CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 79/23

In the matter between:

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Applicant

and

MEDTRONIC INTERNATIONAL TRADING S.A.R.L. Respondent

Neutral citation:	*Commissioner for the South African Revenue Service v Medtronic International Trading S.A.R.L* [2024] ZACC 26
Coram:	Maya CJ, Madlanga ADCJ, Kollapen J, Majiedt J, Mathopo J, Mhlantla J, Rogers J, Theron J, Tolmay AJ and Tshiqi J
Judgments:	Madlanga ADCJ (unanimous)
Heard on:	20 August 2024
Decided on:	20 December 2024

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Division, Pretoria.

1. Leave to appeal is granted.

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

3. The order of the Supreme Court of Appeal is set aside and replaced with the following:

   (a) The appeal is upheld.

   (b) The order of the Gauteng Division of the High Court, Pretoria is set aside and replaced with the following:

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

JUDGMENT

MADLANGA ADCJ (Maya CJ, Kollapen J, Majiedt J, Mathopo J, Mhlantla J, Rogers J, Theron J, Tolmay AJ and Tshiqi J concurring):

Introduction

[1] This is an application for leave to appeal brought by the Commissioner for the South African Revenue Service (Commissioner) against a judgment of the Supreme Court of Appeal.[1] At issue is whether a taxpayer, who – in terms of section 230 of the Tax Administration Act[2] (TAA) – has concluded a voluntary disclosure agreement (VDA) with the South African Revenue Service (SARS), can seek remission of interest in terms of section 39(7) of the Value Added Tax Act[3] (VAT Act) where that taxpayer has agreed to pay the interest in terms of the VDA. The majority in the Supreme Court of Appeal did not give a categorical answer to this question. It

[1] *Commissioner, South African Revenue Service v Medtronic International Trading SARL* [2023] ZASCA 20; 2023 (3) SA 423 (SCA) (Supreme Court of Appeal judgment).

[2] 28 of 2011.

[3] 89 of 1991. Although section 39 of the VAT Act was substantially amended by the TAA, the wording of the section prior to such amendment continues to apply in relation to interest. It is this prior wording to which I make reference later in this judgment.

held that once a taxpayer has made a request that interest be remitted in terms of section 39(7) of the VAT Act, the Commissioner is obliged to consider the request in terms of the Promotion of Administrative Justice Act[4] (PAJA) and to take a decision on it one way or the other. To the majority, it mattered not that the taxpayer had already agreed to pay the interest in terms of the VDA. On the other hand, the minority took the view that remission of interest post conclusion of a VDA was legally incompetent. Therefore, a request for remission at that stage would be stillborn.

Background

[2] The respondent, Medtronic International Trading S.A.R.L. (Medtronic International), is a Swiss registered company. It manufactures and distributes medical devices and provides certain medical solutions. Medtronic International, Medtronic Africa (Pty) Ltd (Medtronic Africa) and other entities are subsidiaries of Medtronic plc, all of which comprise the Medtronic Group. Medtronic Africa is the Medtronic Group's distribution arm in South Africa.

[3] During the period June 2004 to May 2017 Ms Hildegard Steenkamp was employed as an accountant by Medtronic Africa. Although employed by Medtronic Africa, she performed functions for Medtronic International as well. Her duties entailed all VAT-related work, and the management of audits from tax authorities. During that period Ms Steenkamp embezzled an amount of R537 236 176.59 from the Medtronic Group. She did this by exploiting SARS and the Group's weak accounting systems. She made repeated payments from one of the Group's bank accounts to her late husband's bank account. She added this bank account to a list of bank accounts into which the Medtronic Group had to make payments lawfully.

[4] Ms Steenkamp concealed the embezzlement by submitting false VAT returns to SARS. Medtronic International then sought reimbursements for VAT payments which

[4] 3 of 2000.

it had not made. Consequently, the funds embezzled by Ms Steenkamp were repaid by SARS. A complex scheme, indeed. In all of this, Medtronic Africa and Medtronic International had underpaid on their VAT liabilities.

