IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)

CASE NO: CA 118/2024

In the matter between:

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Appellant

and

HR FOCUS CC Respondent

(1) REPORTABLE: (YES) / NO
(2) OF INTEREST TO OTHER JUDGES: (YES)/NO
(3) REVISED.

20/8/2025
DATE

SIGNATURE

JUDGMENT

POTGIETER J

INTRODUCTION

[1] This is an automatic appeal in terms of section 133(2)(a)[1] of the Tax Administration Act[2] ('the TAA') against the decision of the Tax Court held at the Eastern Cape Division, Gqeberha ('the Tax Court'), which was handed down on 12 December 2023, upholding the appeal of the respondent against additional assessments raised in respect of skills development levies ('SDL') and Value Added Tax ('VAT'), pursuant to audits conducted by the appellant.

[2] The appellant is the Commissioner for the South African Revenue Service ('SARS').

[3] The respondent is HR Focus CC, registration number CK 2002/070808/23, ('HR Focus'), a close corporation having its principal place of business at 32A Bonanza Street, Quigney, East London, Eastern Cape Province.

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[1] The relevant sections of the TAA provide that:

133 Appeal against decision of tax court

(1) The taxpayer or SARS may, in the manner provided for in this Act, appeal against a decision of the tax court under sections 129 and 130.

(2) An appeal against a decision of the tax court lies-

(a) to the full bench of the Provincial Division of the High Court, which has jurisdiction in the area in which the tax court sitting is held; or

(b) to the Supreme Court of Appeal, without an intermediate appeal to the Provincial Division, if-

(i) the president of the tax court has granted leave under section 135; or

(ii) the appeal was heard by the tax Court constituted under section 118(5).

...

135 Leave to appeal to Supreme Court of Appeal against tax court decision

(1) If an intending appellant wishes to appeal against a decision of the tax court to the Supreme Court of Appeal, the 'registrar' must submit the notice of intention to appeal lodged under section 134(1) to the president of the tax court, who

(2) must make an order granting or refusing leave to appeal, having regard to the grounds of the intended appeal as indicated in the notice.

[2] Act 28 of 2011

[4] SARS applied in terms of section 133(2)(b) of the TAA for leave to appeal directly to the Supreme Court of Appeal. The latter section permits an unsuccessful party in a tax appeal, such as the appeal that served before the Tax Court, to seek leave from the president of the Tax Court to appeal directly to the Supreme Court of Appeal '*without an intermediate appeal to the Provincial Division.*' This application was refused on 29 February 2024. Hence, SARS is currently invoking, as indicated, the automatic right of appeal to this court in terms of section 133(2)(a) of the Act.

THE RELEVANT BACKGROUND

[5] HR Focus is a service provider to an extensive network of businesses in the mid-market retail sector throughout the Eastern Cape Province, including well-known chain stores such as Spar, OK Foods, Build-It and Fruit & Veg. During the period relevant to this appeal, it was rendering services to more than 90 such retail clients and its operations were the largest of its kind in the province. The issue between the parties, which is also the central question in this appeal, is the exact nature of such services. The issue put crisply is whether at the material time, HR Focus was the employer of some 4500 persons ('the disputed personnel') who, it is common cause, were registered on its payroll system but were deployed at the businesses of its retail clients. As more fully set out below, SARS contended that all these persons were employees of HR Focus (acting as a labour broker) who outsourced the employees to the retail clients. In contrast, HR Focus contended to the contrary. According to HR Focus it, *inter alia*, provided payroll administration services (under a services agreement) to its clients in respect of the latter's employees (in effect, the disputed personnel). This includes determining (and if it is required, attending to paying) wages on behalf of clients and deducting and accounting to SARS for Pay-As-You-Earn (PAYE) and Unemployment Insurance Compensation (UIC), also referred to as UIF, in respect of the said employees. It is thus readily apparent that the issue concerns a factual dispute between the parties. The Tax Court determined this dispute in favour of HR Focus and found that the latter was not the employer of the disputed personnel. The significance hereof for present purposes is that should HR Focus be the employer, it

would be liable to pay the SDL together with the VAT, which SARS attempted to recover from it in respect of the disputed personnel, *inter alia*, under the provisions of the Skills Development Levies Act[3] ('SDL Act'). Unsurprisingly, HR Focus vehemently disputed that it was liable as claimed by SARS. I revert to this aspect below.

[6] Pursuant to a payroll tax audit conducted by SARS in 2016 in respect of HR Focus, additional assessments were issued on 14 June 2016 against HR Focus for SDL covering the tax period 03/2011 to 08/2015. The additional assessments were not issued in respect of each tax period, SARS instead aggregated 12 tax periods and issued assessments for the tax periods 02/2012 (covering the tax periods 03/2011 to 02/2012); 02/2013 (covering the tax periods 03/2012 to 02/2013); 02/2014 (covering the tax periods 03/2013 to 02/2014); 02/2015 (covering the tax periods 03/2014 to 02/2015); and 02/2015 (covering the tax period 03/2015 to 08/2015). The additional assessments were raised on the basis that HR Focus was the employer of all the persons recorded on its payroll taxes declaration (including the disputed personnel) during the assessment period. I should add that HR Focus neither collected SDL from its retail clients nor did it include SDL in its accounting to SARS for payroll taxes. It was accordingly determined to be liable for the non-payment of SDL calculated at the prescribed rate of 1% of its total payroll value, together with understatement penalties and interest. HR Focus unsuccessfully objected to the additional assessments. As indicated, its appeal to the Tax Court, however, succeeded.

[7] SARS also subjected HR Focus, which is a VAT vendor, to a VAT audit in 2018 and issued additional VAT assessments on the basis that the disputed personnel recorded on its payroll taxes declarations were its employees whose work capacity was placed at the disposal of its retail clients for consideration. This was determined to be a vatable supply which was taxable at the standard rate. The value of the taxable consideration was seemingly calculated from the declarations that HR Focus made in its payroll tax return, which included PAYE as well as UIF deductions in respect of the disputed personnel. I should interpose that it is, of course, trite that wages are not taxable

[3] Act 9 of 1999.

supplies for purposes of VAT. The wages paid to the disputed personnel can accordingly not constitute the basis for determining the consideration that allegedly accrued to HR Focus for the apparent supply of the services of the disputed personnel to its retail clients. SARS presented no evidence to indicate on what basis the amount of consideration was computed or assessed to tax.

[8] The additional VAT assessments were also not issued on a per-period basis but were based on the aggregation of six VAT periods. The objection of HR Focus was again unsuccessful, but the appeal to the Tax Court succeeded.

[9] There were two further issues with regard to VAT that arose before the Tax Court, which can be disposed of swiftly. First, that HR Focus apparently failed to account for VAT on the income that it received under the cession to it by Roslyn Store Management Services of a contract concluded by the latter with the South African Social Security Agency (SASSA). The version of HR Focus that it duly accounted to SARS for the income and VAT obligations arising out of this transaction was placed in dispute by SARS in its Rule 33 reply. However, the relevant witness on behalf of SARS was unable to advance or substantiate any basis for disputing the version of HR Focus, which was correctly accepted by the court *a quo.*

[10] The remaining issue related to an error in the VAT invoices and returns in respect of transactions with Healthcare Solutions, which was conceded by HR Focus and was accepted by SARS as an issue that was no longer in dispute. Nothing further needs to be said thereanent.

PROCEEDINGS IN THE TAX COURT

[11] The parties agreed in the joint statement of facts dated 19 May 2023 that both the SDL and the VAT appeals should be adjudicated in the same hearing. The court found this to be convenient as the appeals were both based upon the same set of facts and

required the determination of substantially similar issues. It accordingly gave effect to this agreement. I should mention in passing that this outcome could arguably have been achieved through an application for the consolidation of the appeals.[4]

[12] Given that the burden of proof was on HR Focus to establish that it was not liable to pay any SDL or VAT as assessed by SARS[5], it had the duty to begin and presented the evidence of four witnesses. SARS, in turn, also called four witnesses. Before dealing in more detail with the respective versions of these witnesses, it is convenient to set out the general facts relevant to the matter, which were either common cause or not really in contention.

The undisputed relevant facts

[13] No written contract was entered into to record the business relationship between HR Focus and its various retail clients, in particular setting out the nature and extent of the services to be provided by HR Focus (in terms of the relevant services agreement) to those businesses. The erstwhile sole member and proprietor of HR Focus, Mr Bruce Butler, who passed away in December 2022, concluded verbal or gentlemen's agreements with his counterparts in those businesses. The only survivor with first-hand knowledge of the relevant agreements is Mr Kairuz. He is the former proprietor of a number of these entities, namely Engcobo Spar, Cala Build-It Hardware Store, Mzantsi Auto Filling Station and Trac Props Property Development and Rental, that engaged the services of HR Focus. Mr Kairuz was called as a witness on behalf of HR Focus. As more

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[4] The court correctly indicated that the rules of the Tax Court, R 3146 of 10 March 2023, prescribed in terms of section 103 of the TAA, do not expressly provide for the consolidation of actions. To clarify any misapprehensions in this regard, it should be indicated that rule 42 of those rules provides that where a procedure is not catered for in such rules, the most appropriate rule under the Uniform Rules of the High Court may be utilised to the extent that it is consistent with the TAA and the rules of the Tax Court. It would thus have been open to consolidate the said appeals by applying Uniform Rule 28, which is not inconsistent with either the TAA or the rules of the Tax Court. In any event, in the result, the appeals were justifiably *de facto* consolidated.

[5] Under section 102(1)(a) of the TAA: *'A taxpayer bears the burden of proving that an amount, transaction, event or item is exempt or otherwise not taxable.'*

fully set out below, the court *a quo* correctly pointed out that the evidence of Mr Kairuz was not gainsaid.

[14] HR Focus provided labour law and payroll administration services to its clients. The labour law services entailed, *inter alia,* drafting employment contracts and managing workplace disputes. It charged a flat rate fee for the services. The latter component, namely managing workplace disputes, included attending to disciplinary proceedings and representing the clients in hearings before the Commission for Conciliation, Mediation and Arbitration ('CCMA'). The employment contracts were drafted in the form of tripartite agreements, which designated HR Focus as the *'employer'*, the relevant business as the *'client'*, and the relevant individual as the *'employee'*. These contracts played a central role at the hearing to which I will return.

