. As with all tax legislation, it regulated the tax consequences of specific types of transaction and expressly permitted the amalgamated company to distribute consideration shares STC-free. Similarly questionable, at the level of principle, so it was put, is the contention that retaining the law as it was created a risk of “extensive and permanent harm” to the fiscus. Since “harm” presupposes the loss of something already held, this suggests that the fiscus is in fact “entitled” to more tax than the law provides. This principle cannot be applied to tax law. What the fiscus is entitled to is what the law provides. In any event, even if “harm” were a legitimate consideration, the Applicant submitted that no case has been made out to this effect inasmuch as there was no suggestion that in the five years that Section 44 had been in force, any tax payer had “used” the provisions of the Section, or that the fiscus actually suffered any “loss”. If the Shoprite transaction was the primary “driver” for the amendment, once that transaction was off the table, the legislature had no reason to fear any particular prejudice to the fiscus if the amendments were not retrospective. There was also no

concrete evidence that any other amalgamation transaction was proposed to take place, or actually did take place, in the period between February and August 2007. There was also no evidence to support the loose averment that there was a real likelihood of a "flood of Section 44 amalgamations". There was also no evidence that the Commissioner would have been unable to apply the general anti-avoidance provisions to such transactions if they were undertaken for the sole or main purpose of obtaining a tax benefit.

It was also argued that the Respondents had put up no facts or explanations why the ultimate solution had to be made retrospective. The fact that Government identifies the need "to close any tax avoidance schemes in relation to the STC" obviously does not mean that this must be done with retrospective effect.

65.

Remedy:

If I were to find that the ***Amendment Act*** was unconstitutional I am empowered by the provisions of Section 172 (1) (b) of the ***Constitution***, to make any order that is just

and equitable. It was submitted that in the present context a just and equitable order would entail a remedy of severance.

See: ***Coetzee v Government of the Republic of South Africa 1995 (4) SA 631 (CC) at par. 16***.

In this case severance would merely entail the striking out of the words "shall be deemed to have come into operation on 21 February 2007", and the words "on or after that date" from S. 34 (2) (c) of the ***Amendment Act***. This would remedy the unconstitutionality of the ***Amending Act***, but leave all of its remaining provisions, which embody "main objective of the Statute" intact and operate prospectively. Severance in this case would not require any "special treatment" and there would be no need for an order suspending the order of constitutional invalidity. Applicant also asked for an order as to costs, including the costs of two Counsel.

66.

First Respondent's argument:

The constitutional validity of the amendment:

Apart from the challenge relating to Section 25 of the ***Bill of Rights*** which was introduced at a later stage, Applicant's main challenge related to the provisions of Section 1 (c) of the ***Constitution*** – the Rule of Law, and did in this context not rely on any provision of the ***Bill of Rights***.

67.

It was submitted by Mr W. Trengrove SC on behalf of First Respondent, that the ***Constitution*** does not in general out-law retrospective legislation, except in the context of Criminal Law, i. e. Section 35 (3) (l). The question therefore was to which extent the entrenchment of the Rule of Law inhibited or prohibited retrospective legislation. It is correct that our Courts have not squarely considered the issue and certain limited comments have all been in passing.

See: ***Pharmaceutical Manufacturers Association of South Africa: In re: Ex parte President of the Republic of South Africa supra at par. 39***;

Veldman v Director of Public Prosecutions supra, par. 2;

Robertson v City of Cape Town supra at par. 92, which was reversed on appeal to the Constitutional Court in ***City of Cape Town v Robertson 2005 (2) SA 323 (CC)***, although the Constitutional Court did not with the retrospectivity issue.

68.

The Applicant also accepted that the Rule of Law does not preclude retrospective legislation altogether. In the present case, Applicant conceded only a very narrow exception, namely "when there was adequate warning of the intention to implement the change retrospectively". Therefore, in this case, it was Applicant's contention that the retrospective amendment was invalid, because there had not been adequate notice for its enactment.

Mr Trengrove SC submitted that this approach is untenable for the following reasons:

1. It is inconsistent with the approach in the foreign jurisdictions to which our Courts have frequently look for guidance in such matters, such as Canada, the United States, the European Union and the United Kingdom;
2. It is inconsistent with the approach the Constitutional Court has laid down in relation to the constitutional scrutiny of legislation; and

3. The Applicant's challenge must in any event fail, even on its own test.

69.

Retrospective legislation, a necessary tool of modern Government:

It was submitted that retrospective legislation is a necessary tool of modern Government throughout the world's leading democratic societies. I will refer to some examples hereunder.

There are also examples of such approach in South Africa. The following examples were given:

1. The ***Income Tax Act*** always proceeded from the unspoken premise that a Trust was a person in law, and thus subject to taxation. The High Court in ***Friedman v CIR 1991 (2) SA 340 (W)***, held in October 1990, that a Trust was not a person in law and was thus not subject to taxation. The judgment of the High Court was upheld in the Appellate Division in ***CIR v Friedman 1993 (1) SA 353 (A)***.

The implications of the judgment would have been calamitous. Parliament therefore moved quickly to undo it and did so by the ***Income Tax Act 129 of 1991***, by which the main Act was amended by defining a “person” to include a Trust. The amendment only came into force in July 1991, but with retrospective effect from March 1986, i. e. with retrospective effect of more than five years. It needs scarcely be said that numerous vested rights would have been affected by this amendment;

2. In ***Cohen Brothers Furniture v Minister of Finance 1998 (2) SA 1128 (SCA)***, the Court was concerned with a withholding tax on dividends levied in the Ciskei. A judgment of the South African Special Income Tax Court, handed down in March 1992, cast doubt on the validity of the Ciskei tax. The Ciskei Government thereupon enacted new legislation for the imposition of the withholding tax on dividends in 1993, with retrospective effect from March 1985;
3. There have also been occasions when it has been necessary for Parliament to make even more drastic retrospective amendments. When there was doubt

cast on the validity of the ***Exchange Control Regulations***, promulgated under the ***Currency and Exchanges Act 9 of 1933***, Parliament amended the main ***Act*** by ***Act 23 of 1987***, and thereafter by ***Act 48 of 1988***, on both occasions with retrospective effect from 1 December 1961. The amendments were thus made with retrospective effect of some 26 and 27 years respectively;

4. Our Courts have always developed common law with retrospective effect, despite the fact that the "development" may sometimes change the common law altogether, or introduce a new rule. The observations of Lord Hoffmann referred to in par. 43 above, make this abundantly clear.