[5] Ms Steenkamp's fraudulent activities were eventually uncovered through extensive investigations and forensic audits. She was arrested, charged criminally, convicted in respect of more than 330 transactions and sentenced to a lengthy period of imprisonment. Round about the time of Ms Steenkamp's arrest, Medtronic Africa and Medtronic International each applied to SARS' voluntary disclosure unit for relief in terms of the Voluntary Disclosure Programme (VDP). This they did in terms of sections 225 to 230 of the TAA. Their voluntary disclosures related to the VAT underpayments. The benefit a taxpayer who is in "default"[5] gets under the VDP is absolution from criminal prosecution[6] and relief in respect of any understatement penalties[7] and administrative non-disclosure penalties or other penalties imposed under a tax Act.[8] This benefit is obtainable if the taxpayer has made a valid voluntary disclosure and concluded a VDA.[9]

[6] During the negotiations under the VDP, Medtronic Africa and Medtronic International made separate requests to SARS for the waiver of interest arising from the VAT underpayment. Responses to the two companies were that SARS would waive penalties in terms of section 229(b) and (c), but that it lacked the power to waive interest under the VDP. The voluntary disclosure unit advised that the Medtronic companies could either proceed to the conclusion of VDAs and pay the full agreed amounts, including interest, or withdraw from the VDP, in which event SARS' ordinary

[5] In terms of section 225 of the TAA "'default' means the submission of inaccurate or incomplete information to SARS, or the failure to submit information or the adoption of a 'tax position', where such submission, non-submission, or adoption resulted in an understatement".

[6] Id at section 229(a).

[7] Id at section 229(b).

[8] Id at section 229(c).

[9] Id at section 229.

statutory enforcement processes would ensue. By "ordinary" I am referring to processes outside of the VDP.

[7] The companies elected to continue pursuing relief under the VDP. This culminated in the conclusion of two VDAs, one in respect of each company. At this point, I need say nothing more about Medtronic Africa because the review proceedings about which I say more presently concern only Medtronic International. In terms of its agreement, Medtronic International was to pay a total amount of R457 670 112, made up of capital VAT, understatement penalties and interest. SARS granted Medtronic International 100% relief in respect of administrative non-compliance penalties. Also, SARS was not to pursue criminal prosecution for any offence arising from the disclosed default.

[8] After conclusion of the VDA, Medtronic International submitted a request for remission of interest in terms of section 39(7) of the VAT Act. SARS refused to consider this request. The reason was that section 39(7) of the VAT Act did not apply to VDAs. Medtronic International brought an application in the Gauteng Division of the High Court, Pretoria seeking a declarator that sections 225 to 233 of the TAA do not prohibit a request for remission of interest in terms of section 39(7) of the VAT Act and an order reviewing and setting aside SARS' refusal to consider Medtronic International's request for remission. Medtronic International succeeded and the High Court remitted the matter to the Commissioner to consider Medtronic International's request.

[9] On appeal to the Supreme Court of Appeal, the Court was split three / two. The majority judgment framed the question to be decided as being whether SARS could lawfully refuse to consider Medtronic International's request for remission of interest. The majority emphasised that this was the real question by saying the following. The Court was not called upon to determine "the issue whether section 39(7) finds

application in circumstances where SARS and a taxpayer have concluded a [VDA]".[10] "For now," continued the majority, "*all* we are called upon to decide is whether SARS was justified in law to refuse to even consider Medtronic International's request by virtue of such request having been made subsequent to the conclusion and implementation of the [VDA]".[11] (Emphasis added.)

[10] Proceeding to answer the identified question Petse DP, for the majority, held:

> "SARS bears a statutory duty buttressed by [section 33 of] the Constitution to, at the very least, give consideration to the request and decide it on its own merits. This, SARS irrefutably refused to do. In these circumstances a review under section 6(2)(g) read with sections 6(3) and 8(2) of PAJA is warranted."[12]

[11] The majority went on to hold that neither the VAT Act nor the TAA provides, whether expressly or by necessary implication, that a taxpayer who has concluded a VDA may not seek remission of interest in terms of section 39(7).[13] If such a result was intended, that intention "would have been clearly and indeed easily expressed".[14] The majority then summed up by stating that it was of the view that—

> "at the very least, SARS was required to entertain the application for remission and to consider and adjudicate it on its merits. The question whether remission of interest should be allowed and, if so, to what extent, does not arise in this appeal."[15]

[12] Consequently, the majority dismissed the appeal.