[15] The payroll administration services provided by HR Focus and for which it charged a fee based on a percentage of the client's wage bill together with ancillary charges, entailed: managing the client's payroll; ensuring that the necessary deductions were made from the employees' salaries; issuing payslips; calculating the leave or sickness benefits due to the employees; and determining any benefits due to the employees on termination of their employment. HR Focus operated and managed a separate payroll for each client. Some clients paid the employees directly based on the payroll calculations provided by HR Focus. Others required HR Focus to attend to paying employees' salaries and employees' taxes on their behalf. The dispute between the parties related to the latter group only. In these instances, HR Focus only effected payment to the employees after receipt of the full payroll amount from the particular client. It utilised a dedicated bank account, the Wage Distribution Account in the name of Mr Butler, for receipt of these payments from the clients and payment of the relevant salaries and employees' taxes.

[16] HR Focus accounted to SARS in respect of all persons on its payroll system, including the disputed personnel, for employees' taxes, namely PAYE and UIF. It rendered the relevant monthly payroll taxes returns under its own employer's tax number and paid the amounts due in respect of PAYE and UIF over to SARS.

[17] As indicated, HR Focus did not account in the periods of assessment to SARS for SDL as part of its accounting for PAYE and UIF. It also did not collect any SDL that might have been payable by its clients. It is principally the dispute that arose between the parties in respect of SDL that constituted the subject matter of the appeal before the Tax Court. It is apposite to return to the evidence presented by the parties at the Tax Court hearing.

The witnesses on behalf of HR Focus

[18] HR Focus presented the evidence of the undermentioned witnesses. Given the particular importance attached to his testimony by the Tax Court, it is convenient to commence with the evidence of Mr Kairuz, even though he was the final witness called by HR Focus. The evaluation of the versions of these witnesses is also dealt with and recapitulated below when dealing with the decision of the Tax Court.

(i) *John Phillip Kairuz*

[19] The witness confirmed that he was at all material times the proprietor of the businesses referred to above. He met Mr Butler in the year 2000 or 2001. The latter was interested in facilitating the human resources, payroll, and timekeeping for the witness's businesses. They had a verbal arrangement, which formed the basis of their business relationship that developed over time. This was never reduced to writing. It was not unusual because he had had business dealings with many parties in the past without having a written agreement in place.

[20] The services rendered by HR Focus entailed: facilitation of the payroll; timekeeping and attendance; as well as paying wages, PAYE, union dues and UIF. The businesses provided the funds to HR Focus beforehand, which were then used to effect these payments.

[21] The employees of the businesses were interviewed and appointed by the management of the relevant stores and businesses. Prospective employees approached the businesses directly and applied for employment, and the management would place them within the business. The senior management and lower supervisory staff would be responsible for giving instructions and supervising the employees. HR Focus would not be involved in any of these tasks. The management within a store would initiate any disciplinary proceedings from the outset, whereafter they would seek guidance from HR Focus with regard to the process. This was part of the services rendered by HR Focus. The witness stated unequivocally that his businesses (and not HR Focus) were the employers of all the staff at the stores. With regard to the designation of HR Focus as the *'employer'* on the tripartite agreement, the witness indicated that it was an arrangement made at the time to enable HR Focus to attend to the human resources matters of the businesses.

[22] With regard to the issue of employment tax incentive rebates or refunds ('ETI') claimed from SARS by HR Focus, it was part of the function of HR Focus to assist the businesses in processing the ETI claims. Credits would be passed by HR Focus in favour of the relevant business once the claim had been successfully finalised. The witness identified credit notes forming part of the record, passed by HR Focus in respect of ETI tax rebates, in favour of some of his businesses. This concluded his evidence-in-chief.

[23] Under cross-examination, the witness confirmed that all of the staff employed at Build-It, Engcobo, where the services of HR Focus were obtained, are permanently employed by the business in terms of employment contracts prepared by HR Focus, where the latter is designated as the *'employer'*. He indicated that the business paid the funds in respect of wages to HR Focus, who, in turn, administered the actual payments to the employees. The money came from the business. He reiterated that the source of the funding was his company, but that the funds were physically paid over by HR Focus to the employees concerned. He indicated that he was unsure which tax reference number was used to claim the ETI rebates or refunds. He was similarly unsure which tax

reference number was used for the payment of PAYE. He indicated that he assumed that his businesses were registered for SDL, being part of a large corporate entity such as Spar, but that he could not vouch for that. The court indicated that the evidence of the witness was not disputed in cross-examination and accepted his version without reservation. This conclusion has not been shown to be wrong and must thus be accepted.[6]

(ii) *Quentin Ashton de la Rey*

[24] The witness is currently the Legal Operations Manager at HR Focus. He initially worked at HR Focus for one year in 2008, performing relatively minor duties. He returned in June 2010 and took up the position of Human Resources Manager, reporting to a senior manager, Mr Craig Snelling. His current role is more labour-related and includes attending to disciplinary matters where he assists with investigations, chairs disciplinary hearings and attends to incidental matters. He furthermore attends to compiling templates for employment contracts. He also deals with the unions and appears at the CCMA. At first, his role was more junior, but he grew into the position. After his return in 2010, he worked directly with Mr Bruce Butler, the owner of HR Focus. When he commenced service in 2010, Mr Butler pre-empted the rumoured banning of labour brokers at the time by changing the business model of HR Focus away from a labour broking role to concentrating on the payroll administration and labour-related services provided by HR Focus. The payroll administration services entailed functions such as drawing up payslips containing all relevant information, such as the earnings and deductions, including tax and UIF. HR Focus also attended to claiming ETI rebates on behalf of its clients. Once the rebates are recovered, a credit note is passed in favour of the relevant client. The witness was only indirectly involved in the payroll administration services, for example, when he had to deal with pay disputes. During his second term at HR Focus and after having assumed a more senior role, he became more involved in this aspect and developed an understanding of how the payroll administration services work. He

[6] *KPMG v Securefin Ltd* 2009(4) SA 399 (SCA) para 24.

demonstrated the change in the business model with reference to copies of employment contracts in the trial bundle that were concluded both before and after the change. The earlier contracts relating to the labour broking era provided for temporary employment services in terms of section 198 of the Labour Relations Act for renewable periods ranging between one and three months. The later contracts reflect the change in that they did not provide for temporary employment, but were notice period contracts involving permanent employment for an indefinite period, terminable on notice. After the change, the retail clients of HR Focus were the employers. This fact was confirmed by Mr Butler and is reflected by the wording of the contracts as well as by what happens in the workplace. In the latter regard, the employee is based at the retail store, has to wear the uniform of the business, eg Spar, the company would recruit the employees and subsequently instruct HR Focus to engage the employees on the payroll in the positions and at the rates of pay advised by the company. HR Focus had no control over the day-to-day duties of the employees, whether they had to work overtime, or were entitled to receive a bonus. The retail clients provided the necessary instructions to HR Focus and also notified HR Focus when employees were on annual or sick leave and when employees had to be disciplined. HR Focus merely acted as an agent of the retail clients.

[25] In respect of disciplinary matters, HR Focus would advise the company on what would be the best option and would then be instructed by the company on how to proceed. Where a warning had to be given, HR Focus would draft the document and provide it to the company that issued the warning. If the company's instruction was to proceed with a disciplinary hearing, HR Focus would prepare the necessary documentation and provide it to the company to issue to the employee. The company would be the initiator at the hearing and would present all the facts and evidence. In most cases, the witness would chair the hearing and eventually provide his recommendations. If these were endorsed by the company, a finding and sanction would be issued. In cases where there was a settlement of the disciplinary dispute endorsed by the company, the witness would attend to the implementation thereof. The relevant settlement agreement would be signed by the employee, the company and HR Focus. Any monies owing to the employee are paid by the company. If the matter proceeded to the CCMA, the witness or one of his colleagues

would appear on behalf of the company and attend to the relevant processes on the instructions of the company. The retail clients obtained tremendous value out of the labour law services in that the businesses are generally fearful of the CCMA and of dealing with unions or labour-related matters. The relevant employees at HR Focus are experts in this field and took this burden away from the clients, allowing them to focus on their businesses.

[26] The witness also explained the process relating to the engagement of an employee on the HR Focus payroll as well as the preparation of the relevant employment contract. The process is initiated upon the receipt of a duly completed engagement form from the client. The form would contain all the necessary information to enable the employee to be engaged on the payroll. In addition to the information that has been referred to above, the form records the personal particulars of the employee, the work commencement date, the employee's banking details, and the duration of the contract. This information is also utilised to draft the employment contract, which is signed by the employee, the retail client, and HR Focus. The latter is still described as the employer in the later contracts for two reasons, even though it transitioned away from being a labour broker in 2008, namely (i) to ensure the *locus standi* of the relevant employees of HR Focus who appear at the CCMA, and (ii) to provide protection to the clients insofar as union activity at the workplace is concerned. By interposing HR Focus (rather than the individual businesses) as the employer of the total number of employees, the union is precluded from easily satisfying the stipulated threshold for membership numbers to enjoy recognition in the workplace. It is a mechanism to stymie attempts by unions to organise or operate in the workplace of the retail clients of HR Focus. As the witness put it: *'We had to try ... our best to protect our clients and keep the unions out as best as we could within the provisions of the law. So, that was the thinking behind it at the time.'*

[27] From approximately 2017, the employment contracts changed once more and now described HR Focus as the *'designated agent'*. Ever since the shift in 2008, HR Focus has always maintained that it was an agent, and the latest version of the employment contract expressly confirms this.

[28] The witness furthermore indicated that the initial negotiations to engage the services of HR Focus, ie, in concluding a services agreement, took place solely between Mr Butler and the relevant business owner. No discussions in respect of the material aspects of the services agreements involved store managers or internal staff. The latter were not privy to what transpired between Mr Butler and the business owner. The services agreements were verbal gentlemen's agreements based on mutual trust between Mr Butler and the relevant business owner. The witness himself was not involved in any of this. Mr Butler would, however, subsequently provide him with feedback and explain the details of the relationship with the relevant client going forward. He was simply required to follow through with the instructions of Mr Butler.