   See: ***K v Minister of Safety and Security 2005 (6) SA 419 (CC) par. 16, Mukaddam v Pioneer Foods 2013 (5) SA 89 (CC) at par. 68***.

   The Constitutional Court recognised these implications of development of the common law, and for the first time accepted in ***Masiya v Director of Public Prosecutions, Pretoria 2007 (5) SA 30 (CC) at par. 51***, that the Court may, by exception, limit their development of the common law to operate only with prospective effect. In other words, the retrospective development of the

common law remains the default rule and it thus common place for the Courts to change the law with retrospective effect; I agree with that contention and it is a fact that occurs regularly in the High Courts. The ***Westminster Bank decision supra*** made particularly apt observations in this context.

70.

Also, our constitutional era introduced even greater fluidity in the state of the law. Under the doctrine of objective constitutional validity, an unconstitutional law is rendered invalid with full retrospective effect from the outset.

See: ***Cross-Border Road Transport Agency v Central African Road Services 2015 (5) SA 370 (CC) par. 13 to 20***.

This default rule is however subject to the wide discretion vested in the Courts by Section 172 (1) (b) of the ***Constitution***, to limit or suspend the retrospective operation of the declaration of invalidity of a law.

See: ***Executive Council, Western Cape Legislature v President of the Republic of South Africa 1995 (4) SA 877 (CC) at par. 107***.

It is clear from the relevant *dicta* that a Court must in certain instances avoid or control the consequences of a declaration of invalidity of post-constitutional legislation, where the result of invalidating everything done under such legislation is disproportional to the harm which would result from giving the legislation temporary validity. The concept of proportionality therefore clearly plays a role in the context of judging constitutionality *vis-à-vis* retrospectivity.

It was therefore contended that the capacity to change the law with retrospective effect is a common and necessary rule of modern Government and modern jurisprudence. It has even received constitutional recognition. This is incompatible with any suggestion that there somehow lurks in Section 1 (c) of the ***Constitution*** either a total prohibition of retrospective legislation or one so constrained as the Applicant contended for.

71.

Comparative law:

I have already referred to the ***2013 treatise by Gribnow and Pauwels***, on behalf of the European Association of Tax Law Professors.

It is clear that three important conclusions were contained therein relevant for present purposes:

1. Retroactive tax legislation is a commonly known phenomenon in the countries referred to in this general report;
2. Only in countries like Poland, Portugal and Hungary, is there a mere prohibition of such retroactive tax legislation;
3. The constitutional restrictions on retroactive tax legislation vary significantly.

At p. 66 of this treatise, the following appears: "In general, it can be observed that in the various countries the standards that Courts impose for retroactivity on tax legislation differ significantly. On the one side, there are countries in which the Courts (almost) fully leave the issue of granting retroactive effect to tax legislation to the discretion of legislature (or Parliament, as the case may be). On the other side, there

is a group of countries in which an (almost) absolute prohibition of retroactive taxes applies. Between these opposite positions, there are countries in which Courts review whether legislators' decision to grant the retroactive effect stays within certain (formal and/or substantive) standards. These differences are at first sight remarkable".

The Applicant contended that retrospective tax legislation is presumptively unconstitutional and that, without proper warnings to taxpayers, a retroactive amendment can never pass constitutional muster. It was submitted that such a rule would make of South Africa a rare exception, wholly at odds with the significant democracies to which our Courts usually look for guidance.

72.

Canada:

In Canada, for example, there is no constitutional restriction on retrospective tax legislation. It is worthwhile quoting ***Prof. P. W. Hogg, Constitutional Law of Canada 5TH Edition Supplemented Vol. 2, p. 51***, where he says that the Canadian Charter permits retrospective legislation as "a proper tool for modern Government". Prof. Hogg

has been frequently cited by the Supreme Court of Canada, and our Constitutional Court. He said the following: "Apart from Section 11 (g) [which deals with criminal offences] Canadian Constitutional Law contains no prohibition of retroactive (or *ex post facto*) laws. Changes to the common law by judicial decision are always retroactive. There is a presumption of statutory interpretation that a statute should not be given retroactive effect, but, if the retroactive effect is clearly expressed, then there is no room for interpretation and the statute is effective according to its terms. Retroactive statutes are in fact common. For example, a taxation law is often made retroactive to budget night, when the law was publicly proposed; otherwise there might be room for avoidance action by tax payers during the hiatus between the budget and the enactment of the law. Another common example is a retroactive statute to change the law as it was declared to be in a judicial decision: a law that has been interpreted in an unexpected way, or has been held to be invalid on remediable grounds, may be amended or validated retroactively to restore the legal position to what it had been believed to be prior to the judicial decision. The power to enact retroactive laws, were exercised with appropriate restrain, is a proper tool of modern Government. Section

11 (g) diminishes this power only by excluding the creation of retroactive criminal offences. Other kinds of laws may still be made retroactive".

It is my view that these views are of equal importance in the present proceedings.

73.

In ***British Columbia v Imperial Tobacco Canada [2005] 2 SCR 473 par. 69 and 70***, the Supreme Court cited Prof. Hogg with approval and reiterated at par. 71 that retroactive tax is "not constitutionally barred". It said the following: "The absence of a general requirement of legislative prospectivity exists despite the fact that retrospective and retroactive legislation can overturn settled expectations and is sometimes perceived as unjust … Those who perceive it as such and perhaps take comfort in the rules of statutory interpretation that require the legislature to indicate clearly any desired retroactive or retrospective effects. Such rules ensure that the legislature has turned its mind to such effects and "determined that the benefits of retroactivity (or retrospectivity) outweigh the potential for disruption or unfairness…"

The "unfairness test" is in my opinion not part of our law such as an isolated concept.