[13] The minority judgment penned by Goosen JA would have upheld the appeal. Unlike the majority's PAJA-based approach, the minority foregrounded an

[10] Supreme Court of Appeal judgment above n 1 at para 45.

[11] Id.

[12] Supreme Court of Appeal judgment above n 1 at para 46.

[13] Id at para 47.

[14] Id at para 49.

[15] Id at para 50.

interpretative exercise. It held that a decision on whether SARS may consider a request for the remission of interest in terms of section 39(7) after a VDA has been concluded—

> "can only be made upon a proper interpretation of the relevant statutory provisions. If it is found that the TAA, read with section 39(7) of the VAT Act, entitles a taxpayer to request remission *after* conclusion of a voluntary disclosure agreement, then (and only then) must the Commissioner's decision be set aside. If, however, the effect of the conclusion of an *agreement* as to the outstanding tax liability precludes a request for remission of interest thereafter, then the Commissioner's decision must stand, since it is lawfully justified."[16] (Emphasis in original.)

[14] The minority then engaged in an interpretative exercise. It held that there were three purposes for the VDP. The first is that the principal purpose of the VDP is to have an agreement whose obligations are enforceable in the ordinary course like any other contractual obligations.[17] The second purpose is that the VDA obviates the need for SARS to engage in investigation and auditing processes in order to raise an assessment.[18] The third purpose is to incentivise disclosure by taxpayers of defaults otherwise unknown to SARS by assuring taxpayers that SARS will be bound by the outcome of the process.[19] In this regard, the VDA is the mechanism chosen by the Legislature for the protection of the interests of both parties.[20] On this, the minority concluded that the VDA "is the centrepiece of the voluntary disclosure programme".[21] On this aspect, the minority then concluded that the provisions governing the VDP—

> "do not permit a taxpayer who has entered into a voluntary disclosure agreement to seek a remission of interest, the amount of which was incorporated in the determined tax debt due, *after* the conclusion of the voluntary disclosure agreement. To hold

[16] Id at para 60.

[17] Id at para 85.

[18] Id at para 86.

[19] Id at para 88

[20] Id.

[21] Id at para 89.

> otherwise would undermine the legal consequences that attach to the conclusion of such agreement."[22] (Emphasis in original.)

[15] Paraphrasing, I would say the minority's holding is to the effect that once you interfere with the material terms of the "centrepiece" (and provision in the VDA for payment of interest is certainly a material term), you have effectively undone the VDA. This is so because the VDP—

> "involves the determination of a tax debt payable in consequence of a default. That determination necessarily includes the 'capital' of the outstanding tax and *the interest* payable in relation thereto. The [VDA] is an agreement to pay the mutually agreed tax debt, in exchange for indemnity from punitive sanctions that would ordinarily apply."[23] (Emphasis added.)

Also, "[i]n accordance with the principles of the law of contract, both parties to the agreement are bound by its terms, subject only to the provisions of section 231 of the TAA".[24]

[16] The Commissioner now seeks leave to appeal from us. He submits that, since this is a PAJA review, our constitutional jurisdiction is engaged. The Commissioner also invokes our general jurisdiction. He argues that the question of interpretation raises an arguable point of law of general public importance that warrants consideration by this Court. On whether leave to appeal must be granted, the Commissioner contends that there are reasonable prospects of success. The existence of reasonable prospects is demonstrated by the three / two split in the Supreme Court of Appeal.

[17] Medtronic International argues that the Commissioner is raising the constitutional issue for the first time in this Court and that, therefore, our constitutional jurisdiction is not engaged. Also, this case is not about the interpretation of PAJA, but

[22] Id at para 93.

[23] Id at para 94.

[24] Id at para 62.

about the interpretation of the VAT Act and the TAA. That too, according to Medtronic International, does not engage our constitutional jurisdiction. Medtronic International also counters the submission that our general jurisdiction is engaged by contending that the point of law raised is not arguable. That there was a split Bench in the Supreme Court of Appeal was a function of errors made by the minority. Finally, Medtronic International argues that what happened in this case is fact-specific or unique and thus not of general public importance.

