**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

**Reportable**

Case no: 1010/2019

In the matter between:

**CONSOL GLASS (PTY) LTD** **APPELLANT**

and

**THE COMMISSIONER FOR THE**
**SOUTH AFRICAN REVENUE SERVICE** **RESPONDENT**

**Neutral citation:** *Consol Glass (Pty) Ltd v The Commissioner for the South African Revenue Service* (1010/2019) [2020] ZASCA 175 (18 December 2020)

**Coram:** NAVSA, WALLIS, MAKGOKA JJA and SUTHERLAND and UNTERHALTER AJJA

**Heard**: 10 November 2020

**Delivered**: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the

Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h45 on 18 December 2020.

**Summary:** Tax liability under the Value-Added Tax Act 89 of 1991 – services rendered in respect of a debt refinancing transaction – disallowance of input tax deduction claimed in respect of fees paid for services provided by local vendors – imposition of tax on imported services in terms of s7(1)(c) - interpretation of the definitions of input tax and imported services – meaning of 'the purpose of consumption, use of supply in the course of making taxable supplies.'

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## ORDER

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**On appeal from:** The Tax Court, Gauteng (Louw J, sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel.

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## JUDGMENT

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**UNTERHALTER AJA (NAVSA, WALLIS and MAKGOKA JJA and SUTHERLAND AJA concurring)**

[1] The Appellant, Consol Glass (Pty) Ltd ('Consol'), manufactures and sells glass containers. It is a vendor, registered as such under the Value-Added Tax Act 89 of 1991 ('the VAT Act'). In 2012, Consol restructured its debt. In doing so, it procured services, some from local vendors and others from suppliers resident outside of South Africa. Services of this latter kind are defined in the VAT Act as imported services. In July 2015, the Respondent, the Commissioner, raised additional assessments in respect of Consol's value-added tax ('VAT') liability for five tax periods in 2012. The additional assessments disallowed input tax deductions that Consol had claimed in relation to the services provided by local vendors. The Commissioner imposed output VAT on the imported services procured by Consol.

[2] Consol lodged an objection to the additional assessments. The objection was disallowed. Consol appealed the additional assessments to the tax court. The tax court dismissed Consol's appeal, save in respect of

the 10% penalty imposed by the Commissioner. There is no cross appeal by the Commissioner of this order. The appeal before us thus concerns the disallowance by the Commissioner of the input tax deductions and the imposition by the Commissioner of output value-added tax in respect of the imported services procured by Consol.

**The facts**

[3] In order to understand why Consol procured the services that it did in 2012, it is necessary to describe certain transactions that took place in 2007. During April 2007, Consol, then a shell company, acquired the businesses of Consol Limited and two of its subsidiaries. These businesses were acquired as going concerns. Upon making these acquisitions, Consol commenced trading, continuing the glass making businesses previously conducted by the three companies.

[4] These acquisitions formed part of a leveraged buy-out. In simple terms, a leveraged buy-out is the acquisition by one company of another (or its assets and liabilities) using a significant amount of debt to fund the cost of acquisition.

[5] The transaction in 2007 took place in the following manner. First, in December 2006, through a scheme of arrangement, Consol Holdings Limited (Consol Holdings) offered to acquire the ordinary share capital of Consol Limited, then a listed company. The shareholders of Consol Limited approved the scheme, and upon sanction by the high court, the scheme became operative in April 2007. The scheme entitled the shareholders of Consol Limited to receive a cash consideration for their shares, or to elect to receive cash and Consol Holdings shares. The effect

of the scheme was to buy out the public shareholders of Consol Limited and to constitute a consortium of private equity investors, styled the Brait Fund IV, as the controlling shareholder of the new holding company, Consol Holdings. Consol Holdings made use of bridging finance to buy the shares of Consol Limited.

[6] Second, a reorganisation was effected. Consol, a shell company and a wholly owned subsidiary of Consol Holdings, was used to acquire the businesses of Consol Limited and its two subsidiaries. Consol was able to make these acquisitions by securing debt funding. The debt funding took the form of Eurobonds issued by Consol. The debt was denominated in Euros, and hence Consol's obligations to pay interest and redeem the bonds were in Euros. In order to cover the risk of Rand volatility against the Euro (since Consol's revenue was Rand based, but its debt obligations were in Euros), Consol entered into collateral hedging agreements to cover its Euro exposure.