74.

Applicant had submitted that the position in South African law is different than that of Canada, because of the provisions of S. 1 (c) of our ***Constitution***, which entrenches the Rule of Law. Mr Trengrove SC however submitted that this did not actually distinguish us from Canada, inasmuch as the Canadian Charter of Rights and Freedoms also recognises in its preamble that Canada is founded on the Rule of Law. In the ***Imperial Tobacco case supra***, the Supreme Court of Canada also considered whether the Rule of Law precluded retrospective legislation. It recognized that the Rule of Law is "a fundamental postulate of our constitutional structure … that lies at the root of our system of Government". It accepted that "unwritten constitutional principles" including the Rule of Law, are "capable of limiting Government actions". Nevertheless, it rejected a submission that the Rule of Law requires all legislation to be prospective (par. 63). It rejected the notion that the Rule of Law precludes retrospective legislation, except in the case of Criminal Law.

Also in ***Singh v Canada (Minister of Citizenship of Immigration) [2006] 3 FCR 70 (9 December 2005)***, the Canadian Federal Court of Appeal reiterated that there was no requirement of legislative prospectivity embodied in the Rule of Law, and that Prof. Hogg accurately set out the state of Canadian Law in the paragraph that I have quoted above.

75.

United States:

At a federal level, retrospective legislation, and retrospective taxation legislation in particular, freely pass muster as long as it meets the threshold requirement of rationality.

In ***United States v Carlton 512 US 26 (1994)***, Justice Blackmun cited the earlier case of ***Welsh v Henry 305 US 134 (1938) 146 to 147***, where it was said that no citizen enjoys immunity from the burden of paying costs of Government and retrospective imposition does not necessarily infringe due process. In the context of the rationality threshold requirement it was said that "provided that the retroactive application of a

statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches …

To be sure, … retroactive legislation does have to meet a burden not faced by legislation that has only future effects … the retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffer for the former … that that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose”.

Many years later, and certainly not coincidentally, the rationality of legislation was deemed by the South African Constitutional Court to be the crucial question whether legislation offended the Rule of Law, or a particular provision in the Bill of Rights.

See: ***Pharmaceutical Manufacturers of South Africa supra at p. 708 to 709.***

76.

The European Union:

In ***Hail v Rutgen [2001] QB 27 C (CA) par. 49***, the English Court of Appeal commented that "there is no general principle under the (***European Convention on Human Rights***) that changes in Civil Law should not operate retrospectively". As I have said in paragraph above, the only basis upon which a retrospective taxation statute can be challenged under the European Convention, appears to be Art. 1 of ***The First Protocol to the ECHR***, which is equivalent to our Section 25 (1) of the ***Constitution***. I have already referred to the decisions of ***Huitson*** in that context.

77.

England:

It was submitted that under English Law there has never been any bar to retrospective tax legislation, and I have referred to a number of relevant decisions of the Courts.

In ***James v IRC [1977] STC 280 at 284***, the following was said: "As the Constitutional Law of England stands today Parliament has the power to enact by statute any fiscal law, whether of a prospective or retrospective nature and whether or not it may be thought by some persons to cause injustice to individual citizens".

78.

Germany:

I have stated what the general position in Germany is, although it must be remembered that the *stare decisis* doctrine plays no role in the German Courts, and that they make decisions based on the particular facts of each individual case. It is therefore not surprising that its Constitutional Court acts progressively, having regard to the facts before it and the demands of society. What does seem clear however is that the public interest element in each particular case plays an important role. Proportionality is also considered in that balancing process.

Prof. Klaus Rennert, President of the German Administrative Court, presented a paper on **"**The Protection of Legitimate Expectations under German Administrative Law**"**, to a seminar of the Association of Councils of State and Supreme Administrative Jurisdictions of the European Union on 21 April 2016, in Vilnius, Lithuania. On the topic of 'The protection of legitimate expectations *vis-à-vis* the legislature he said that if any restrictions are to be imposed on legislature, then – leaving aside Union law –

these restrictions may derive exclusively from Constitutional Law. It was incumbent on the Constitutional Court to word such restrictions. He then put the position in German law as follows:

"In its order of 11 May 1960, the Federal Constitutional Court introduced the distinction between the so-called real (retroactive) and the so-called artificial (retrospective) effects of laws which then went on to shape its further adjudication. A retroactive effect was given, the Court held, "if the law intervenes with facts and circumstances of the past that have already been completed," by contrast, it held that the retroactive effect was not an issue – or not in the same way – in cases in which laws had only retrospective effect and "intervened only with facts and circumstances or legal relationships given at present that have not yet been completed and stipulate changes for the future."

a) According to the adjudication handed down by the Federal constitutional Court, any retroactive effect will be in principle unconstitutional and impermissible. As its reasons, the Court relied significantly on the concept of protecting legitimate expectations, which it stated was a component of the constitutional principle of

the rule of law. In a state governed by the rule of law, citizens are entitled to trust that their actions, taken in compliance with applicable laws, will continue to be recognised by the legal order, along with all of the legal consequences that originally had been tied to such actions. It is not permissible for the state to retroactively strip its citizens of this legal position or to devalue it. Nothing else applies if the lawmaker has enacted a law for a limited period of time – such as a law providing for a tax benefit for a certain number of fiscal years – even if this period has not yet expired and the amendment of the law would concern only the remainder of that period.