[18] In broad terms, on the merits, the Commissioner supports the reasoning of the minority in the Supreme Court of Appeal captured above and Medtronic International, that of the majority. Where necessary, below I do focus on other arguments raised by the parties.

[19] I next consider whether our jurisdiction is engaged and, if it is, whether leave to appeal must be granted.

Jurisdiction and leave to appeal

[20] The first issue before us is whether PAJA enjoins an organ of state to consider an application purportedly made in terms of an Act regardless of whether it is within its power to act in terms of the Act. I frame this question in this manner because of the holding by the majority that *all* that the Supreme Court of Appeal "was called upon to decide was whether SARS was justified in law to refuse even to consider Medtronic International's request by virtue of such request having been made subsequent to the conclusion and implementation of the parties' [VDA]". That concerns the interpretation and application of PAJA. *Bato Star Fishing* says that "[a]s PAJA gives effect to section 33 of the Constitution, matters relating to the interpretation and application of PAJA will of course be constitutional matters".[25]

[25] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 25. This is a trite principle in our law and has been supported in many cases. See for example *Camps Bay Ratepayers' and Residents' Association v Harrison* [2010] ZACC 19; 2011 (2) BCLR 121 (CC); 2011 (4) SA 42 (CC) at para 51 and *Alexkor Ltd v Richtersveld Community* [2003] ZACC 18; 2003 (12) BCLR 1301 (CC); 2004 (5) SA 460 (CC) at para 23.

[21] On leave to appeal, the application bears reasonable prospects of success. That will soon become clear as I say more in this judgment. Also, axiomatically the question to be answered potentially affects large numbers of taxpayers and is thus of general import. VDAs that may have appeared to be acceptable to the taxpayers concerned and were never challenged on the question of interest may suddenly be dusted off and requests for remission made. This is also true of current conclusions of VDAs. Consequently, it is in the interests of justice to grant leave to appeal.

[22] The second issue, which is related to the first, is the interpretation of the TAA in order to determine whether it is competent for SARS to grant a remission of interest after a VDA has been concluded. It will soon be shown that the Commissioner's interpretative points are arguable. As with the first issue, the determination of this issue has a potential impact on a large number of taxpayers. And, in my view, we ought to determine it. For these reasons, our general jurisdiction is also engaged.[26]

Must the appeal succeed?

[23] As indicated earlier, the majority in the Supreme Court of Appeal identified the issue for decision to be whether SARS could in law not even consider Medtronic International's request for remission after conclusion of a VDA. I have difficulty understanding how this can be the pre-eminent question. If there is no power to decide the request for remission of interest under section 39(7) of the VAT Act post conclusion of a VDA, there is no point in considering the request. So, in line with the minority's approach, the question to answer first is whether – once a VDA has been concluded – SARS has the power to remit interest in terms of section 39(7). If SARS lacks the power, that is the end of the matter. If it is within SARS' remit to exercise the

[26] Section 167(3)(b)(ii) of the Constitution provides that "[t]he Constitutional Court . . . may decide . . . any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court".

section 39(7) remission power after conclusion of a VDA, SARS is obliged to exercise the power.[27]

[24] This being the position, it is unsurprising that the majority found it necessary – albeit secondarily – to engage with the question whether SARS enjoys the section 39(7) remission power post conclusion of a VDA.[28] Without this secondary holding, it would not have made sense for the majority to require SARS not only to consider the request for remission, but also to decide it "on its own merits".[29] However, this secondary holding does not sit comfortably with the majority's firm view that *all* that the Supreme Court of Appeal was called upon to decide was whether SARS could in law not even consider Medtronic International's request for remission.

[25] The majority also ignored the true nature of the relief sought by Medtronic International in the High Court. In the main, that relief was a declarator whether, post conclusion of a VDA, a taxpayer was entitled to seek remission of interest in terms of section 39(7). The need for SARS to consider the request for remission would arise only if the first question was answered in the affirmative. That was the sequence in which the relief sought was couched. That sequence was logical and ought to have been followed by the majority.