[7] Third, the consideration paid by Consol for the acquisition of the businesses was then distributed as a dividend by the vendor companies to the holding company, Consol Holdings. Consol Holdings, in turn, was obliged to use the proceeds of the dividend to repay the bridging loan secured by it.

[8] One salient feature of the transaction in 2007, relevant for present purposes, was that the operating businesses of the listed company Consol Limited, and its two subsidiaries, were, upon the execution of the reorganisation, acquired by Consol, funded by the debt that Consol had secured by issuing Eurobonds. Functionally these businesses were

otherwise unchanged and continued precisely the same business operations that they had engaged in prior to the transaction in 2007.

[9] The evidence of Mr Nayager, the Chief Financial Officer of Consol, who testified before the tax court on behalf of Consol, was that, in the period 2007 – 2012, the cost of servicing Consol's Euro debt and securing hedging cover for its Euro exposure became ever more expensive. This was because the Rand depreciated against the Euro and was subject to much volatility. As a result, in 2012, Consol sought competitive funding in the South African market, denominated in Rand, to replace its Eurobond debt and unwind the hedging positions. A consortium of South African banks agreed to lend some R5 billion to Consol. This took place in terms of an agreement, styled the Common Terms Agreement, concluded on 7 July 2012 between Consol and a number of lenders. In terms of the Flow of Funds Agreement, concluded at the same time as part of these arrangements, the debt funding secured by Consol was to be used to redeem the Eurobonds and unwind the hedging instruments. I shall refer to these arrangements as the refinancing transactions.

[10] In order to retire the Eurobond debt, unwind the hedge positions and secure domestic loans, Consol procured various services. The services fell into two categories. First, Consol procured the services of local service providers. The South African banks that participated in the lending consortium charged arranging and structuring fees. Consol retained the services of two firms of South African attorneys. These firms gave advice and drafted agreements to put in place the refinancing transactions. Second, foreign service providers were retained to advise

upon the early redemption of the Eurobonds and the unwinding of Consol's hedging positions.

[11] These service providers, local and foreign, raised fees that were paid by Consol. Consol's liability for VAT, arising from the fees incurred by it, gives rise to the appeal before us.

**The Issues**

[12] Two issues require determination in this appeal. First, was the tax court correct to find that the Commissioner was entitled to disallow the input tax claimed by Consol on the fees charged to it by local service providers? Second, was the tax court correct to find that Consol was obliged to declare and pay VAT on the fees paid by Consol to non-resident suppliers for their services?

[13] The first issue turns upon the meaning and application of the definition of input tax. In relevant part, 'input tax' in s1 of the VAT Act is defined as:

'*(a)* tax charged under section 7 and payable in terms of that section by –

(i) a supplier on the supply of goods or services made by that supplier to the vendor; …

where the goods or services concerned are acquired by the vendor wholly for the purpose of consumption, use or supply in the course of making taxable supplies….'

[14] Whether Consol was entitled to deduct as input tax the VAT paid on the services supplied to it by local service providers depended upon whether these services were acquired by Consol for the purpose of consumption, use or supply in the course of making taxable supplies. That enquiry raised two issues. First, for what purpose did Consol acquire

the services? Second, did Consol do so in the course of making taxable supplies. The relationship between the purpose for which the services were acquired and the use to which these services were put lies at the heart of the matter.

[15] As to the second issue, that is, whether Consol was obliged to pay VAT on the services supplied to it by the service providers who carried on their business outside of South Africa, a similar enquiry is required. Section 7(1)(c) of the VAT Act levies VAT on the supply of any imported services by any person.

'Imported services' are defined in s1 of the VAT Act to mean:

'a supply of services that is made by a supplier who is resident or carries on business outside of the Republic to a recipient who is a resident of the Republic to the extent that such services are utilized or consumed in the Republic otherwise than for the purpose of making taxable supplies.'

[16] Stated affirmatively, this provision entailed that no VAT could be levied on the supply of services to Consol by suppliers who carried on business outside of South Africa if those services were utilized or consumed in South Africa by Consol for the purpose of making taxable supplies. Here too, the issue is this: did Consol make use of the services of foreign suppliers for the purpose of making taxable supplies?