However, there are a few exceptions to this principle, albeit within very narrowly defined bounds. For the most part, the exceptions can be traced back to the first of the three questions regarding the protection of legitimate expectations that we had posed at the outset, this being the question of whether the citizen's expectations actually merit protection. This is not the case where a citizen had to count on the law's being amended because a corresponding announcement had been made in the political sphere, or because the previous legal situation

was unclear and confused and the amendment served to obtain the necessary clarity. Likewise, the citizen's confidence does not merit protection where the amendment of the law or the new provision of the law does not result in any disadvantage at all for the citizen, such as when an invalid provision is replaced by a provision that addresses the same substance and that is valid; the Court later expanded this by stating that a citizen must accept as inescapable any petty disadvantages. Finally, the Federal Constitutional Court also addressed the second of our three initial questions and accepted the adoption of a retroactive law, even in the face of contravening legitimate expectations meriting protection, if the balance struck between the two shows that the interest of the public in obtaining a new legal status outweighs the interests of the individual in seeing the previous status continue to apply. However, the overriding nature of this public interest must be very clear; the Federal Constitutional Court has stipulated "imperative grounds of general welfare" as a pre-requisite, and it takes the meaning of the term "imperative" very seriously.

b) While, according to what I have outlined above, the retroactive effect of law is as a rule impermissible under constitutional law, the so-called artificial retrospective effect is as a rule permissible. We need to keep in mind that the Federal Constitutional Court uses this term to designate a law that intervenes with processes that have commenced but have not yet been concluded, and that does so with effect for the future. Such amendments of the legal status are widespread and customary; prohibiting them would paralyse all legislation. This is why the mere expectation that laws that currently are valid will not change in future is not afforded any protection under constitutional law. However, the principle of protecting legitimate expectations has not lost its significance entirely in this context. On the contrary, it may force the lawmaker to create an appropriate transitional provision that prevents too abrupt a modification of the legal situation and absorbs its detrimental consequences for the parties (and their fundamental rights) affected by way of complying with the principle of proportionality."

79.

Although the German Basic Law (Grundgesetz) together with the Canadian Charter of Rights formed the most important basis of the South African Bill of Rights, the legal system of Germany as a whole, is vastly different to the South African jurisprudential order. Our system, in the present context is more closely aligned, for historical reasons mainly, to that of England, Canada and even the United States. (I must emphasize: in the present context.)

The decisions on the present topic arrived at by the English Courts are in my view particularly persuasive in this case where no direct decision on the constitutional point raised by Applicant herein, has been as yet made by a South African Court.

Applicant obviously prefers the "strict" approach of the German Constitutional Court to completed transactions, in my view, and for the reasons stated, the less "rigorous: or "strict" approach should be followed at least in the case of tax statutes where a rational reason appears in the interest of the fiscus and where a broad warning was given that a particular deficiency or "loop-hole" would be addressed by the authorities.

80.

The test under our law:

It was submitted that the foreign law comparison makes it clear that retrospective laws are permissible and indeed common place in countries based on the Rule of Law. At the same time it was not suggested that Parliament may legislate with retrospective effect as it pleases. The real question is what the standard is by which the constitutional validity of retrospective legislation is judged. I agree with that contention and intend to follow that approach.

This question must be answered with reference to the standards of review laid down by our Courts when the constitutional validity of a statute is challenged. There are two main standards:

1. The first is the "rationality" test. This is the standard that applies to all legislation under the Rule of Law entrenched in S. 1 (c) of the ***Constitution***.

   See: ***New National Party of South Africa v Government of the Republic of South Africa and Others 1999 (3) SA 191 (CC) par. 19***;

2. The second, and more exacting standard, is that of "reasonableness" or "proportionality", which applies when legislation limits a fundamental right in the ***Bill of Rights***. Section 36 (1) of the ***Constitution*** provides that such a limitation is valid only if it is "reasonable and justifiable in an open and democratic society".

In ***Bobroff and Partners Inc v De La Guerre, South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development 2014 (3) SA 134 (CC) par. 6 to 8***, the Constitutional Court explained the difference between these two standards as follows: "The Constitution allows judicial review of legislation, but in a circumscribed manner. Underlying the caution is a recognition that Courts should not unduly interfere with the formulation and implementation of policy. Courts do not prescribe to the legislative arm of Government the subject-matter on which it may make laws. But the principle of legality that underlies the Constitution requires that, in general, the laws made by the legislature must pass a legally defined test of 'rationality' ...", and

A rationality enquiry is not grounded or based on the infringement of fundamental rights of the Constitution. It is a basic threshold enquiry, roughly to ensure that the means chosen in legislation are rationally connected to the ends sought to be achieved. It is a less stringent test than reasonableness, a standard that comes into play when fundamental rights under the Bill of Rights are limited by legislation.

In those cases the Courts have a more active role in safeguarding rights. Once a litigant has shown that legislation limits fundamental rights, the limitation may only be justified under Section 36 of the Constitution. Section 36 expressly allows only limitations that are "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom"".

81.

It was also submitted that there is an intermediate standard that applies in only one context – when assessing whether a law violates the prohibition of arbitrary deprivation property in Section 25 (1) of the ***Constitution***. The Constitutional Court held in ***First National Bank of South Africa Ltd T/A Wesbank v Commissioner for the South African Revenue Service and Another 2002 (4) SA 768 (CC) par. 98 to 100***, that a

deprivation is arbitrary within the meaning of Section 25 if it is made "without efficient reason". This standard is more exacting than the rationality standard in terms of Section 1 (c) of the Constitution, but less exact than the reasonableness standard in terms of Section 36 (1) of the Constitution.

82.

The question then is which of these standards applies when a retrospective law is enacted. It was submitted that the answer was quite clear: if the law limits a fundamental right, the exacting "reasonableness" standard applies. If the law permits a "deprivation of property" under Section 25 (1) of the Constitution, the intermediate standard of "sufficient reason" applies. If however, the law does not infringe upon the Bill of Rights, then the question is merely whether it passes muster under Section 1 (c) of the Constitution, then the basic "rationality" standard applies. I agree with this contention. Also, the rationality standard for a retrospective law to pass constitutional muster happens to be the same that was applied by the United States Supreme Court in the ***Carlton case supra***. It is however a more exacting standard than that set out

under Canadian, English and European Law. I may add that it cannot be seriously contended that none of these countries abide by the Rule of Law.

83.

Application to the facts:

It was submitted that the difficulty for Applicant was that once this rationality standard applies, its case much inevitably fail.

There was an unintended loop-hole in the ***Income Tax Act*** created by S. 44 (9). SARS considered on the basis of the possible ***Shoprite/Brait transaction***, that a “flood” of such transactions would occur and that there was a real risk the national fiscus would suffer extensive and permanent harm. This transaction -, which was pending when the decision was made to close the loop-hole, would have resulted in a loss of approximately R 1.5 billion in unpaid STC.