[26] With all this in mind, the real question can only be whether SARS enjoys the section 39(7) remission power post conclusion of a VDA. If it does not, PAJA cannot enjoin it to consider a request for remission under section 39(7) made after a VDA has been concluded. What then is the answer to this real question? I will first deal with the provisions governing the VDP.

[27] What the outcome will be is something else altogether.

[28] Supreme Court of Appeal judgment above n 1 at paras 47 and 49.

[29] Id at para 46.

[27] To be valid for purposes of the VDP, in terms of the TAA, a disclosure must: be voluntary;[30] involve a "default" which has not occurred within five years of the disclosure of a similar "default";[31] be full and complete in all material respects;[32] involve a behaviour referred to in column 2 of the understatement penalty percentage table in section 223;[33] not result in a refund due by SARS; and be made in the prescribed form and manner.[34]

[28] Pursuant to the making of a valid voluntary disclosure and the conclusion of a VDA in terms of section 230 of the TAA, SARS *must*: not pursue criminal prosecution for a tax offence arising from the "default";[35] grant the relief in respect of any understatement penalty to the extent stipulated in section 223;[36] and grant 100 percent relief in respect of an administrative non-compliance penalty that was or may be imposed under the TAA or a penalty imposed under a tax Act.[37]

[29] In terms of section 230 of the TAA a VDA must include details on: the material facts of the "default" on which the voluntary disclosure relief is based;[38] the amount payable by the person, which amount must separately reflect the understatement penalty payable;[39] the arrangements and dates for payment;[40] and relevant undertakings by the parties.[41]

[30] It is common cause that the VDA was concluded validly.

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[30] Section 227(a).

[31] Section 227(b).

[32] Section 227(c).

[33] Section 227(d).

[34] Section 227(e).

[35] Section 229(a).

[36] Section 229(b).

[37] Section 229(c).

[38] Section 230(a).

[39] Section 230(b).

[40] Section 230(c).

[41] Section 230(d).

[31] The TAA's silence on remission of interest in terms of section 39(7) of the VAT Act does not of necessity lead to a conclusion that it permits remission post conclusion of a VDA. In terms of section 39(1)(a)(ii) of the VAT Act, when a disclosure about a default in respect of VAT is made in terms of the VDP with a view to concluding a VDA, interest is automatically on the table. I say so because, in terms of section 39(1)(a)(ii), if a taxpayer is more than one month late with their VAT payment, interest will automatically be payable on the tax amount. In this regard, the provisions are couched in peremptory terms; the word "shall" is used.[42] That means that agreement in a VDA by a taxpayer to pay interest is an agreement to pay something that section 39 peremptorily requires to be paid.

[32] A taxpayer concludes a VDA with the section 39(1)(a)(ii) provision on interest with her or his eyes wide open. There can be only one conclusion, and that is that the taxpayer accepts this provision and considers her- or himself bound by it. That being the case, Medtronic International's contention that – in the event of interest being remitted in terms of section 39 of the VAT Act – it is open to it to walk away from part of this unequivocal covenant is glaringly absurd. On this argument, a taxpayer may conclude a VDA and on the same day apply for remission of the interest. Effectively, the interest portion of the VDA is not worth the paper it's written on. One may ask: why bother to have this portion of the agreement? The reality is that this portion is there because it is decreed statutorily. So, it is unsurprising that – as was the case in Medtronic International's VDA – a VDA makes provision for interest. By signing the VDA, a taxpayer categorically accepts its terms, including the provision for interest which is a statutorily imposed component.

[33] Medtronic International's interpretation must be rejected as it leads to a glaringly absurd outcome. *Endumeni* says that "where the context makes it plain that adhering to the meaning suggested by apparently plain language would lead to glaring absurdity,

[42] See *Bezuidenhout v AA Association Ltd* 1978 (1) SA 703 (A) at 709H.

the court will ascribe a meaning to the language that avoids the absurdity".[43] This principle applies more so here because there is not even language that supports the absurd interpretation.

[34] It is so that the same section 39 also provides for remission of interest. However, there is simply an illogicality, if not contradiction, for a taxpayer to think that – although the VDP, which culminates in a VDA, requires her or him to commit categorically to pay a specified rate and amount of interest – there is still room to walk away from that categorical commitment.