[29] Under cross-examination, the witness repeated his version, which was not contraverted in any respect. He was referred to a letter dated 19 May 2016 on an HR Focus letterhead written by Mr Butler, addressed to SARS, in which it was stated that:

> *'When the Company was bought, it had about 80 Employees and today it has grown to just over 4000 employees (outsourced). We do the payroll for another 1000 staff of other Companies. Therefore, in total, our payroll office handles over 5000 employees a month.'*

The apparent purpose of the cross-examiner was to challenge the witness's evidence-in-chief that, according to his understanding, after the change in the business model, the retail clients were the employers of these employees and not HR Focus. The witness again confirmed his version that HR Focus was not the employer. He was then asked to confirm that HR Focus contributed the employer's 5% towards the employee's Provident Fund, which he did, but added that this was after payment of the 5% contribution was received from the retail client. It was indicated to the witness that the SDL exemption letter from SARS dated 30 November 2005 was addressed to Andrews Recruitment, which sold the business to HR Focus, and that the latter was not exempt from SDL. The witness was

also referred to various employment contracts in respect of different retail businesses, which described HR Focus as *'employer'*. He responded that the important issue is the true nature of the contract and the terms of the agreement with the retail client. All of these were clear between the relevant parties. He indicated that HR Focus was merely fulfilling an administrative role in cases where it assisted employees in recovering payments due to them. By way of example, HR Focus would act as the intermediary between the employer and the Provident Fund and would complete the necessary claim documentation and provide the relevant forms to the employee. In the process, HR Focus would relieve the burden on the company that lacks the requisite skill and competency to fulfil such functions. The rest of the cross-examination was uneventful. Nothing of note emanated from the re-examination. The evidence of the witness was correctly accepted by the court.

(iii) Karen Ann Veaudry

[30] The witness is employed as an office administrator by HR Focus. She got married to Mr Bruce Butler in 2022 after they met in 2005, and she started working in his office in 2006. She has never been involved in the strategic management of the business. Mr Butler did not discuss his strategic decisions with the witness but would simply issue the necessary instructions. Her duties became more extensive over the years and basically entail ensuring that the office runs smoothly, that everybody in the office is provided with what they need to perform their duties, and to make sure that deadlines are met. Her interaction with the clients was limited to passing their instructions on to the relevant official in the office and assisting in dealing with and resolving errors that had been made by the office. Mr Butler initially released the payments himself, but she eventually took over this role. Her principal duties related to the payroll, and she was never involved in the labour law services, which were a separate department. She does not have much knowledge of this side of the business. Her role does not really entail the supervision of staff. However, she would often receive instructions from Mr Butler which she had to convey to the staff. She has no knowledge or experience of accounting. The standard

payroll process is that engagement or discharge forms in respect of new employees or those who have left the employ are received from the clients, and the relevant information is imported into the payroll computer software. The wages payable to employees are calculated, and the payslips are generated by the computer software on the strength of a timesheet, which is received from the client at the end of the month. The figures so calculated are sent to the client for verification. Once the client is satisfied with the relevant values, they would advise HR Focus to take the necessary steps to process payment. A payment method report is prepared, indicating how each person on the payroll would be paid for the month in question. In some cases, cash payments are made, and in others, electronic fund transfer (EFT) payments are made. The EFT payments are loaded onto the bank account, and the actual payments are released after the funds are paid over by the client pursuant to an invoice provided to the client by HR Focus. The payments are released on the date provided by the client. The client deposits the funds into a separate bank account titled the Wage Distribution Account. This account was in the name of Mr Butler and was set up in order to distribute the salaries and wages to the employees of the clients. HR Focus was very strict with regard to these payments in that the funds would have to appear in the relevant bank account before any salaries would be released. HR Focus had no influence over which persons are employed by the client on its workforce and would only become aware of any new persons employed by the client upon receipt of the engagement form.

[31] The witness referred to the fees charged by HR Focus for the services it rendered to its clients. It charged an admin fee to run the payroll, which is calculated by the software as a percentage of the wage bill. A basic fee based on the number of employees is charged in respect of the labour law services. The Compensation for Occupational Injuries and Diseases Act (COIDA) fees must be paid by the clients under their own reference numbers and cannot be made on their behalf by HR Focus. The client is provided with a payroll report to make the COIDA payment. While the witness was aware of ETI rebates, she had no specialised knowledge of this aspect. The relevant ETI rebate figures are calculated by the software. HR Focus would provide the client with a credit

note in respect of the rebate or refund due to the client. Mr Butler would attend to this aspect and ensure that the credit notes for each client were correct.

[32] Under cross-examination, the witness indicated that she was not a payroll administrator but an office administrator. Her knowledge of payrolls is based on working with the payroll software of HR Focus, but she is not a payroll expert. She was further referred to the question that was asked and the answer given with regard to employees reflected in the document or questionnaire that recorded an interview with SARS auditors, which was signed on 5 April 2016 by the witness, as well as Ms Beryl Porter of their accounts department. The relevant question was how many employees were employed by HR Focus in South Africa. The answer provided was approximately 4500. The witness indicated that she was not sure who completed the document, which was not in her handwriting. Nor was she sure who provided the information or answer, which did not correctly reflect the situation at HR Focus. She does not believe that she would have answered the questions and does not recall having checked their accuracy. Given that it was a SARS matter, she would have left it to the accounts department to handle. It is thus possible that Ms Porter of the accounts department responded to the questions and subsequently brought the document for her to sign. She was then referred to the letter of Mr Butler dated 19 May 2016, which stated that HR Focus had more than 4000 employees. She replied that she was unaware of the letter, but is sure that it related to the number of staff that they were processing through their payroll software. This was the approximate number for some time. She also confirmed that HR Focus made the 5% employer's contribution to the provident fund. This was, however, not a personal contribution. The funds emanated from the clients. The PAYE and UIF contributions are paid to SARS under the reference number of HR Focus. She was not aware whether HR Focus was registered for SDL.

[33] In re-examination, she testified that Ms Porter was employed in the accounts department on the numbers side, not at a high level. She was not involved in any discussions with Mr Butler, nor was she privy to any information about or had an understanding of the strategic nature of the business. Ms Porter has since left the employ

of HR Focus. The witness reiterated that the disputed personnel were under the complete control of the clients who engaged them and would discipline or discharge them. Throughout her involvement with HR Focus, it did not operate as a labour broker but provided payroll administration and labour law services to its retail clients. That concluded her testimony, which was in substance accepted by the court.

(iv) Justin John Emslie

[34] The evidence of the witness was not disputed in cross-examination and must be accepted. He practises as a chartered accountant. During the periods of the relevant assessments at issue in this matter, he was the accounting officer of HR Focus. He presently only attends to compiling its financial statements. He has never been the public officer of HR Focus. Typically, the main member of the corporation would be its public officer. The late Mr Butler was the sole member of HR Focus at the relevant time. The witness was also never involved in the preparation of statutory returns such as VAT, SDL, PAYE, or ETI for HR Focus. The wages for the staff on the payroll did not go through the income and expenditure statement of HR Focus but were accounted for through the balance sheet section of the financial records. HR Focus accounted for the wages as an agent. The wages were not reflected as income. The income statements of HR Focus only reflected the fees that HR Focus earned from delivering the payroll administration and other services. The witness confirmed that he attended a meeting on 3 November 2016 with representatives of SARS in his capacity as the accounting officer of HR Focus. Although he did not have a clear recollection of the meeting, he confirmed the correctness of the following extract (which refers to him) from the minutes of the meeting, which was signed by him on 18 November 2016, namely –

> *'Justin also stated that there is possibly some confusion around who is the employer for tax purposes and for labour law purposes. Justin proposed that he discuss with Mr Butler the possibility of obtaining an opinion on the nature of the relationship with the staff.'*

[35] Under cross-examination, the witness confirmed the correctness of the following extract from the aforesaid minutes:

> *'According to the SARS officials who attended the previous meeting, Mr Butler stated twice that he is the employer. The amended minutes signed by Mr Butler and Justin now indicate that Mr Butler said, "let us say for argument's sake that he is the employer". Justin confirmed that Mr Butler said in the meeting that HR Focus is the employer and that he was possibly trying to give some context to the discussion.'*

[36] The witness was further referred to the PAYE pre-audit assessment questionnaire involving Ms Veaudry, which referred to him as the public officer of HR Focus CC. He confirmed that, unlike the questionnaire, the aforesaid minutes correctly reflect him as the accounting officer and not the public officer of HR Focus CC. He indicated that he had no idea where the meeting involving Ms Veaudry took place. It could have been at his building, but he was not part of the meeting. The witness also indicated that in the course of preparing the financial statements of HR Focus, any supporting information provided is validated, although an audit is not conducted. There was no re-examination, and the case of HR Focus was then closed.

The witnesses on behalf of SARS

[37] SARS presented the evidence of the witnesses set out below. The evaluation of their versions is addressed in the next section, which outlines the Tax Court's decision.

(i) Gafsa Obaray

[38] She has been employed by SARS as an auditor for 30 years, since 1996. SARS conducted an audit of HR Focus. She and a colleague, Nobathlo Mbogeni, interviewed Ms. Veaudry and Ms. Porter of HR Focus and completed the PAYE pre-audit assessment questionnaire on 5 April 2016, which was signed by all four of them. There was some

confusion about the latter date in that the email, which requested the meeting, was sent by the witness to Ms Veaudry on 5 May 2016. It proposed that the meeting be held on 12 May 2016. The witness subsequently stated under cross-examination that the email relates to a different meeting. The meeting of 5 April 2016 took place at the premises of the accountant, Mr Emslie. The witness asked the questions set out in the questionnaire and made audit notes next to the answers provided by the representatives of HR Focus. She was referred in particular to the following questions and answers:

> *'13. Approximately how many employees do you employ within SA?* ***+/_4500.***
> **Audit note:** *All under HR Focus's control, excl. 7 office staff.'*
>
> *28. Do you procure staff or workers from a "labour broker" (individual) or a personal service provider (company)?:* ***No.***
>
> *30. Please furnish a list of all payrolls, including any offshore payroll and any payroll administered by any other party. Indicate categories and number of employees on each payroll:* ***+/- 80 different payrolls. Co. names & payroll names to be provided.***
>
> *34. Are all payments (in connection with services) made to your employees processed through the payroll system?:* ***Yes.***
>
> *40. At the end of their latest tax year, were all qualifying employees issued with IRP 5 certificates?:* ***Yes.***

[39] The witness indicated that the employer referred to in the questionnaire was HR Focus. She carried out an audit in respect of payroll taxes on HR Focus with regard to PAYE and SDL and provided the audit findings (presumably dated 10 May 2016, although the date is not complete) to HR Focus. The taxpayer has 21 days to respond to the findings. The outcome of the audit was that no adjustments were made in respect of PAYE since HR Focus was compliant. The audit concluded that the remuneration paid by HR Focus exceeded the SDL threshold and that it was liable to pay SDL, but that it rendered 'Nil' SDL declarations. The amount due was recalculated based on the total remuneration

paid according to the payroll, and HR Focus was liable for the shortfall. HR Focus wrote a 'without prejudice' letter to SARS dated 19 May 2016 in response to the audit findings. The letter indicated that *(sic)*:

Our main business is that of labour broking and up until March 2015, offered only temporary employment positions.