**Exempt Supply**

The Commissioner submitted that the services, local and foreign, were not acquired by Consol to make taxable supplies, but rather to make an exempt supply in the form of a financial service. A 'debt security' in terms of s 2(2)(iii) of the VAT Act means 'an obligation or liability to

pay money that is, or is to be, owing by any person'. In terms of s 2(1)(*c*) of the VAT Act:

'The issue, allotment, drawing, acceptance, endorsement or transfer of ownership of a debt security'

is deemed to be a financial service. Consol procured the services to enable it to conclude the new loan facility. Section 12 lists the goods and services that are exempt from VAT imposed under s7(1)(a). One category of exempt supply is the supply of any financial service. One variant of a financial service defined in s2(1)(c) is the issue of a debt security. The Commissioner contended that, in securing the loans from the consortium of banks under the refinancing transactions, Consol issued a debt security.

[17] If that be so, it was contended, Consol did not acquire the local services for the purpose of use in the course of making taxable supplies. Nor did Consol utilize the foreign services for the purpose of making taxable supplies. Taxable supply is defined in s1 to mean any supply of goods or services which is chargeable with tax under the provisions of s7(1)(a). However, since s12(a) read with s2(1)(c) excludes the issue of a debt security from VAT imposed under s7(1)(a) the issue of debt is not the making of a taxable supply.

[18] It would then follow that if Consol made use of the local and foreign services supplied to issue a debt security, it did not utilize these services for the purpose of making, nor in the course of making, a taxable supply. Hence, Consol was not entitled to the deduction of input tax that it had claimed in respect of the local services acquired by it. So too, Consol was obliged to declare and pay VAT on the fees paid by Consol to non-resident suppliers for their services. I shall refer to this submission, made on behalf of the Commissioner, as the exempt supply submission.

[19] The exempt supply submission failed to comprehend the position of Consol as a vendor within the scheme of the VAT Act. It is essential in any VAT enquiry to identify at the outset the enterprise that the vendor is conducting.[1] Section 23(1) requires that every person who carries on an enterprise, and is not registered for VAT, is required to be registered. A vendor is defined in s1 to be any person who is or is required to be registered under the VAT Act. An enterprise, in the case of a vendor, is defined in s1 to mean any enterprise or activity which is carried on continuously or regularly by any person in the Republic.

[20] Consol registered as a vendor under the VAT Act. It did so because it carried on an enterprise. The enterprise carried on by Consol was the manufacture and sale of glass containers. The imposition of VAT in terms of s7(1) was levied on the supply by any vendor of goods or services supplied by that vendor. In the case of Consol, VAT was levied on its sales of glass containers. That was the enterprise carried on by it. Consol at no stage carried on a financial services enterprise.

[21] Consol, like every other enterprise, required a variety of inputs in order to carry out the enterprise upon which it is engaged. As the facts of this case make plain, Consol raised loans to acquire the businesses that then constituted the enterprise conducted by it. Consol concluded the refinancing transactions, which included taking out loans with a consortium of local banks, when it had previously raised funds by issuing Eurobonds.

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[1] *Commissioner for the South African Revenue Services v De Beers Consolidated Mines Ltd* [2012] ZASCA 103; 2012 (5) SA 344 (SCA) paras 44 – 47.

[22] Neither the original issuance of the Eurobonds, nor the loans secured from the local consortium, transformed Consol from a vendor engaged upon the enterprise of selling glass containers into a vendor engaged also upon the enterprise of supplying financial services by issuing debt. Consol elected to borrow money to acquire the businesses. It did so to carry on the enterprise of selling glass containers. When Consol entered into the refinancing transactions and borrowed moneys from the lending consortium, it remained the same enterprise – a seller of glass containers. It did not become, in addition, a supplier of financial services. Put simply, when an enterprise borrows money, it is supplied a financial service, it does not become the supplier of a financial service. To hold otherwise is to confuse a borrower with a lender. The lender supplies the financial service, the borrower receives that service. Consol is simply not a vendor of financial services. It registered as a vendor in respect of the enterprise upon which it engaged, that is, as a manufacturer and seller of glass containers and so it remained.

[23] That disposes of the exempt supply submission. It is therefore unnecessary to reach any of the other issues raised by this submission. One problem is that a conventional loan agreement does not readily fall within the concept of a 'debt security'. The definition in s 2(2)(iii) provides that it is 'an interest in or right to be paid money'; or 'an obligation or liability to pay money' that is, or is to be, owing by person. An obvious example of a debt security is a bond or a similar financial instrument of the type that banks, some large companies, public authorities, public enterprises and various levels of government issue to secure funding. Another is a letter of credit or bill of exchange other than a cheque. A conventional loan agreement under which a bank agrees to

lend money to its customer does not fit comfortably within this definition. What is contemplated, as is apparent from s 2(1)(*c*), is a document that may be issued, allotted, drawn, accepted, endorsed or the ownership of which may be transferred. Again, that is typical of bonds and certain types of financial instruments, of which a loan agreement is not one.