[35] Also, Medtronic International's interpretation renders the VDP susceptible to the negotiation of VDAs in bad faith. I am here not focusing on individual VDAs. My focus is on the susceptibility to bad faith negotiation of the entire voluntary disclosure scheme. After a voluntary disclosure has been made in compliance with section 227 and a VDA has been concluded in terms of section 230, which is inclusive of a provision for payment of interest, SARS will, *as it is obliged to do*, (a) "not pursue criminal prosecution for a tax offence arising from the 'default'" and (b) grant all the other relief provided for in section 229. I say SARS is "obliged" because section 229 provides that after the disclosure and conclusion of the VDA, SARS "*must*" grant the relief provided for.

[36] SARS must act in this manner, not only because the TAA binds it to do so, but also because of the attendant belief that all the terms of the VDA are binding. A belief that may prove to have been misplaced as a result of the taxpayer's bad faith. Once the commitment to pay interest, which is definitely a material term of the agreement, is removed from the VDA, I do not see how the rest of the terms of the agreement can remain binding on SARS. As the taxpayer is being released from the obligation to pay interest, so too must SARS be released from the section 229 obligations. The edifice of the VDA comes tumbling down. In fact, this would be true even in instances where a

[43] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (*Endumeni*) at para 25.

taxpayer would be acting innocently in seeking remission of interest in terms of section 39(7) of the VAT Act. This undermines the entire voluntary disclosure scheme.

[37] This tells me that the object of the TAA was that – once concluded – a VDA could not be undone by a remission of interest in terms of section 39(7) of the VAT Act. In fact, and to be more direct, a request for remission in terms of this section is incompetent. This is a harmonious reading of the TAA's provisions on the VDP, on the one hand, and section 39(7) of the VAT Act, on the other. Medtronic International's reading leads to disharmony and that is at odds with the rules of interpretation. In *Independent Institute of Education* this Court held:

> "Statutes dealing with the same subject matter, or which are *in pari materia* [on the same subject], should be construed together and harmoniously. This imperative has the effect of harmonising conflicts and differences between statutes. The canon derives its force from the presumption that the Legislature is consistent with itself. In other words, that the Legislature knows and has in mind the existing law when it passes new legislation, and frames new legislation with reference to the existing law. Statutes relating to the same subject matter should be read together because they should be seen as part of a single harmonious legal system."[44]

[38] Medtronic International's reading of the provisions on the VDP and section 39(7) has the potential to create uncertainty and run counter to the broader purpose of the VDP, which is to regularise tax affairs and provide a clean slate to taxpayers who satisfy the VDP's requirements.[45]

[39] Also worth looking at is the first iteration of the VDP (VDP 1).[46] It made provision for the remission of interest. A qualifying taxpayer could receive 50% or 100% remission of interest where applicable.[47] Significantly, the VAT Act was

[44] *Independent Institute of Education (Pty) Ltd v KwaZulu-Natal Law Society* [2019] ZACC 47; 2020 (2) SA 325 (CC); 2020 (4) BCLR 495 (CC) (*Independent Institute of Education*) at para 38.

[45] Memorandum on the Objects of the Tax Administration Bill (2011) at para 2.2.16.3.

[46] Voluntary Disclosure Programme and Taxation Laws Second Amendment Act 8 of 2010.

[47] Section 6(c) of the TAA, read together with section 3(1) and (2).

enacted in 1991 and VDP 1 was introduced in 2010. If Medtronic International's argument were correct, section 39(7) of the VAT Act would have been enough to cover remission of interest at whatever stage. Provision for remission in VDP 1 would not have been necessary. The VDP under VDP 1 and the VAT Act were able to co-exist and there was no need to deal with the remission of interest separately under section 39(7) of the VAT Act after conclusion of a VDA. This was plainly a manifestation of the Legislature being "consistent with itself".[48]