> *When we purchased the business, we were advised by the previous owners that the Company was exempt from paying SDL.*
>
> *When the Company was bought, it has about 80 Employees and today it has grown to just over 4000 employees (outsourced). We do the payroll for another 1000 staff of other Companies. Therefore, in Total, our payroll office handles over 5000 employees a month.'*

[40] A finalisation of audit letter dated 14 June 2016 was forwarded to HR Focus after consideration of its response to the audit findings. No adjustments were made in respect of the audit findings or the calculation of the SDL due by HR Focus. On 4 August 2016, HR Focus requested reasons for the assessment, which were provided by SARS on 7 October 2016. HR Focus lodged an objection on 13 December 2016, and SARS made a request for relevant material on 24 January 2017, requiring, *inter alia*, proof that HR Focus was appointed as an agent. HR Focus responded as follows on 6 March 2017: *'Kindly note that HR Focus CC was not officially appointed in writing as an agent of its clients, but they do the work and act as an agent on behalf of their clients.'* The objection was eventually unsuccessful, whereupon HR Focus lodged an appeal. The witness had no further involvement in the matter during the appeal stage. An initial understatement penalty of 100 % was raised, which was subsequently reduced to 25%.

[41] Under cross-examination, the witness conceded that the pre-audit assessment questionnaire had to be completed during an interview with the Public Officer of HR Focus. She, however, added that it can also be completed with a taxpayer representative. When this proposition was challenged, she conceded that the questionnaire nowhere

indicates that this is the case. She then alluded to the fact that this was set out in an email which she sent to Ms Veaudry, but added that it was not the email of 6 May 2016 that she referred to in her evidence-in-chief. She indicated that the latter email actually related to a meeting to discuss the audit findings and did not relate to the questionnaire. The new email that she referred to has not been disclosed to the counsel of HR Focus. When she was asked whether Mr Butler attended the meeting where the audit findings were discussed, as confirmed in the response of Ms Veaudry to the email of 6 May 2016, she stated: *'... it is not a yes, it is not a no at this time.'* She indicated that she was 100% certain that the meeting where the questionnaire was completed was held at the offices of Mr Emslie and that the meeting where the audit findings were discussed was held at the offices of Mr Butler. She was then reminded that the response of Ms Veaudry confirmed that the latter meeting would be held at the offices of Mr Emslie, as the witness requested in her email of 6 May 2016. She gave the following confounding, unrelated reply: *'There was a meeting that took place between myself, Mr Butler, Mr Butler's son Owen Bruce Butler and the audit manager, there were four people in total.'* When she was asked why the letter of 6 May 2016 was handed up, she replied that she did not know and that she *'did not have my ducks in a row.'* When the issue was revisited, she confirmed that the pre-audit assessment questionnaire had to be completed in an interview with the Public Officer, who is a senior official of the corporation, specifically approved by SARS for the role of chief liaison officer. She confirmed that she did not establish who the Public Officer of HR Focus was and that she should have forwarded the letter of notification of the audit to the Public Officer with whom SARS has to liaise in terms of the legislation. She confirmed that the questionnaire erroneously recorded that Mr Emslie was the Public Officer of HR Focus. She at first disagreed with the proposition that if it appears that the person being interviewed is not the Public Officer that the interview should be stopped and rather continued with the Public Officer. She added peculiarly that this was not necessary because *'... the employer knows more about his employees and his workforce and the remuneration than the accounting officer.'* When the proposition was repeated, she simply indicated that she did not do so in this case. She agreed that the reason for requiring the interview to be conducted with the Public Officer is to ensure that a senior official or member of the corporation is involved who has

personal knowledge of the structure of the corporation so as to be able to answer the questions accurately. She agreed that one of the interviewees, Ms Porter, did not occupy a senior position in the accounts department and that the other one, Ms Veaudry, is an office administrator and is neither a member nor a senior official of the corporation. She was unable to recall which one of the two interviewees answered the questions recorded in the questionnaire or who made each of the specific audit notes. She confirmed that she made the note *'i.e. Labour Broker'* opposite question 2 with an arrow pointing at question 3, which dealt with *'Main business activity'*, where the following response was recorded: *'Payroll Services & Labour Law Services'*. She indicated that she made the note because the information was provided to her by one of the interviewees. Her attention was then drawn to the minutes of the meeting held on 3 November 2016 between Mr Emslie and the following SARS officials, namely Euan Davidson, a senior manager, Riette Fellows, an operational specialist, and Stephen Luff, a specialist. She was referred to the following extract from the minutes:

> *'Euan said that Mr Butler is the person that best knows what the true relationship is between staff and HR Focus, and despite the fact that the employment contracts and the disciplinary documents state that HR Focus is the employer, the true substance of the relationship is what will determine if HR Focus or the client is the employer. If HR Focus is not the employer, then the ETI cannot be claimed, and the clients are the only taxpayers entitled to claim the ETI, and they are responsible for the PAYE, UIF and SDL. Justin asked if a labour broker can claim ETI. Euan confirmed that a labour broker can claim ETI and reminded Justin that in terms of the definition, HR Focus is not a labour broker.'*

Counsel then put it to the witness that even the senior SARS representative (Euan Davidson) indicated that, based on the definition (that labour brokers are natural persons), HR Focus was not a labour broker. She responded that she sees that and has read that. It was then put to her that the reference in the questionnaire to a labour broker is a misdescription of the business of HR Focus. She responded that she was not accepting

the proposition and that she was neutral on this issue. She, however, agreed with the proposition that the Public Officer, Mr Butler, and not the two interviewees, was the best person to describe the business of HR Focus. She refused to accept that the disputed personnel were under the control of the retail clients. She relied on the fact that they were on the payroll of HR Focus and on the provisions of the relevant employment contracts, which indicated that HR Focus was the employer. When she was asked if those were the only reasons for her view, she responded, *'For now yes ... because something might crop up in my mind, then I can go back.'* She accepted that payrolls can be administered by a third party and that HR Focus conducted a payroll for each of the retail clients. She confirmed that she was aware that HR Focus gets the funds to pay wages from the retail clients and thereafter administers the payments. The funds were paid into the Wage Distribution Account in the name of Mr Butler and were then paid out to the personnel. She disagreed with the proposition that the retail clients recruit and hire the disputed personnel and contended that HR Focus hired the personnel and outsourced them to the retail clients. She had nothing else to rely on for this contention apart from the wording of the employment contracts. She was unaware that the retail clients would send an engagement form to HR Focus containing the details of employees whom they wanted to be registered on the HR Focus payroll. When she was referred to an engagement form that was part of the trial bundle, she stated that it was the first time that she had seen the form. She was then referred to an employee discharge form as well as an employee inter-departmental transfer request prepared by a retail business contained in the trial bundle, and indicated that it was also the first time that she had seen any of these documents. She indicated that she was not in a position to answer the question of whether she agreed that the engagement form demonstrated that the retail clients engaged their own employees. She was also not in a position to dispute the evidence to that effect because she did not know. She confirmed that, in her understanding, the retail clients placed the employees. She also indicated that she had no personal knowledge of the relationship between the retail clients and the employees and cannot dispute that the retail clients determined the tasks to be performed by the employees, their wages, and the Department that the employees would work in. She was aware of the control test in respect of the employment relationship, but refused to answer the question whether she had applied the

test in the present matter. She was neither aware of nor applied the dominant impression test, and while she was aware of the supervision test, she did not apply it in the present matter. She later indicated that she only relied on the payroll data and the answers in the questionnaire, which provided the required information. She was then referred to the notice of objection dated 13 December 2016, which was addressed to her and was signed by Mr Butler, where it is stated that:

> *'This business model has significantly changed over the years to what we have today. The company no longer supplies staff to the SPARs and other clients per se, but still administers the Payroll and offers Labour Law Services, for which the clients are charged separately for wages that are payable by the client. The fees charged by HR Focus CC are not only based on wages but also on the number of staff members employed by the clients.'*

The witness indicated that she was aware that the business model had changed, but disagreed with the statement that the company no longer supplies staff. She intimated that she preferred not to answer the question whether she agreed that if HR Focus was acting as an agent for the retail clients, it would not be an employer in terms of the definition contained in the Fourth Schedule to the Income Tax Act, 58 of 1962. This was an issue raised in the notice of objection. She also indicated that she was not going to answer the question whether she had any views on the contention in the notice of objection that HR Focus did not fall within the definition of a labour broker, as it was not a natural person. She had no comment on the question of whether she investigated the statement in the notice of objection that HR Focus was not responsible for the payment of workmen's compensation for occupational injuries or safety issues at the retail clients' premises.

[42] Nothing of note resulted from the re-examination. In response to questions from the court, the witness confirmed that SARS conducted an audit of payroll taxes, which

covered PAYE, UIF, SDL, and ETI. She indicated that she relied upon the following facts for the conclusion that the disputed personnel were employed by HR Focus, namely, the personnel were on the payroll of HR Focus, PAYE and UIF contributions were deducted in respect of the personnel and were paid over to SARS, and HR Focus claimed ETI as an employer. In her view, HR Focus could not have it both ways in claiming that, in respect of SDL, it was an agent and not an employer, while in respect of ETI that it was an employer. There is no response reflected in the record to the statement of the court that, according to the evidence that was presented, HR Focus was in all instances acting as an agent. That concluded the evidence of the witness.

(ii) Seeiso Vuza

[43] The witness has been in the employ of SARS for 21 years and has occupied his current position as an Audit Manager for the past 11 years. The official who conducted the VAT audit in respect of HR Focus, Ms Riette Fellows, who has since retired, reported to him, and he is familiar with the audit. The witness referred to the audit findings letter addressed to HR Focus and the latter's response, which indicate that the real issue was that SARS intended to raise additional assessments based on its conclusion that HR Focus was the employer of the disputed personnel. Apart from certain adjustments that were made pursuant to the response of HR Focus, this constituted the basis for the additional assessments raised by SARS. The further two matters raised in the audit findings relating to Health Care Solutions and Rosslin Store Management Services CC appear not to have been pursued any further by SARS. He indicated that the central issue in both the SDL and VAT appeals is therefore whether HR Focus was the employer of the disputed personnel. The witness, however, did not independently add anything of note in respect of this issue.