The Applicant complained that the evidence on flood of other transactions that was anticipated, was vague and also hearsay. In answer thereto, it was contended that this complaint misses the point. Parliament is not required to wait for iron-clad

evidence before it enacts to prevent damage to the fiscus. On the contrary, it is perfectly appropriate for it to act proactively, whenever it fears such damage may occur.

In ***Minister of Home Affairs v NICRO 2005 (3) SA 280 (CC) par. 35***, the Courts stressed in a Section 36 limitation context: "There may for instance be cases where the concerns to which the legislation is addressed are subjective and not capable of proof as objective facts. A legislative choice is not always subject to Courtroom fact-finding and may be based on reasonable inferences unsupported by empirical data. When policy is in issue it may not be possible to prove that a policy directed to a particular concern will be effective. It does not necessarily flow from this however, that the policy is not reasonable and justifiable. If the concerns are of sufficient importance, the risk associated with them sufficiently high, and there is sufficient connection between means and ends, that may be enough to justify action taken to address them".

It was therefore submitted that it was eminently rational to close the loop hole with retrospective effect. A mere prospective amendment would have encouraged tax payers to exploit the loop-hole in the last few months before the loop-hole was closed and this was also the view of Prof. Hogg in the Canadian context, where he made it clear in ***Constitutional Law of Canada 5TH Edition supra Vol. 2 p. 51***, that "A taxation law is often made retroactive to budget night, when the law was publicly proposed; otherwise, there might be room for avoidance action by tax payers during the hiatus between the budget and the enactment of the law".

85.

Mr Trengrove SC submitted that the Applicant might well feel that it was unfairly treated as a consequence of the change, but in the absence of a breach of fundamental rights, this is simply irrelevant.

In ***Law Society of South Africa and Others v Minister of Transport and Another 2011 (1) SA 400 (CC) par. 5***, it was said that "The requirement of rationality is not

directed at testing whether a legislation is fair or reasonable or appropriate. Nor is it aimed at deciding whether there are other or even better means that could have been used. Its use is restricted to the threshold question whether the measure the law giver has chosen is properly related to public good it seeks to realize …"

In the light of these considerations, all that remained is the Applicant's complaint that the manner in which parliament ultimately closed the loop-hole differed from the manner in which the Minister had originally foreshadowed in his budget address. I have already referred to the relevant facts in this context, and the process that was followed.

It was contended that the amendment ultimately was made less drastic than the one originally proposed, because it maintained the exemption in Section 44 (9) and merely qualified it by the new Section 44 (9A). It moreover closed the loop-hole in line with the underlying purpose of Section 44 to ensure that amalgamations are STC neutral. The Applicant complained that the distribution of its share premium was not taxable when it was made on 3 May 2007. This is correct. But, the Applicant had been notified at the time that SARS intended to plug the loop-hole by the repeal of

Section 44 (9). If SARS had implemented its plan, "OLD CO's" distribution of the consideration shares to its shareholders, would have been subject to STC. The net effect of the change of plan was accordingly merely that "OLD CO" was not liable for STC on its distribution of the consideration shares, but "NEW CO" became liable for STC on its distribution of its newly acquired share premium. What this means is that even on Applicant's own test, it cannot succeed. It contended there had been no adequate warning, but this not so in the context of the budget speech of 21 February 2007 and the ***Draft Bill*** published on 27 February 2007. All tax payers were thus given ample notice that, to put it at its lowest, they could not safely rely on Section 44 (9) of the ***Income Tax Act*** after 21 February 2007. The question of whether the Applicant and its advisors actually made themselves aware of the budget speech or ***Draft Bill*** is in the present context not relevant.

I agree with that approach. I am not aware of any provision in any of the jurisdictions that I have referred to, or indeed in ours, to the effect that the warnings given must relate to the exact same amendment that is ultimately made. To adopt such an approach would undermine the parliamentary process and the public participation

process completely. It would also mean that parliament would be bound by an announcement made by the executive. Applicant had already suggested that I do not need to find how precise a warning in this context must be, inasmuch as in the present proceedings, no warning at all had been given. I do not agree with this contention, the facts show otherwise, and it loses sight of the fact that there may be cases where no warning needs to be given at all. I am therefore not of the opinion that a precise warning must be given in each and every case, nor that a warning, of whatever ambit, needs to be given in all cases. In my view, a proper approach would be to judge the legality of retrospective amendments on a case-by-case basis, having regard to the various considerations that I have referred to. The Constitution itself certainly does not prohibit retrospective legislation in civil law.

86.

Mr Trengrove SC also contended that because Applicant brought this matter for purely commercial gain, it should be directed to pay the costs of SARS including costs of two

Counsel, and in this context relied on ***Weare v Ndebele N. O. 2009 (1) SA 600 (CC) par. 78***.

87.

Second Respondent's argument on the constitutional challenge:

Mr I. Semenya SC and his juniors also handed up comprehensive Heads of Argument for which I thank them. In general it was Second Respondent's position that Parliament was competent to pass legislation, prospective or retrospective, in accordance with procedure and within the limits of the ***Constitution***, provided that such law was not arbitrary or capricious. Mr Semenya SC then dealt with the argument under the following headings:

88.

The constitutional framework:

The Constitution obviously does not prohibit the passing of legislation in the civil sphere that has retrospective effect, and this ought to be the starting point in any

argument. In the criminal sphere, the position is of course different and retrospective operation is proscribed in the context of the provisions of S. 35 (3) (l) of the ***Constitution***.

89.

<u>The Rule of Law</u>:

I have referred to the relevant principles and it is also clear that as yet there has not been any test on whether the retrospective operation of a statute is inconsistent with the Rule of Law. Mr Semenya SC also referred me to the ***Imperial Tobacco Canada decision supra***, as well as to the decision in ***Air Canada v British Columbia [1989] 1 SCR 1161***, where a majority of the Supreme Court of Canada confirmed the constitutionality of a certain ***Gasoline Tax Act***, which retroactively taxed certain companies in the Airline Industry.

90.