[24] The definition says that a debt security does not include a cheque. However, the definition of a cheque in s 2(2)(i) goes far beyond the conventional notion of a cheque. It means:

‘A bill drawn on a bank payable on demand, a postal order, a money order, a traveller’s cheque, or any order or authorisation (whether in writing, by electronic means, or otherwise) to a financial institution to credit or debit any account’.

[25] This exclusion casts light on the meaning of a debt security. Particularly in international trade, payment of the price of goods is conventionally secured by way of either a bill of exchange or, more frequently, a letter of credit. Once that is drawn, and perhaps accepted or endorsed by the drawer’s bank, such instruments can be transferred from one person to another, usually by way of endorsement. On presentation they constitute a right to be paid money by the holder thereof. Conversely they constitute an obligation by various parties, but particularly the issuer or drawer of the bill or letter of credit, to pay money. All of this is entirely inconsistent with the notion that a conventional agreement of loan constitutes a debt security.

[26] That being the case, the exempt supply submission must fail. Consol was not a supplier of financial services. Consol was a manufacturer and supplier of glass containers. Those were not goods exempt from VAT imposed under s7(1)(a). VAT was levied on the

supply by Consol of its glass containers. And it followed that the exempt supply submission could not avoid the principal issues as to whether the local services acquired by Consol were acquired for the purpose of use in the course of making taxable supplies and whether the imported services were utilized by Consol for the purpose of making taxable supplies.

**Taxable supplies**

[27] I turn to consider these issues. Counsel were at odds as to the nature and closeness of the connection that must exist between the use of the services acquired by Consol and the making of taxable supplies by Consol, that is to say, the supply of glass containers. It was submitted on behalf of Consol that there must be *some* nexus or link between the services acquired and the making of taxable supplies. Unsurprisingly, this undemanding test did not find favour with the Commissioner's counsel who submitted that the use of the services must be closely associated with the making of taxable supplies or an integral part of the processes used to make taxable supplies. Anything less is too remote.

[28] The relevant part of the definition of input tax, quoted above, has these components. The services must be acquired wholly or partly for the purpose of consumption, use or supply. Acquisition for some other purpose will not do. Acquiring to consume, use or supply will not suffice if the purpose of the acquisition is not in the course of making taxable supplies. In this case, this means in the course of manufacturing and selling glass containers. The Commissioner submitted that 'in the course of' connotes 'during' or 'in the process of' manufacturing and selling glass containers, rather than steps preparatory to such process.[2]

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[2] Relying upon *ITC 174465* SATC 154.

[29] It is of limited assistance to make use of synonyms in order to understand the specificity of the statutory formulation: in the course of making taxable supplies. Two observations assist the interpretative exercise. First, the diversity of goods and services that may constitute taxable supply in a modern economy and the complexity of the lines of supply that may be used in the making of such goods and services should not be underestimated. An interpretation that is too restrictive of what is required to make taxable supplies runs the risk of underestimating this diversity and complexity.

[30] Second, since the purpose of acquisition is for consumption, use or supply, it is helpful to consider how these attributes of the goods or services acquired have utility in the making of the taxable supplies. It is this functional relationship that signifies. One way of analysing this relationship is to consider the following: for a given quantity of output, what inputs of goods or services are consumed, used or supplied to make or produce that output. Some inputs will clearly qualify. For example, in the making of glass containers, cullet (waste glass) is often used as a raw material. Other goods and services will not qualify at all and others may require difficult judgments in determining on which side of the line they fall.

[31] Similar considerations are of application in the interpretation and application of the definition of imported services in s1. The definition specifies a relationship between the supply of imported services to a recipient and the extent to which such services are utilized or consumed, otherwise than for the purpose of making taxable supplies. Although the definition focuses upon supply for a purpose other than the making of

taxable supplies, the enquiry is much the same as that contemplated by the relevant portion of the definition of input tax. In both definitions there is a differentiation between the purpose of making taxable supplies and other purposes. Under both definitions, the determination as to whether the supply was for the purpose of making taxable supplies provides an answer as to whether the requirements of the definition are met. The definition of imported services does not extend to the supply (as opposed to the use or consumption) of services otherwise than for the purpose of making taxable supplies. But this difference has no relevance for present purposes. I turn next to the application of these statutory concepts to the facts of this case.