[44] Under cross-examination, the witness confirmed that he did not have personal knowledge of the details of the audit, which was conducted by the specialist auditor, Ms Fellows, who acted autonomously. His role was to review the relevant file to ensure that

the audit was conducted in a procedurally correct way and that the standard audit procedure was followed. His knowledge of the present matter was acquired by having had regard to the relevant documentation and the information provided to him by Ms Fellows. He confirmed that the nub of the case was that the taxpayer maintained that it was administering the payment of wages on behalf of its retail clients, while SARS concluded that it was the employer of the disputed personnel. The crux of the matter was whether HR Focus was acting in this regard as a principal or as an agent. In the latter event, it would not fall within the definition of *'employer'* in the Fourth Schedule to the Income Tax Act, 1962, and would not be liable for the VAT as assessed by SARS. The witness was vacillating when it was put to him that, according to the letter of audit findings in respect of VAT, one of the grounds for SARS' conclusion was that HR Focus was a temporary employment service provider or labour broker as envisaged in section 198A(3) of the Labour Relations Act. This section provides that the labour broker is the employer of employees performing a temporary service for the client. Furthermore, if the employee does not perform temporary services for the client, the latter is deemed to be the employer, provided the employee is employed on an indefinite basis. The witness eventually accepted that HR Focus was regarded as a labour broker, especially given the following statements in paragraph 5.3 of the audit findings letter: *'The position under the Income Tax Act is however determined by a different test to that under the Labour Relations Act. For the purposes of the Fourth Schedule the test is whether the amounts paid by the company performing labour broking activities constitute remuneration. ... In terms of section 198(4A)(a) of the Labour Relations Act, both the company providing Temporary Employment Services and the Client are "jointly and severally liable" to the employee for amongst others the remuneration payable. This means that each party is individually responsible for the payment of the remuneration and HR Focus is therefore not excluded from being an "employer" in terms of the definition contained in the Fourth Schedule of the Income Tax Act when paying salaries to its employees.'* The witness, however, added that their focus was really on the definition of an employer and employee. The statement made by Mr Butler in his *'without prejudice'* letter that when he bought the company, it had 80 employees, which has grown to just over 4000 outsourced employees, was also very important to the audit. When he was asked what facts they relied upon he

listed the following considerations after some prompting: they picked up that HR Focus rendered a service by supplying labour to each of its clients which is a standard rated supply which should have been declared because in their understanding, relying on the definition, HR Focus was the employer of the approximately 4500 employees rendering services at the premises of the clients; they had regard to the employment contracts which designate HR Focus as the employer; it bothered them that they never received the contracts between HR Focus and its clients that underpin the multi-million rand business which would have assisted them to make up their minds as to what the business relationship was between the two parties and who these employees belonged to; two of the clients who were interviewed agreed that HR Focus was the employer of the employees in question; they also considered that HR Focus claimed ETI in respect of those employees which can only be done by the employer. The witness indicated that *'... these are the kind of things that we looked into to actually make our determination as to whether HR Focus is the employer or not.'* It was then put to the witness that, according to the evidence presented by HR Focus, it was confirmed that the clients would find the employees and make the decision whether to hire them. The witness agreed and confirmed that this also appeared from the interviews with clients. In response to a further proposition, the witness indicated that it was possible that the clients would decide what salaries are to be paid to the employees. He confirmed that the clients would decide how many hours and the shifts that must be worked by the employees, and that it was possible that the clients would determine the bonuses to be paid. He confirmed that the clients determined the sick leave and annual leave of the employees and decided when disciplinary steps should be taken against employees. He indicated that he cannot agree to the statement that the clients control every function of the employees in their everyday work because he did not know. He confirmed that the supervisory function was vested with the client. When it was put to him that the clients gave the instructions when a settlement agreement should be entered into with a client and would pay the settlement amount, he indicated that HR Focus was doing the hiring and firing of employees. He was then reminded that he had earlier conceded that the employees are hired by the clients, whereupon he indicated that he was withdrawing his earlier statement. He could not comment on the reason why the witnesses of HR Focus were not challenged in cross-

examination on this issue. The witness indicated that he did not dispute that the payroll information, such as the hours worked by employees, is provided by the client and is then imported into the payroll system by HR Focus, but did not know how the payment of wages actually occurred. They did come across the Wage Distribution Account, which was utilised for the payment of wages, but he could not remember whether this account was in the name of Mr Butler. He also confirmed that he was aware of the application brought by HR Focus in this court to recover the payment of ETI from SARS, but indicated that he would not comment when it was put to him that HR Focus indicated in the court papers that it was claiming the ETI as an agent for the retail clients. He finally agreed with the proposition that the relevant facts are not really in dispute, but that the issue was how those facts must be interpreted. Nothing of note arose from re-examination.

(iii) Anthony George Veaudry

[45] The witness has been the general manager at OK Foods, Cambridge, East London, for approximately 17 years. He attends to the day-to-day operations and the running of the business. He confirmed the minutes of a meeting that he had on 30 August 2016 with the SARS auditors, Mr Vuzo and Ms Fellows, where he indicated that HR Focus was the employer of the disputed personnel. He indicated that the employment contracts designated HR Focus as the employer. He signed a services agreement in 2017, which recorded that HR Focus has acted as an agent for OK Foods since 2010.

[46] Under cross-examination, he confirmed that the initial services agreement was concluded between the proprietor of OK Foods, Mr Efstratiou and Mr Butler. He was not involved in this process and had no personal knowledge thereof. He had a long-standing relationship with Mr Butler, who acted as the labour broker for the businesses of the witness until 2005 when the witness closed those businesses down. He then started at OK Foods in 2010. He was not aware that during the timeframe 2008 – 2010, HR Focus had changed its business model and stopped operating as a labour broker. He indicated that he answered the questions of the SARS auditors at their meeting based on the

information that was in front of him, whether it was right or wrong. He was then referred to an employment contract of 2007, which provided for temporary employment and a 2014 employment contract, which provided for permanent employment. He confirmed that originally, no employment contracts were longer than 12 months. He was then referred to a payment method form, being a record of how the employees would be paid for the period in question and confirmed that it was based on information and data that was provided by the business to HR Focus. This included how many hours the employees worked and their rate of pay. He also confirmed that the business would always have the last word when it came to engaging employees, deciding who was to be hired and when employees have to be disciplined. In the latter respect, they would be assisted by HR Focus, which provided them with the labour law services. When it came to settlement agreements, HR Focus would present the settlement agreement for their approval, and the business would make payment per the settlement agreement. The amount of wages to be paid to employees was confirmed by OK Foods and paid into the Wage Distribution Account at HR Focus, which was in the name of Mr Butler. HR Focus would then release the payments of wages to each employee. If OK Foods did not make the payment, the employees would not receive their wages. He confirmed that the business would get a credit for successful ETI claims submitted by HR Focus. The everyday functions of the employees were under the control of OK Foods. They would decide which department the employee would work in, what functions they would perform and whether they would go on annual leave or sick leave. If they identify an employee whom they want to employ, they will provide HR Focus with an engagement form containing all the relevant details for registration on the payroll system. If an employee ceased to work for OK Foods for any reason, they would send a discharge form for implementation to HR Focus. He indicated that he could not answer the proposition that, objectively, the disputed personnel were employees of OK Foods and added that *'maybe it is, maybe it is not.'* He confirmed that he answered the question of the SARS auditors about who the employer was, based on the employment contracts that he had seen, but that he was not privy to the discussions between Mr Efstratiou and Mr Butler as to the true nature of the relationship. Regarding the 2017 services agreement, he indicated that he did not disagree with the clause in the agreement recording the services that HR Focus had been

rendering since 2010. He indicated that all the services that were recorded in the agreement were the work that HR Focus was doing. He confirmed that he signed the agreement because it accurately reflected the position according to his understanding.

[47] In re-examination, the witness explained that they employed two types of staff, namely internal staff and contract staff. The pro forma employment contract prepared by HR Focus was used only for contract staff, and a different contract was used for internal staff. His understanding was that the contract staff was employed by HR Focus. When positions had to be filled, they would advise HR Focus, what the working hours and rate of pay are. They did this on the engagement form. HR Focus would provide them with an invoice for the wages of contract staff. At a later stage, HR Focus also ran the payroll for internal staff.

[48] Under further cross-examination in respect of new issues that were raised in re-examination, the witness confirmed that during the earlier years when HR Focus acted as a labour broker, the staff that it provided was referred to as contract staff who were employed by HR Focus, who exercised control over that staff. This was the historical situation. In contrast, the internal staff were historically directly employed and managed by the business until about 2015, when HR Focus was requested to also deal with the internal staff. They would then pay the wages of the internal staff over to HR Focus, who would pay the wages into the bank accounts of the employees. He indicated that the distinction between internal and contract staff was a historical one. That concluded the evidence of the witness.

(iv) Sherry Lynette Clayton

[49] The witness has been employed at Fruit and Veg, Vincent, East London, since 1998, when the store opened. She holds the position of credit controller and also deals with human resources. She is assisted by HR Focus with the employment issues falling within her duties. She confirmed that the pro forma employment contract prepared by HR

Focus was used to employ staff at the store. The contract designates HR Focus as the employer. The store used HR Focus as its recruitment agency, and the staff are employed through them. The store has two payrolls, one for the management salaried staff who are employed by the store and the other for hourly-paid staff who are employed by HR Focus. The store makes declarations to SARS for PAYE under its tax reference number for the salaried staff only. When the store needs hourly paid staff, they often identify candidates because people approach the store regularly for employment. They then liaise with HR Focus to engage the staff on the payroll. They would set out the job specifications as well as the rate of pay. In her understanding, the store has not signed an agency agreement with HR Focus. The relationship goes back to when the store first opened, but there has never been anything signed. She confirmed having had a meeting on 26 August 2016 with two auditors from SARS, where she had to answer questions.