It is clear from the Canadian decisions that their parliament has an unfettered discretion in deciding the effective dates of new tax laws provided that the intended retrospective effect must be clear and unequivocal.

In ***Gustavson Drilling (1974) Ltd v Minister of National Revenue [1977] 1 SCR 271***, an oil company tried to deduct in 1964 drilling expenses incurred prior to 1960. Tax laws passed in 1962 had repealed the right to claim such deductions for tax years following 1962. The majority of the Court upheld the legislation on the basis that "no one has a vested right to continuance of the law as it stood in the past" (at 282).

In ***Attorney General of Quebec v Irvin Toy Ltd [1989] 1 SCR 927 (SCC)***, it was amongst others held that S. 7 of the ***Canadian Charter*** does not guarantee a right to the permanence of a statute. It was contended that similarly, and because our Constitution was greatly inspired by the Canadian Constitution as it was put, the Bill of Rights in the South African Constitution does not guarantee a right to the permanence of a statute, nor does it protect economic rights.

The submission therefore was that there was no reason why South African Courts should not follow the position in Canada and ultimately, where legislation expressly

states that it is to operate retrospectively, the only enquiry is whether the legislation was passed in accordance with restrictions of the Constitution.

91.

United States:

The United States Supreme Court has to date dismissed all due process challenges relating to retroactive income tax provisions. Reference to due process in this context is the equivalent of the Rule of Law.

In ***Pension Benefits Guarantee Corporation v R.A. Grey and Co 467 US 717 (1984)***, the Supreme Court held that if the retrospective statute in economic policy is "supported by legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the executive and the legislative branches. The Court said that "strong deference" should be accorded to economic legislation and this was no less applicable when that legislation is applied retroactively. In the same case, it was also stated that it would be doubtful that retrospective application of an Amendment Act would be invalid under

the due process clause even if it was suddenly enacted without any period of deliberate consideration.

92.

I have already referred to the decision of ***Welsh v Henry supra,*** wherein it was pointed out that taxation is not a penalty, but rather a distribution of the burden which those who enjoy the benefit in a State must carry. It also pointed out (at 149) that there may be a particular need for allowing income tax retroactivity inasmuch as “experience has shown the importance of reasonable opportunity for the legislative body, in the revision of tax laws, to distribute increased costs of Government among its tax payers in the light of present need for revenue and with knowledge of the sources and amounts of the various classes of taxable income during the taxable period preceding revision. Without that opportunity accommodation of the legislative purpose to the need may be seriously obstructed if not defeated”. It also held (at 146) that no tax payer could “assert surprise, or complain of arbitrary action in the retroactive

apportionment of tax burdens to income at the first opportunity after knowledge of the nature and amount of the income is available".

In ***US v Carlton supra***, it was also held that retrospective closing of tax loop-holes is something that individuals might expect parliament to do upon discovering them. Relying on loop-holes remaining open, or relying on closure being prospective only, was not a rational expectation. As to the question of what actually constitutes adequate notice, the ***Carlton*** majority asserted that "lack of notice is not dispositive".

93.

In the context of the Applicant's assertion that knowledge of the amendment was essential in order to regulate its affairs, reference can usefully be made to the ***Carlton decision supra,*** the ***Benefits decision supra*** and also to ***W. David Slawson*** in ***Constitutional And Legislative Considerations In Retroactive Law-making, 48 CAL. Law Review 216 (1960) at 226***, where the author said the following: "Reliance on existing rules therefore must be sacrificed to some extent to the need for change. It is

this basic and simple conflict that is often overlooked in writings on retroactivity. The conclusive distinction between valid and invalid retroactive law is the element of "surprise" – whether it serves to give effect to or defeat the bona fide and reasonable expectations of the person it affects. Such a test is far too rigorous since it ruled out all but the most inconsequential legislative changes". I agree with that reasoning in the present context as well.

It is therefore clear from the mentioned authorities and if one follows the approach of the United States, the impugned provision herein would not be inconsistent with the Constitution. In the United States the crux really is whether the legislation was rationally related to a legitimate legislative purpose and that is of course also the test in South Africa, as has been said, on numerous occasions.

94.

United Kingdom:

I have dealt with a number of relevant authorities on the present topic above.

In the matter at hand, the language is in my view clear and Applicant did not contend that it was not clear. In cases of unclarity the position in English Law seems to be that greater emphasis is then placed on the question of unfairness, and in particular the degree thereof. In the present instance, unfairness is in my view certainly not the decisive question. Many laws may be "unfair" in many particular instances, but they are not unjust if they have been lawfully and constitutionally passed by Parliament. Laws are in general aimed at the broader public and are in the main not concerned whether or not a particular statute unfairly affects a particular individual simply on the basis that it may not unfairly affect the majority of the populace.

95.

Mr Semenya SC submitted that in the present instance there was ample evidence in the budget speech and the press release of 21 February 2007, that future legislation was contemplated that would have retrospective operation, and that such legislation would target amalgamation transactions which result in the STC lost to the fiscus. Mr Semenya SC submitted that inasmuch as the UK decisions seem to strike a fair balance between the taxpayer and the public or State interest in securing payment of

taxes, the Applicant in this case did not use it as a basis for the challenge, and there was also no reason to import such a requirement which on its terms limits the legislative power inconsistent with Section 44 of the ***Constitution***.

96.

Australia:

In ***Deputy Commissioner of Taxation v Zammitt [2012] NSWDC 135 at par. 36***, the Court held that the Government had the power to enact retrospective legislation even when that legislation impacts on the results of proceedings currently pending in the Courts.

In ***Bawn (Pty) Ltd v Metropolitan Meat Industry Board [1971] 92 WN (NSW) 823 at 842***, the Court said: "Once it is accepted that the general principle of construction recognises that a statute may operate retrospectively so as to disturb and alter substantive rights which accrued before the commencement of the statute, provided that the statutory intention … is manifested with sufficient clarity …it is not easy to see

why any different rule should be applied to the possible operation of a statute on rights which have already accrued …"

The enquiry therefore is whether the statute is couched with "sufficient clarity" that it is to have retrospective effect and if no doubt arises, the statute must be given effect on its own terms.