[40] Medtronic International argues that the fact that the current VDP, which is governed by sections 225 to 233 of the TAA, is silent on the remission of interest is indication enough that such remission is now governed by section 39(7) of the VAT Act. In fact, continues the argument, it makes sense that the current VDP makes no provision for remission of interest because provision for remission is made in the VAT Act. I disagree. This argument ignores what I consider to be cogent counters which I have set out above. In addition and crucially, the argument pays no heed to the purpose of the Legislature in not importing all the provisions of VDP 1 to the current TAA provisions on the VDP. The Legislature was quite intentional in excluding from the TAA provisions on the VDP some of the stipulations of VDP 1, including those on the remission of interest. What was intended is set out in the Memorandum on the Objects of the Tax Administration Bill, which explains thus in clause 2.2.16.3:

> "Voluntary Disclosure Programme (''VDP'') (clauses 225 to 233):
> A permanent legislative framework for voluntary disclosure applicable across all tax types, excluding customs and excise, is included in this Chapter. The main purpose of such a framework will be to enhance voluntary compliance *and is in the interest of the good management of the tax system* and the best use of SARS' resources. The permanent framework in the [Tax Administration Bill] *will not provide interest* or exchange control relief *but will on a permanent basis provide the following relief*:
> (a) If the taxpayer has remedied all non-compliance with any obligation under a tax Act, 100% relief in respect of an administrative non-compliance penalty

[48] *Independent Institute of Education* above n 44 at para 38.

> that was or may be imposed under Chapter 15, excluding a penalty imposed under that Chapter or in terms of a tax Act for the late submission of a return.
>
> (b) The relief in respect of any understatement penalty referred to in column 5 or 6 of the Understatement Penalty Percentage Table in clause 223.
>
> (c) SARS will not pursue criminal prosecution."[49] (Emphasis added.)

[41] I read this to specify *the relief that is not to be provided for* under the VDP. That is interest or exchange control relief. This stands in stark contrast to another stipulation, *which is about relief for which provision is to be made*. That is the relief set out in (a) to (c) of the quote. This reading is consonant with my reasoning above. Also of importance is the fact that the explanatory memorandum says the permanent framework of the VDP is in the interest of the good management of the tax system. A self-contained VDP aids SARS in achieving its purpose of enhancing "good management of the tax system". A fractured system that permits the remission of interest after conclusion of a VDA and outside of the TAA provisions on the VDP flies in the face of this purpose. A self-contained process better conduces to the achievement of this purpose.

[42] That said, what, in law, are we to make of the content of an explanatory memorandum to a Bill? In *New Clicks* Chaskalson CJ answered this question thus:

> "In *S v Makwanyane and Another* I had occasion to consider whether background material is admissible for the purpose of interpreting the Constitution. I concluded that
>
> > 'where the background material is clear, is not in dispute, and is relevant to showing why particular provisions were or were not included in the Constitution, it can be taken into account by a Court in interpreting the Constitution.'
>
> Although it is not entirely clear whether the majority of the Court concurred in this finding, none dissented from it. I have no reason to depart from that finding and, in my view, it is applicable to ascertaining 'the mischief' that a statute is aimed at where that would be relevant to its interpretation. This would be consistent with the decisions of the Appellate Division in *Attorney-General, Eastern Cape v Blom and Others*, and

[49] Memorandum on the Objects of the Tax Administration Bill (2011) at para 2.2.16.3.

> *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* and the cases from other jurisdictions referred to in *Makwanyane's* case."[50]

[43] The recent judgment of this Court in *Thistle Trust* notes that—

> "[s]ince *New Clicks*, this Court has frequently had regard to explanatory memoranda to bills in the process of identifying the purpose of a statute or an amendment to a statute. So too, has the Supreme Court of Appeal, including in numerous cases involving revenue statutes."[51]

[44] In sum on this aspect, the interpretation I am advancing finds support in the Memorandum on the Objects of the Tax Administration Bill.

[45] Section89*quat* of the Income Tax Act[52] also points away from the correctness of Medtronic International's argument. This section provides for payment of interest by provisional taxpayers. In similar terms as section 39(7), section 89*quat*(3) provides for the remission of interest. If Medtronic International's submission in respect of the remission of interest under the VAT Act is correct, it must be equally correct in respect of remission of interest under the Income Tax Act where a voluntary disclosure and resultant VDA are in respect of income tax, as opposed to VAT. Section 232(1) of the TAA provides that SARS may issue an assessment or make a determination to give effect to a VDA. And section 232(2) provides that this assessment or determination is not subject to objection and appeal.