[50] Under cross-examination, she indicated that she did not have a bookkeeping or accounting background and holds a payroll certificate. As the credit controller, she deals more with the creditors. She has not been involved in the negotiations and original agreement concluded between HR Focus and Fruit and Veg, which took place between Mr Harry Nate, the proprietor of Fruit and Veg, and Mr Butler. According to her knowledge, there was never anything in writing, and she was unaware of the terms that were negotiated. She confirmed that her impression of how the relationship worked was based on nothing else than what she read in the employment contracts and the fact that HR Focus managed the payroll for the hourly paid employees. She would send through the rate of pay and hours worked by these employees, and once this is confirmed by HR Focus and approved by her, the store is invoiced by HR Focus, and payment is promptly made into the Wage Distribution Account at HR Focus. The latter will only release the funds to the employees upon receipt of payment. She confirmed that the store is invoiced for an admin fee, a basic fee and an EFT fee. She was unaware exactly what these fees entailed, although according to her understanding, HR Focus has always done all the paperwork in respect of the store, and that is what they were paying for. In most circumstances, she would send an engagement form to HR Focus with respect to the staff members they wanted to engage. The form gave instructions as to what role the

persons would play, their rate of pay, and how many hours they would be working. She helped to accumulate all of that information and gave it to HR Focus to register on the payroll system. It is ultimately their decision who they would employ. If they no longer wanted the staff, they would provide HR Focus with a discharge letter, usually in cases of misconduct. They would first consult with HR Focus for guidance in cases of misconduct to hear what procedures needed to be followed. She indicated that she could not confirm or deny that the reason they consulted with HR Focus was because it provided labour law services to the store, for which they paid the basic fee. HR Focus does not supervise the staff or control any of their activities on the store premises and would not know what was happening concerning the staff unless she communicated with them. HR Focus would attend to disciplinary hearings as well as hearings at the CCMA. She indicated that she vaguely remembered that HR Focus historically ran its business as a labour broker, but she was not part of any discussions with regard to a change in their business model. She realised that there were changes in the law, but was not sure exactly how it impacted their store. She indicated that although she signed the employment contracts, she had never noticed that the later contracts cited HR Focus as the designated agent.

[51] In re-examination, she confirmed that the later contracts that cited HR Focus as the designated agent do not indicate who the employer is. In her understanding, HR Focus was the employer in those contracts. She indicated that the salaried staff were on the payroll of Fruit and Veg, while the hourly-paid employees were on the payroll of HR Focus. That concluded the testimony on behalf of SARS, whose case was thereafter closed.

Decision of the Tax Court

[52] The court correctly indicated that it was the failure of HR Focus to account to SARS for SDL that gave rise to the present dispute. SARS initially conducted an audit in respect of payroll taxes, including SDL, followed by a subsequent VAT audit. This resulted in

additional assessments having been issued in respect of SDL and VAT, unsuccessful objections and internal appeals by HR Focus, and the eventual proceedings in the court.

[53] The court held that the central issue for determination was whether HR Focus was the employer of the 4500 persons registered on its payroll system.[7] The court indicated that this issue was dispositive of the SDL appeal in its entirety and also of the greater part of the VAT appeal.[8]

[54] The court assessed the evidence and concluded that it did not support the factual basis relied upon by SARS for raising the additional assessments, namely that HR Focus was the employer of the relevant persons reflected on its payroll system ('the disputed personnel')[9]. It found that there was no written agreement regulating the business relationship between HR Focus and its retail clients. The relationship was based on what was referred to as a *'gentlemen's agreement'* concluded between Mr Butler and the proprietors of those businesses served by HR Focus. The court accepted the uncontested evidence of Mr Kairuz, who was a party to and had direct knowledge of the *'gentlemen's agreements'*, to the effect that his businesses and not HR Focus were the employers of the disputed personnel. The court further accepted the argument advanced on behalf of HR Focus that, should it not be the employer of the disputed personnel, it could only have acted as an agent on behalf of the retail clients and not as a principal. The court also had regard to the evidence of Mr De la Rey, as supported by the evidence of Ms Veaudry,

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[7] This was referred to in the judgment as the *'supply of workers'* issue.

[8] There were two further matters relating to VAT that fell outside of the *'supply of workers'* issue. The first concerned a supply of furniture to the South African Social Security Association ('SASSA') by Rosslyn Store Management Services ('Rosslyn Store'), an entity that was connected to HR Focus in that Mr Butler was the sole member of both. Rosslyn Store was unable to fund the purchase, which was then done on its behalf by HR Focus, who invoiced Rosslyn Store and accounted to SARS for the relevant income and VAT obligations arising from these invoices. Mr Vuza was unable to dispute the relevant facts, and the court found that HR Focus had discharged the onus to show that the relevant amounts were not taxable. This issue was not pursued by SARS before us and requires no further attention. The second matter related to transactions concerning an entity known as Healthcare Solutions. In his evidence-in-chief, Mr Vuza indicated that this was no longer an issue in dispute. It therefore equally requires no further attention herein.

[9] Judgment Rec. Vol. 10 p1024 para 20: *'The analysis of the evidence below does not support the factual basis relied on by the Commissioner in raising the additional assessments, both for SDL and VAT in the periods of assessment, that the appellant is the employer of persons reflected on the appellant's payroll system'.*

concerning the business operations of HR Focus and accepted their version that although HR Focus initially operated as a labour broker, its business model changed around 2010 away from labour broking to payroll administration and the provision of labour law services. This was in line with the legislative developments at the time and met the needs of its retail clients who did not possess the necessary infrastructure or internal specialist staff to handle their own payrolls or labour and disciplinary processes. They further indicated that the disputed personnel were in the employ of the retail clients. The court also accepted the explanation of Mr De la Rey that the rationale for HR Focus being cited as the employer in the employment agreements was two-fold. First, this allowed HR Focus to represent the clients at the CCMA, and it increased the threshold significantly for unions to reach the requisite membership numbers to qualify for representation in the workplace at the businesses of the retail clients.[10] Furthermore, since the employees were based at the clients' business premises, they were subject to the control of the clients, and HR Focus only effected payment of the wages after the funds were received from the clients. Ms Veaudry provided the clients with a *'payment method report'* to obtain the clients' instructions and approval for the payment of the wages. After approval of the wages, the clients were invoiced, and they deposited the wages into the Wage Distribution Account held in the name of Mr Butler. The evidence established that ETI was claimed on behalf of the clients who were reimbursed in the form of a credit note issued in their favour upon SARS crediting the PAYE account of HR Focus.

[55] The court also accepted the undisputed evidence of Mr Emslie that the wage payments were not processed through the books of account of HR Focus because the latter acted as an agent.

[56] In contrast, the court was critical of the evidence of Ms Obaray. It found that she was defensive under cross-examination and not prepared to make reasonable concessions such as that the note that she made on the questionnaire that HR Focus acted as a labour broker, was incorrect in that a labour broker is defined as a natural

[10] The validity or lawfulness of this arrangement was not placed in issue either in the Tax Court or before us.

person in the Fourth Schedule to the Income Tax Act as opposed to a corporate entity such as HR Focus. The court held that she doggedly stuck to her view that HR Focus was the employer of the disputed personnel despite not having been previously aware of either the engagement form sent to HR Focus by the clients to register employees on the payroll system or the discharge form instructing HR Focus to give effect to the discharge of employees. The 'without prejudice' letter of 19 May 2016 that she referred to does not contain an admission that HR Focus was the employer of the disputed personnel. Read in context, the letter indicates that HR Focus collects the payroll taxes from its clients and declares and pays them over to SARS. There is no indication that the accounting is for its own account. On the contrary, a proper reading of the letter shows that the accounting is on behalf of the clients. This was the undisputed evidence of its witnesses. The court finally found that Ms Obaray was obstructive and evasive and rejected her testimony as being unconvincing. There is limited scope to interfere on appeal with the credibility findings of the trial court, which was steeped in the atmosphere of the trial and had the advantage of observing the demeanour of the witness[11]. In my view, the Tax Court did not misdirect itself in any respect in this regard. The finding in respect of Ms Obaray is borne out by the record and cannot be faulted.

[57] The court held that Mr Vuza had no personal knowledge of the audits and conceded that the facts indicated that the engagement, control, transfer, and dismissal of the employees vested in the retail clients. The court, however, indicated that the interpretation of those facts was in issue. It correctly considered that the testimony of Mr Vuza did not take the matter any further.

[58] The court found that Mr Veaudry adopted a contradictory stance in that he accepted that OK Foods decided who had to be employed and exercised control over the employees, while insisting that HR Focus was the employer. The court concluded that it

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[11] *Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd* 1979(1) SA 621 (A) at 623H - 624A; *Union Spinning Mills (Pty) Ltd v Paltex Dye House (Pty) Ltd* 2002(4) SA 408 (SCA) para 24; *Louwrens v Olwage* 2006(2) SA 161 (SCA) para14.

could attach little weight to his insistence that HR Focus was the employer. This conclusion cannot be assailed.

[59] The court similarly held that little weight could be attached to the opinion of the remaining SARS witness, Ms Clayton, who was of the view that HR Focus was the employer of the disputed personnel instead of her employer, Fruit & Veg, Vincent, East London, where she worked as a credit controller. She nevertheless conceded that Fruit & Veg determined the wages to be paid to the employees and provided HR Focus with the number of hours worked by the employees. She acknowledged that she received a document every month from HR Focus setting out the details of the workers, together with the amount due to each one. After she confirmed the information, Fruit & Veg would receive an invoice from HR Focus and would then make payment into the Wage Distribution Account. The court held that these concessions did not support her opinion, hence its conclusion that her opinion carried little weight. This finding can also not be faulted.

[60] The court analysed the evidence and found no support for SARS' conclusion that HR Focus was the employer of the persons registered on its payroll system. The court held that this conclusion constituted an erroneous basis for raising the additional assessments. It referred to the evidence of Ms Obaray who testified that SARS arrived at its determination for the reasons that: the relevant persons were recorded on the payroll of HR Focus when it made the payroll declaration to SARS; HR Focus accounted for and paid over the employees' taxes (PAYE and UIF) to SARS; it claimed ETI in respect of the employees; and HR Focus is designated as the employer in the tripartite employment contracts. The court, however, correctly indicated that the undisputed evidence presented on behalf of HR Focus was that the payroll taxes were collected from its clients, accounted for, and paid over to SARS on behalf of the clients, not for its own account. Furthermore, the evidence of Ms Veaudry was not challenged under cross-examination, which showed that she prepared the 'payment method report' extracted from the client's payroll. When confirmed by the client, she invoiced the client, who made the necessary payment. HR

Focus would then facilitate the payment of the staff and make the declarations to SARS. The court indicated that while HR Focus attended to making the physical payments, nothing turned on this, given that the source of the payments was the clients of HR Focus. Moreover, it was not established that the answers in the questionnaire were binding on HR Focus since Mr Butler did not attend the meeting, and neither of the two HR Focus employees who were interviewed was part of management. The accuracy of the answers was, in any event, questioned by Ms Veaudry, and little weight could therefore be ascribed to the information recorded in the questionnaire. I agree with this reasoning and conclusion of the court.