See also: ***Attorney General of New South Wales v World Best Holdings Ltd and Others [2005] NSW CA 261***.

A word of warning was also given by Mason P in that decision (at par. 153). He was troubled with the invocation of "unfairness" or a scale of unfairness or injustice, "Courts have no mandate to construe legislation by reference to perceptions of morality that are not already firmly embedded in fundamental common doctrines or the statute itself". I would agree with that approach in general terms. In the present case, Applicant in any event, never argued that its particular circumstances were so grossly unfair and oppressively affected that the amendment could not be regarded as rational as a result. Nor was the amendment aimed solely at itself.

It was submitted therefore that Australian jurisprudence therefore does support the Applicant's case, and I agree.

I have already referred to the decisions of the European Court of Human Rights, and its approach also does not support the position of the Applicant herein.

97.

Mr Semenya SC, in the context of Applicant's contention that knowledge of proposed retrospective amendment to the law is fundamental to the Rule of Law, pointed out that there does not appear to be any authority on which this proposition rests. Certainly, our Constitution does not have this constraint. There was also no foreign law which required knowledge of the proposed retrospective amendment to be there and more so, that such knowledge would be fundamental to the Rule of Law.

Similarly, Applicant did not provide any authority for their contention that "knowledge" or "adequate warning" is constitutionally required for tax legislation to pass constitutional muster. In any event, if it were to be found that such "knowledge" or "adequate warning" was essential, it was submitted that the process that was followed,

and I have given all relevant details, was sufficient and ought to have put any taxpayer who was contemplating amalgamation transactions with a view to derive STC exemption from such, would have been placed on full guard that legislation was going to be amended to remove the particular exemption. Despite this warning, Applicant went ahead with the amalgamation transaction. There was in any event no authority for the proposition that a specific notice was required, and the reason was obvious: it is the executive who initiates legislation and it is Parliament which passes the legislation sometimes with an amendment and certainly after public participation processes in any event.

I have no hesitation in agreeing with these submissions for the reasons stated.

98.

Should the Notice mirror the actual amendment?:

It was argued that Applicant offered no authority for the proposition that "warning" of retrospective legislation must "self-evidently pertain to the actual amendment that is implemented". That is of course correct. Applicant however also contended that I need

not decide this inasmuch as in the present sentence no “warning” was given at all, and I have already said that I do not accept that on the facts. I have already given my reasons why a notice need not mirror the actual amendment intended, if it is given in advance of any public-participation process and parliamentary proceedings.

99.

Reasons for retrospectivity/justification:

There is no authority for the proposition that retrospective tax legislation would survive constitutional scrutiny only if there were “good reasons” for it. It is not for a Court to say what a good “reason” is. Foreign law also does not support such an approach. The only question is whether a legitimate legislative purpose is indicated. In the present case, the Government’s purpose was to remove the tax exemption in amalgamated transactions. To do so retrospectively was also justified, because there

was loss of STC revenue rising from amalgamations which was previously intended to be deferred and not permanently lost. More importantly, there was a general announcement that the intended amendment would remove that loop-hole. That was sufficient. I agree with Mr Semenya SC's submission in this regard, and I have given my reasons.

100.

Complete or incomplete transactions:

The language of the present amendment is clear, it refers to "all" transactions. It was also submitted that it was immaterial whether a transaction was completed or not if it falls within the period of the retrospective operation of that legislation. All the foreign judgments, to which reference had been made, were concerned with completed transactions. It appears to me that the German Constitutional Court however, does make a general distinction between completed and uncompleted transactions, but

even in those instances there are sensible exceptions. Not surprisingly I must add, in that modern jurisprudence should in my view never be dogmatic, especially not in the field of fiscal legislation, as economic considerations seem to be presently in a constant state of fluidity, and not only in South Africa.

101.

Exceptional circumstances and rigorous approach:

There is in my view no basis for holding that under the present Constitution, Parliament can only pass retrospective legislation if "exceptional circumstances" exist. I also do not agree that a Court is obliged to adopt a "rigorous approach, which would require "a very high level of correlation" between the changes to the law of which the taxpayer has been notified and the actual legislative amendment that follows, as Applicant contended for. There is no authority for this proposition and in any event, I do not

agree with it, inasmuch as there is clearly no such constraint on the powers of Parliament at all. Nor would such approach be practical in the context of tax statutes.

102.

I agree with Mr Semenya SC's conclusion that the constitutional attack on the impugned provision must fail. There is nothing in our Constitution which prohibits parliament from passing retroactive or retrospective legislation. There is nothing in other jurisdictions of similar constitutional structure that prohibits such passing. Also, and more significantly, there is nothing internal in the Rule of Law which renders retrospective legislation *per se* unconstitutional.

103.

Applicant's property challenge: Section 25 (1) of the Constitution:

In a Supplementary Affidavit, Applicant sought to establish a further cause of action based on Section 25 (1) of the ***Constitution***.

This challenge would arise only in the event that the Applicant's interpretational argument was rejected, and Section 34 (2) of the ***Tax Amendment Act*** is held to have retroactive effect to the completed transaction.

104.

This challenge is based on the fundamental right to property proceeds on the basis that the retroactive removal of the exemption from STC in par. (f) of the definition "dividend" without adequate notice would have amounted to a deprivation of property that was both procedurally and substantively arbitrary and thus inconsistent with Section 25 (1) of the ***Constitution*** states:

1.) "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

2.) Property may be expropriated only in terms of law of general application –

   a) for a public purpose or in public interest; and

   b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those

affected or decided or approved by a Court.

3.) The amount of the compensation and the time and manner of payment must be just and equitable, …

4.) For the purposes of this Section –

a) …

b) property is not limited to land.”

105.

It was submitted that the retroactive application of Section 34 (2) to completed transactions would be that Applicant, and any similarly situated taxpayers, became obliged to pay the relevant STC. This would then amount to a deprivation of property for purposes of Section 25 (1) of the ***Constitution***.