[32] Consol procured and made use of the local and imported services for the purpose of executing the refinancing transactions. Consol's grounds of appeal as to the application of the law to the facts relied upon the contention that the Eurobonds were utilized to acquire the assets in order to make taxable supplies, that is to say, to manufacture and sell glass containers. The refinancing transactions substituted local debt for foreign debt with the same object.

[33] It is therefore to the original transaction in 2007, in terms of which Consol acquired its glass manufacturing businesses, that we must look to determine the purpose for which the local and imported services were procured in 2012. The premise of Consol's contention was that the purpose of securing funding to acquire the businesses to make taxable supplies in 2007 did not, in substance, change and remained in place in 2012. The substitution of local debt for foreign debt permitted Consol to continue the very same businesses it had acquired in 2007. Those

businesses were fully functional and engaged upon the very enterprise that Consol now conducts.

[34] I have described above how Consol came to acquire the businesses of Consol Limited and its two subsidiaries as part of a leveraged buy-out. The reorganisation placed the operating businesses into a new entity, Consol. A new holding company, Consol Holdings, held all the equity in Consol Limited and Consol. And Consol Holdings was controlled by a private equity consortium. The net proceeds of the Eurobond debt were used to effect this reorganisation.

[35] Consol's appeal rested upon the initial premise that the Eurobonds were utilized by Consol in 2007 to acquire the assets so as to make taxable supplies. Was this premise correct?

[36] One aspect of the reorganisation was indeed Consol's acquisition of the operating businesses and the use of the Eurobond debt to do so. But the reorganisation must be considered in its totality. What change did the reorganisation effect? The operating businesses, both before and after, continued to make glass containers. That these operating businesses were now held in a different entity within the Consol group was of no consequence to the enterprise carried on by these businesses. The structure of the group changed, and new shareholders were placed in control of a new holding company. But not, on the evidence, to bring about some material change to the business of making glass containers. And most important of all, the stated purpose of the Eurobond debt was to effect the reorganisation of the Consol group of companies. Nothing of that reorganisation was directed to any change in the making of taxable

supplies, that is, in the manufacture of glass. That being so, there was no functional link between the issue of the Eurobonds and the making of taxable supplies. Consol's initial premise does not hold.

[37] It follows according to the logic of Consol's argument, that if the Eurobond debt was not issued in 2007 with the purpose of making taxable supplies, then neither was the raising of local debt in 2012. The purpose remained the same: to maintain the funding for the reorganisation of the Consol group of companies. Once that was so, the procurement of local and imported services in 2012 was not used by Consol in the course of making taxable supplies. The purpose of using these services was to replace Eurobond debt with local debt and thereby continue to finance the reorganisation that had taken place in 2007.

[38] Something was made in the evidence and in the argument before us of the fact that in 2007 some R227 million was spent on capital expenditure. Mr Nayager testified that the main item of such expenditure was the rebuild and expansion of the Bellville plant. Reference was also made in the offering memorandum to the use of the proceeds of the Eurobonds for prefunding capital expenditure. The relevant footnote stated that any remaining funds, after the repayment of short-term borrowings, would be used partially to fund the expansion of the Bellville facility.

[39] The use of funds for capital expenditure, set out in the offering memorandum, was hedged about with qualifications. The memorandum sought to raise some R4 billion by issuing Eurobonds, the balance of R2.5 billion was to be sourced from share capital and shareholder loans. Of the

total funding of R6.5 billion, R200 million was allocated to the repayment of debt and the prefunding of capital expenditure. Of this sum, short term borrowing was first be repaid. If anything remained after the completion of the transaction, then, what remained would be used partially to fund the expansion of the Bellville facility.

[40] This provision for the Bellville facility was so modest and subject to such conditionality that it simply cannot be said to amount to the purpose for which the Eurobonds were issued. The Eurobonds were issued to facilitate the reorganisation. Without the reorganisation, there would have been no need to secure Eurobond debt. The reorganisation was not undertaken to expand the Bellville facility. The expansion was entirely incidental to the reorganisation. That being so, there is no basis to contend that the Eurobond was issued with the purpose of funding capital expansion, and in this sense, for the making of taxable supplies.