[61] The court correctly held that the facts arising from the evidence were either common cause or remain undisputed, particularly concerning the actual recruitment, control, and supervision of the employees. SARS instead relied on the designation of HR Focus in the employment contracts. In the court's view, the designation did not change the terms on which HR Focus and the relevant client had agreed. Given the evidence of Mr Kairuz that HR Focus acted as the agent of his businesses, which were the employers of the relevant employees, the court held that HR Focus fell outside of the definition of *'employer'* in the Income Tax Act and therefore outside of the taxing provision. The court indicated that SARS placed form above substance in its reliance on the designation of HR Focus as the employer in the tripartite agreements. The two-fold purpose of the designation was adequately explained in the evidence presented by HR Focus. It held that this brought an end to the enquiry and upheld the appeal of HR Focus.

IN THIS COURT

[62] SARS filed an extensive notice of appeal which was distilled into the following four grounds of appeal in its heads of argument: (i) HR Focus was conducting an impermissible tax avoidance scheme; (ii) HR Focus failed to discharge the burden of proof in terms of section 102(1) of the TAA to prove that it was not liable for payment of SDL and VAT because it was not the employer of the disputed personnel; (iii) HR Focus

impermissibly attempted to show that the employment contracts are not what they purport to be by presenting inadmissible evidence in violation of the parol evidence rule to advance its case that the employment contracts were simulated, disguised or sham agreements which was never pleaded; and (iv) the presiding judge was biased and ought to have recused herself.

[63] The first three grounds overlap and are intertwined. It was, however, not in contention that the central issue in the matter was in effect whether or not HR Focus was the employer of the disputed personnel. If so, it was liable for the additional assessments in respect of SDL and VAT. Its appeal should, in that event, have been dismissed by the Tax Court, and in the result, the present appeal should succeed. If not, its appeal was correctly upheld by the Tax Court, and the present appeal should fail. The parties accordingly focused their arguments on this issue. Before considering and evaluating the principal submissions of the parties, it is appropriate first to deal with the applicable statutory provisions.

The applicable statutory provisions

[64] The *Skills Development Act*, 97 of 1998, has been enacted to provide for the financing of skills development by means of a levy-financing scheme. To this end, section 3(1)(a)(i) of the *Skills Development Levies Act*, 9 of 1999 ('SDL Act'), requires every employer to pay a skills development levy ('SDL') at a rate of 1% of the leviable amount. The leviable amount is defined in the SDL Act as the total amount of remuneration paid or payable by an employer to its employees during any month as stipulated in the Fourth Schedule to the *Income Tax Act,* 58 of 1962 ('ITA') for the purpose of determining the employer's liability for any employees' tax in terms of that Schedule, whether or not such employer is liable to deduct or withhold such employees' tax (**section 3(3)**). Employers who are liable to pay the levy must apply to the Commissioner to be registered as an employer for the purposes of the levy (**section 5**). The levy is to be paid to SARS and must be accompanied by a prescribed return (**section 6(1) & (2)**).

[65] The SDL Act contains a non-exhaustive definition of the term *'employer'*, which merely provides that the term includes an employer as defined in the Fourth Schedule to the ITA. The latter definition excludes an agent and is to the following effect:

> *'any person, excluding any person not acting as a principal, who pays or is liable to pay to any person any amount by way of remuneration, and any person responsible for the payment of any amount by way of remuneration to any person under the provisions of any law or out of public funds'.*
>
> (emphasis supplied)

[66] The Fourth Schedule defines the term '*remuneration*' as:

> *'any amount of income which is paid or is payable to any person by way of any salary, leave pay, wage, overtime pay, bonus, gratuity, commission, fee, emolument, pension ...'*

[67] The provisions of the *Employment Tax Incentive Act*, 26 of 2013 ('ETI Act') are also of relevance to this matter. The Preamble to the ETI Act records that the Government wishes to support employment growth by focusing on labour market activation, especially in relation to young work seekers. According to its long title, the object of the ETI Act is to provide for an employment tax incentive in the form of an amount by which employees' tax may be reduced or by allowing for a claim and payment of an amount where employees' tax cannot be reduced. The incentive, to be known as the Employment Tax Incentive ('ETI'), was introduced to encourage employment creation (**section 2(1)**). An employer is eligible to receive the ETI in respect of a qualifying employee (**section 2(2)**), who must be between the ages of 18 – 29 years and earn less than R6000.00 per month (**section 6**), if the employer is registered for purposes of withholding and payment of employees' tax in terms of paragraph 15 of the Fourth Schedule to the ITA (**section 3**). I should add that the ETI Act contains no definition of the term '*employer*'.

[68] Insofar as the burden of proof is concerned, section 102(1) of the TAA provides that the taxpayer bears the burden of proving that an amount, transaction, event, or item is exempt or otherwise not taxable or whether a decision that is subject to objection and appeal under a tax act is incorrect. This burden applied to the proceedings before the Tax Court. In essence, to escape liability for the assessed SDL and VAT, HR Focus had to prove that it acted as an agent for it to fall outside of the abovementioned definition of an *'employer'*, given that it otherwise fell within the rest of the definition in that it paid remuneration to the disputed personnel.

Principal submissions on behalf of the parties

[69] While the case advanced by SARS in its heads of argument had been distilled into the aforementioned four grounds of appeal, both counsel accepted that the central issue in the present appeal is whether HR Focus was the employer of the disputed personnel. I turn to this issue next.

[70] The principal argument advanced on behalf of SARS was that the Tax Court erred in finding that HR Focus was not the employer of the disputed personnel, contrary to its designation as such in the tripartite employment contracts. Counsel vigorously argued that the Tax Court improperly allowed the evidence tendered by HR Focus that it was not the employer, and that evidence should have been ruled inadmissible on the strength of the parol evidence rule. Counsel relied heavily on the latter argument and described the parol evidence rule as the appellant's *'angel or guardian of protection'* in the case, in the sense that even if all its other arguments fail, the appeal must succeed on the argument based on the rule. It is important to indicate at this juncture that counsel did not forcefully argue that even if the evidence were admissible, HR Focus had still failed to establish that it was not the relevant employer. The reason is obvious. This evidence was not contested in cross-examination. I should add that it was neither rebutted by the documentary evidence nor the views of Mr Veaudry (a representative of the OK Foods Group) and Ms Clayton (of Fruit & Veg, Vincent, East London) that the employees at their

respective stores were in the employ of HR Focus. As indicated, the Tax Court correctly found that little weight could be attached to their views in this respect. It is equally obvious, in my view, that if the evidence were admissible, HR Focus would have established its case before the Tax Court that it was not the employer of the disputed personnel (but acted as an agent) and therefore not liable for the additional assessments, in which event the present appeal would lack merit. This is in effect the crux of the matter. Needless to say, counsel for HR Focus supported the approach and conclusion of the Tax Court in respect of the central issue and contended that the appeal should be dismissed with costs. The other arguments raised are clearly ancillary to those raised in respect of the central issue, which will be considered next, together with two related matters raised by SARS' counsel.

(i) *Admissibility of the evidence that HR Focus was not the employer of the disputed personnel and the applicability of the parol evidence rule. Are the employment contracts not what they purport to be? The effect of advancing a case that was not pleaded*

(a) The parol evidence rule:

[71] As indicated, SARS contended that the evidence which HR Focus tendered to show that it was not the employer of the disputed personnel was erroneously allowed by the Tax Court. SARS' counsel argued that this evidence was rendered inadmissible by the parol evidence rule because it was extrinsic and tendered to contradict, add to, or modify the employment contracts, which designated HR Focus as the employer. Counsel for HR Focus submitted that this argument was misguided, given that the employment contracts were not the sole memorial of the agreement relating to the employment of the disputed personnel. Counsel further submitted that the extrinsic evidence, which concerned the true nature of the transactions and relationship between the parties, was in any event admissible in line with the contextual, purposive approach to interpretation (which is also applicable in tax cases), emphasised in the oft-quoted decision in

Endumeni[12] and elucidated in *Cool Ideas*[13]. The evidence accords with the exceptions to the applicability of the parol evidence rule in that it established that the description of the parties in the tripartite employment contracts did not reflect either the true relationship or the intention of the parties to facilitate the abovementioned two-fold objectives of designating HR Focus as the *'employer'*. The evidence was, in any event, relevant to determine the meaning of the employment contract, which in turn demonstrated that HR Focus was not endeavouring to contradict, add to, or modify the contract. Counsel submitted that the parol evidence rule accordingly does not apply to the matter. I will first deal with the applicable legal position before determining this issue.

THE LEGAL POSITION

[72] The Constitutional Court confirmed in *University of Johannesburg*[14] that the essence of the parol evidence rule[15] was aptly captured in the case of *Vianni Ferro-Concrete Pipes*[16] where it was stated:

> Now this Court has accepted the rule that when a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such a document be contradicted, altered, added to or varied by parol evidence.

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[12] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012(4) SA 474 (CC).

[13] *Cool Ideas 1186 CC v Hubbard & Another* 2014(4) SA 474 (CC) at para 28.

[14] *University of Johannesburg v Auckland Park Theological Seminary & Another* 2021(6) SA 1 (CC) at para 88; See also: *Capitec Bank Holdings Ltd & Another v Coral Lagoon Investments 194 (Pty) Ltd & Others* 2022(1) SA 100 (SCA) at Paras 41, 46-47 & 53.

[15] The expression is said to be a misnomer in all its component parts akin to the Holy Roman Empire which was famously quipped in 1761 by the French philosopher and thinker, Voltaire to be neither holy, nor Roman, nor an empire. In reverse order, it is not a single rule but two rules (the integration and interpretation rules) which are quite independent of each other. Secondly, neither of the rules belong to the law of evidence. Where a written document is conclusive as to the terms of the transaction, evidence of additional or different terms is excluded because it is irrelevant in terms of substantive law. The exclusion of the evidence is a consequence of the substantive law but this has traditionally been disguised as a rule of evidence. Finally, the rules are not concerned solely with 'parol' or oral evidence, but may also exclude other documents.