“Deprivation” of property was broadly defined in ***First National Bank of South Africa Ltd T/A Wesbank v Commissioner for the South African Revenue Service and***

Another 2002 (4) SA 768 (CC) par. 57, as being any interference with the use, enjoyment or exploitation of private property.

Also, in ***National Credit Regulator v Opperman 2013 (2) SA 1 (CC) par. 66***, where it was stated that "interference significant enough to have a legally relevant impact on the rights of the affected party amounts to deprivation". It was said that reference to this decision was appropriate to the creation of an unavoidable obligation to pay money where none previously existed resulted in the deprivation of money by the State.

106.

In ***First National Bank of South Africa v Minister of Finance supra***, Ackermann J was of the view (par. 100), that a deprivation of property is "arbitrary" as meant by Section 25 when the law referred to in Section 25 (1) does not provide sufficient reason for the particular deprivation or is procedurally unfair.

This approach to Section 25 (1) was then confirmed in ***Mkontwana v Nelson Mandela Metropolitan Municipality 2005 (1) SA 530 (CC) at par. 34***.

It was therefore submitted that in the present instance both the procedural and substantive requirements of non-arbitraries have not been met. The retroactive application of Section 34 (2) would be procedurally arbitrary, because it would deprive the Applicant and others of property in circumstances where they were given no fair opportunity to organize their affairs. Applicant however did not contend that any retroactive application of taxation legislation violates Section 25 (1). Rather, its complaint is confined to retroactive application of legislation in circumstances where the public was not previously given reasonable notice of the intended legislation and thus a fair opportunity to organize their affairs.

I have already held that:

i) there is no over-riding duty to give notice irrespective of the facts;

ii) in the present instance there was sufficient notice of general impact;

iii) there is similarly no over-riding duty to give notice that states precisely what the intended legislation will entail.

108.

On behalf of First Respondent it was argued that:

i) the impugned provisions do not give rise to a deprivation of property;

ii) even if they did, the deprivation was not arbitrary;

iii) Section 36 (1) of the ***Constitution*** permitted a limitation of rights.

Applicant's argument seems to proceed from the premise that a person who incurs a liability imposed by law, suffers a deprivation of property. Section 25 (1) is intended to deal with situations where the law takes away or interferes with the use and enjoyment of assets. The fact that a law creates a civil liability does not in itself deprive the taxpayer of property unlawfully. If it were otherwise, every tax, levy, fee, fine and administrative charge would constitute deprivations for purposes of Section 25 (1).

109.

In ***Mkontwana supra***, the majority held at par. 32 "Whether there has been a deprivation depends on the extent of the interference with or limitation of use, enjoyment or exploitation. It is not necessary in this case to determine precisely what constitutes deprivation. No more need be said than that at the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation."

See also: ***Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd 2011 SA 293 (CC) at par. 39***, where this dictum in ***Mkontwana supra*** was confirmed, as it was in ***Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape 2015 (6) SA (CC) at par. 14 and 73***, ***Tshwane City v Link Africa and Others 2015 (6) SA 440 (CC) at par. 58, 168 and 173***, ***Agri SA v Minister for Minerals and Energy 2013 (4) SA 1 (CC) at par. 67***.

110.

It was therefore submitted that Applicant had to establish that the impugned provisions give rise to a substantial interference with property rights that go beyond the normal

restrictions on property use or enjoyment in a democratic society. In my view it cannot be argued that all taxes involve a "deprivation" of property, in the context of Section 25 (1). A State cannot exist without taxes. Society receives benefits from them. Taxes are not penalties. Neither can they be, without any qualification, be regarded as unjust deprivation of property use. If it is Applicant's view that only retroactive taxation gives rise to such deprivation, then again, no unjust deprivation occurred here. The State used a well-accepted mechanism to close a loop hole in a statute. It did not solely target the Applicant. Its purpose was rational. It gave ample warning of its intention. The retroactive amendment does in my view also not amount to illegitimate deprivation. Sufficient reason was established and the process was fair in the present context, not that "fairness" is a requirement.

See: ***Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government 2009 (6) SA 391 (CC) at par. 33***.

In my view it is clear, as I have said, all tax payers were given sufficient notice, to put it at its lowest, that they could not safely rely on Section 44 (9) of the ***Income Tax Act*** after 21 February 2007. Applicant sought to distribute its shares in reliance on

the Section 44 (9) loop-hole, even after it had been publicly announced that this would be closed with retrospective effect. The fact that this was done in a manner different to that which was initially contemplated does not render the process procedurally unfair. Were I to hold otherwise, the democratic parliamentary and public participation process would be seriously undermined. The executive does not make laws.

See: ***Oriani-Ambrosini v Sisulu, Speaker of the National Assembly 2012 (6) SA 588 (CC) par 46 to 49***.

It can in my view never be seriously argued that when a Minister announces proposed retroactive legislation to cure a problem, parliament is effectively precluded from adopting a different method. In the present instance, various stakeholders greatly resisted the Minister's proposal and as a result, the original method to close the loop-hole was altered. The amendment adopted by parliament was not arbitrary and therefore not in breach of Section 25 (1) of the ***Constitution***. Further, and in any event, the amendment was reasonable and justifiable in terms of Section 36 (1) of the ***Constitution***.

111.

The property challenge can therefore not be upheld.

112.

Costs:

The Respondents sought a cost order against the Applicant. I have a discretion which must be exercised judicially, having regard to all relevant circumstances. One such consideration is the general rule that in constitutional litigation an unsuccessful litigant ought not to be ordered to pay costs. This is not an inflexible rule. The litigation is neither vexatious nor frivolous. It involves a topic that has not yet squarely been decided by a Court in South Africa. The Applicant was justified in seeking clarity on the constitutional issues.

See: ***Affordable Medicines Trust v Minister of Health 2006 (3) SA 247 (CC) at par. 296 to 297***.

113.

The following order is therefore made:

1. **The application is dismissed;**

2. **There is no order as to costs.**

JUDGE H.J FABRICIUS

JUDGE OF THE HIGH COURT GAUTENG DIVISION, PRETORIA

Case number: 87760/2014

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Date of Hearing: 15 - 16 March 2017

Date of Judgment: 29 May 2017 at 10:00