[46] Here is the bite. Section 89*quat*(5) of the Income Tax Act provides that the Commissioner's decision on remission of interest in terms of subsection (3) is subject to objection and appeal. If Medtronic International's argument is correct, this gives rise to two contradictory positions. First, an assessment that is inclusive of interest made in

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[50] *Minister of Health N.O. v New Clicks South Africa (Pty) Ltd* [2005] ZACC 14; 2006 (1) BCLR 1 (CC); 2006 (2) SA 311 (CC) at paras 200-1.

[51] *Thistle Trust v CSARS* [2024] ZACC 19; 2024 (12) BCLR 1563 (CC) at para 66.

[52] 58 of 1962.

terms of section 232(1) of the TAA in respect of a VDA concerning income tax is not subject to objection and appeal. Second, once a taxpayer applies for remission of interest in terms of section 89*quat*(3) of the Income Tax Act in respect of a VDA, the facility of objection and appeal is suddenly available. The disharmony, if not contradiction, is stark. Surely, this must be an indication that Medtronic International's argument is untenable. If the objection and appeal facility is unavailable under section 232(2) of the TAA, which is part of the sections that pertinently deal with the VDP, it cannot be available through the back door, as it were, under section 89*quat*(5) of the Income Tax Act.

[47] To summarise, it simply leads to a glaring absurdity to permit a taxpayer to conclude a VDA which makes provision for interest and, at the same time, to allow the taxpayer subsequently to deal with issues relevant to interest separately. This destabilises the VDP framework. Finality of VDAs will be up in the air. Regard should be had to these words from *Endumeni*: "[a]n interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation . . . under consideration".[53] Medtronic International's interpretation is at variance with this salutary principle and must fail.

[48] Lastly, let me comment on the fact that section 230 of the TAA specifically requires that successful engagement under the VDP must culminate in the conclusion of an agreement. The need for an agreement is not idle. Surely, the agreement must bind the parties to it, SARS and the taxpayer, and be enforceable on *all* its terms: *pacta sunt servanda* (agreements must be honoured).[54] The VDP regime in the TAA requires the conclusion of an "agreement". The effect of Medtronic International's argument is that a taxpayer enjoys a right effectively to undo one of the material terms

[53] *Endumeni* above n 43 at para 26.

[54] *Beadica 231 CC v Trustees, Oregon Trust* [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC) at paras 35, 83 and 85-7 and *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at para 57. I say enforceable on "all" its terms because in this matter there is no question about the possible non-enforceability of some of the terms of the VDA in issue here on some legally cognisable basis.

agreed to (i.e. the interest payable in terms of the VDA). That cannot be. The argument is at odds with the longstanding *pacta sunt servanda* principle that enjoys the recognition of this Court.[55]

Conclusion

[49] The Commissioner must succeed. The question that arises is whether Medtronic International is entitled to *Biowatch* protection so as not to be ordered to pay the Commissioner's costs.[56] The real question in this matter is whether it is competent for SARS to remit interest after conclusion of a VDA. In its notice of motion Medtronic International sought a declarator in that regard. That is an interpretative question that does not raise a constitutional issue. The PAJA review was consequential upon the question being answered in Medtronic International's favour. And once that was the answer, it would have followed as a matter of course that SARS should consider Medtronic International's request for a remission of interest. Put differently, the determination of the review would have been a mechanical exercise. So, there was not really an issue on the PAJA review.

[50] What brought the PAJA issue to the fore before us was the decision of the majority of the Supreme Court of Appeal. As I said, the majority held that in terms of PAJA the Commissioner is obliged to consider a request for remission of interest post conclusion of a VDA and to take a decision on it one way or the other. In these circumstances, what claim Medtronic International might have to *Biowatch* protection is tenuous. I do not consider it appropriate to afford the protection.

Order

[51] The following order is made:

1. Leave to appeal is granted.

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[55] Id.

[56] *Biowatch Trust v Registrar, Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at para 24.

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

3. The order of the Supreme Court of Appeal is set aside and replaced with the following:

   (a) The appeal is upheld.

   (b) The order of the Gauteng Division of the High Court, Pretoria is set aside and replaced with the following:

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

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