[41] One further matter arose in the course of argument before us. Although the issue of the Eurobonds was to effect the reorganisation, the raising of local debt in 2012 was undertaken to provide a more cost effective debt structure, and thereby reduce Consol's costs of servicing its debt and avoid its hedging costs. In this, Consol was successful. Consol produced a schedule comparing the cost of the original debt in the period 2007- 2013 and the cost of the refinanced debt in the period 2013 – 2018. The difference in the cost of the debt over the periods compared is some R275 million.

[42] The local and imported services procured by Consol in 2012 were used to effect the refinancing of Consol's debt. That refinancing reduced

Consol's costs. The consequences of this for Consol's free cash flow, its profits and Consol's capacity to fund capital expenditure or otherwise to enhance its manufacturing capability was little explored in evidence, since this was not the focus of the trial before the tax court.

[43] The issue that arises is whether the refinancing, by reason of these cost savings, may be found to have a functional link to the manufacture by Consol of glass containers, and hence, to the making of taxable supplies.

[44] The difficulty in considering this issue is whether it formed part of the case before the tax court. Rule 32(1) of the tax court rules requires an appellant to deliver a statement of its grounds of appeal. The statement must set out the material facts and legal grounds upon which the appellant relies for the appeal. The statement is a pleading, defining the issues so that the Commissioner knows the case to be adjudicated.[3]

[45] Consol's statement of grounds included the following:

'Consol Glass operates in a very competitive market. The reduction of input costs is essential in order to maintain a competitive position in the market. The expenses that were incurred, substituting (refinance) the Eurobonds with local funding was in order to put in place less expensive funding which made Consol Glass more competitive and more productive in making taxable supplies, ie producing glass bottles.'

[46] he statement of grounds was divided into facts, legal grounds and the application of the law to the facts. The ground of appeal just cited was

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[3] *Commissioner for the South African Revenue Service v Massmart Holdings Limited* IT 14294 para 5

advanced as a fact. The ground of appeal advanced that applied the law to the facts was quite different. It is summarized in paragraph [31] above. There it was contended that the Eurobonds were utilized to acquire assets in order to be able to make taxable supplies. The substitution of this debt with locally acquired finance fulfilled the same function, that is, to finance the assets needed by Consol to make taxable supplies.

[47] A fair reading of the statement of grounds indicates that Consol's case was based upon the contention that the Eurobonds and the replacement funding were utilized to acquire assets so as to manufacture glass containers. It requires some ingenuity to appreciate that Consol could also have been contending that the refinancing was undertaken to make Consol more competitive. The first ground was predicated upon the continuity of purpose to acquire assets that commenced in 2007 when Consol acquired the businesses and remained the purpose of the refinancing. The ground of appeal, based on Consol's competitive positioning, raises entirely distinctive issues. For example, what were the competitive constraints under which Consol operated, in what market, requiring what competitive response that informed the refinancing transaction?

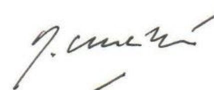
[48] The parties did not understand the case to be concerned with Consol's competitive positioning and the relationship of this to the refinancing transaction. This was not the basis upon which the trial was run, nor was it the basis upon counsel argued their cases, either in the tax court or before this court. There can be little doubt that the refinancing was intended to place Consol in a position to continue to fund the original reorganisation at a lesser cost, and it did so. What the savings achieved by

Consol permitted it to then to do was a matter of effect rather than purpose, beyond the remit of the pleaded case.

[49] In these circumstances, no injustice is done to Consol to hold it to the case that it sought to make out. Furthermore, the paucity of evidence that bears upon a case predicated upon competitive positioning, and the many questions that arise from it that cannot be answered on the evidence before us, provides a strong indication that we should not entertain such a case. And I decline to do so.

[50] For these reasons, the appeal is dismissed. Counsel were in agreement that the costs of the appeal should follow the result. The following order is made:

> The appeal is dismissed with costs, including the costs of two counsel.



DAVID UNTERHALTER
ACTING JUDGE OF APPEAL

Appearances

| | |
|---|---|
| For appellant: | C Louw SC |
| Instructed by: | Cliffe Dekker Hofmeyr, Johannesburg; |
| | Honey Attorneys Inc, Bloemfontein |
| For respondent: | M W Janisch SC (with him ST Seshoka) |
| Instructed by: | State Attorney, Cape Town and Bloemfontein |