[16] *Union Government v Vianni Ferro-Concrete Pipes (Pty) Ltd* 1941 AD 43 at 47.

[73] The Appellate Division indicated in *Johnston*[17] that the rule consists of two sub-rules:

> [T]he parol evidence rule is not a single rule. It in fact branches into two independent rules or set of rules: (1) the integration rule ... which defines the limits of the contract, and (2) the [interpretation] rule, or set of rules, which determines when and to what extent extrinsic evidence may be adduced to explain or affect the meaning of the words contained in a written contract.

[74] The integration facet of the rule was explained as follows in *Johnston*:

> In many instances recourse to evidence of an earlier or contemporaneous oral agreement would, in any event, be precluded by ... that branch of the 'rule' which prescribes that, subject to certain qualifications, when a contract has been reduced to writing, the writing is regarded as the exclusive embodiment or memorial of the transaction and no extrinsic evidence may be given of other utterances or jural acts by the parties which would have the effect of contradicting, altering, adding to or varying the written contract. The extrinsic evidence is excluded because it relates to matters which, by reason of the reduction of the contract to writing and its integration in a single memorial, have become legally immaterial or irrelevant.[18]
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> ...
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> [I]t is clear to me that the aim and effect of [the integration] rule is to prevent a party to a contract which has been integrated into a single and complete written memorial from seeking to contradict, add to or modify the writing by reference to extrinsic evidence and in that way to redefine the terms of the contract.[19]
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> (emphasis supplied)

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[17] *Johnston v Leal* 1980 (3) SA 927 (A) at 942H-943A.
[18] Id at 938C-F.
[19] Id at 943B-C.

[75] The interpretation facet of the rule concerns the grounds for using extrinsic evidence in aid of interpretation. The court indicated in *Johnston* that it is *'concerned with what extrinsic evidence may be led to construe the contents of a written contract'*[20] and referred in this regard to the explanation contained in the separate judgement of Schreiner JA in *Delmas Milling*[21]. It is apparent from the exposition by Schreiner JA that at the time (a now bygone era), contextual evidence (then known as *'evidence of surrounding circumstances'*) was only admissible if the language of the contract was ambiguous. Extrinsic evidence may, on this approach, be resorted to in an attempt to show *'what passed between the parties on the subject of the contract'*[22]. I should indicate that the Constitutional Court in *University of Johannesburg*[23] jettisoned the requirement of ambiguity for the admissibility of extrinsic evidence on context [also referred to as surrounding circumstances] and purpose in the interpretative process. Context and purpose must be considered as a matter of course. The extrinsic evidence is admissible provided it is relevant to context and purpose.

[76] It was emphasised in *National Board*[24] that the *'parol evidence rule only applies where the written instrument is or was intended to be the exclusive memorial of the whole of the agreement between the parties.'* (emphasis supplied)

[77] The court continued as follows:

> The parties' intentions may be proved by reference to the prior negotiations between the parties. It is clear that the power of attorney was not intended to embody the whole of the agreement between Swanepoel and Brigish. The main agreement between them was the

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[20] *Johnston* above n16 at 946G.

[21] *Delmas Milling Co Ltd v Du Plessis* 1955(3) SA 447 (A) at 453-455; See also: *Rane Investments Trust v Commissioner, South African Revenue Service* 2003(6) SA 332 (SCA) at para 26; *Coopers & Lybrand v Bryant* 1995(3) SA 761 (A) at 768C-E.

[22] Id at 455B.

[23] Above n14 at para 69: *'What the preceding discussion clearly shows is that, to the extent that the Supreme Court of Appeal in the current matter purported to revert to a position where contextual evidence may only be adduced when a contract or its terms are ambiguous, it erred. Context must be considered when interpreting* any *contractual provision* and *it must be considered from the outset as part of the unitary exercise of interpretation.'*

[24] *National Board (Pretoria) (Pty) Ltd v Estate Swanepoel* 1975(3) SA 16 (A) at 26H.

oral agreement that Brigish was to have Swanepoel's general power of attorney for the limited purpose of acting for Swanepoel only during the latter's absence overseas if the need therefor should arise. The written power of attorney was intended merely as proof of Brigish's authority, and cannot extend that authority beyond the limits agreed upon between Swanepoel and Brigish.

...

It seems to me, therefore, that the evidence as to the circumstances in which and the purpose for which the general power of attorney was given ... may be introduced even to add to, vary, or restrict the general words of the written power of attorney.[25]

[78] The following illuminating dicta by a Full Bench of the then Transvaal Provincial Division in *Capital Building Society*[26], referred to with approval in *National Board* (*supra* at 26H) and *Johnston* (*supra* at 945D), explain the proper approach to a determination of whether a written document constitutes the exclusive memorial of a transaction:

The question "depends wholly upon the intent of the parties" (*Wigmore, ibid*), and in order to ascertain that intention, it is necessary to look not only at the document but also at the "surrounding circumstances", evidence of which is therefore admissible. *Phipson, ibid,* says:

> "The inference that the writing was, or was not, intended to contain the full agreement may be drawn not only from the document itself, but from extrinsic circumstances."

Wigmore further says:

> "This intent must be sought where always intent must be sought, namely in the conduct and language of the parties and the surrounding circumstances. The document alone will not suffice. What it was intended to cover cannot be known till we know what there was to cover. The question being whether certain subjects of negotiations were intended to be covered. We must compare the writing and the negotiations before we can determine whether they were in fact covered."

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[25] Id at 26H – 27D.
[26] *Capital Building Society v De Jager & Others* 1963(3) SA 381 (T) at 382F – 383A.

> The author then says that the paradox of receiving evidence of the negotiations in order to determine whether to exclude them is more apparent than real because such evidence is received provisionally only until the Court decides the crucial issue whether or not the written document was intended to cover all the subjects of negotiation. It is pertinent to the present case to note that in the author's view, the "surrounding circumstances" include the negotiations conducted by the parties, which of necessity must be correct.

[79] The conclusion in *Capital Building Society* is particularly pertinent to the present matter:

> When regard is had ... to the surrounding circumstances, which include all the negotiations leading up to and accompanying annexure X, the matter is put beyond doubt. I am referring here, of course, to the surrounding circumstances testified to by Dandrea, whose version, for the reasons given above, must be accepted for the purpose. They show that annexure X ... was only a subsidiary part of a scheme that Capital, the Company, and the Bank had verbally agreed upon ... That it was in fact "in the nature of machinery to enable the main agreement to be carried out". It follows that annexure X cannot be treated as the exclusive memorial of the whole contract between the parties (i.e. Capital, the Company, and the Bank) and that the parol evidence of the whole agreement is therefore admissible and, in this case, necessary for a proper decision.[27] (emphasis supplied)

[80] The approach set out in *Capital Building Society* was confirmed in *Johnston*[28] where the court stated:

> [I]t is permissible for the court to hear evidence of surrounding circumstances, including the relevant negotiations of the parties, in order to determine whether the parties intended a written contract to be an integration of their whole transaction or merely a partial integration.

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[27] Id at 383G.
[28] Above n16 at 945D – E.

[81] The court indicated in *University of Johannesburg*[29] that the *'integration facet of the parol evidence rule ... is relevant when a court is concerned with an attempted amendment of a contract. It does not prevent contextual evidence from being adduced. The rule is concerned with cases where the evidence in question seeks to vary, contradict, or add to (as opposed to assisting the court to interpret) the terms of the agreement'*. The court furthermore affirmed, in line with *Endumeni*, that an expansive approach should be taken to the admissibility of extrinsic evidence of context and purpose, whether or not the words used in the contract are ambiguous, in order to determine what the parties to the contract intended and to understand the meaning of the words used in a written contract. Such evidence may be relevant to the context within which the contract was concluded and its purpose. This raises the troubling issue of how this expansive approach can be reconciled with the strictures of the integration rule, which, in the applicable circumstances, prohibits extrinsic evidence that contradicts, adds to, or modifies the contract. This is best comprehended by bearing in mind that the meaning of a contract enjoys priority in this situation. It is only when the meaning of its terms is established that it can be determined whether extrinsic evidence contradicts, adds to, or varies the contract. The extrinsic evidence is initially admissible to ascertain the meaning of the contract. Importantly, the parol evidence rule is not concerned with evidence assisting in interpreting the contract. It should also be pointed out that the rationale of the parol evidence rule is based on the value of objectivism or the approach that the meaning of a contract is to be sought in the objective manifestation (eg its written terms) of the consensus between the parties[30], instead of their subjective intentions or will. Thus, parties conclude written contracts incorporating clauses affirming the contract to be the exclusive memorial of their agreement, so as to ensure certainty concerning the status of the document and to avoid conflicts over the identification of the sole source of their bargain being the written contract. Its identification is a different matter from the meaning of the document, which entails interpreting its terms. The parol evidence rule is

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[29] Above n14 at para 92.

[30] In line with the declaration theory of contract, which focuses on the external (objective) manifestation of the intention of the parties, ie, their concurring declarations as opposed to the will theory, which focuses on the subjective intention or will of the contracting parties. Cf Hutchinson *et al The Law of Contract in South Africa* (4ed) pp. 19-20; *National & Overseas Distributors v Potato Board* 1958(2) SA 473 (A) at 479F.

accordingly concerned with the identification of the written contract as the sole memorial of the agreement of the parties and the substantive consequences thereof, but not with the meaning of the contract. The latter is part of the separate interpretative process.

[82] It needs to be further elaborated that while they are conceptually distinct, the parol evidence rule is closely aligned with interpretation. As indicated by the court in *Johnston*[31], the second leg or facet of the parol evidence rule is the interpretation sub-rule. The parol evidence rule has been associated with the primacy of clear language in the interpretation of contracts. On this view, if a written contract has a plain (unambiguous) meaning and the writing is the exclusive memorial of the contract, the parol evidence rule excludes extrinsic evidence altering or contradicting that plain meaning. The opposing view is that the rule simply reflects the agreement between the parties that the writing constitutes the sole memorial of the agreement (serving the function of identification) and supersedes all earlier contracts and excludes evidence of such contracts. It identifies the document embodying the exclusive agreement, but it is not a rule as to the admission of evidence to interpret the meaning of the exclusive agreement. If the idea that a contract has a plain meaning or the primacy of such plain meaning in the interpretative exercise is rejected, the extrinsic evidence as to the meaning of the contract will enjoy a considerable remit, and the exclusionary force of the parol evidence rule consigned to a residual role.[32] *University of Johannesburg* firmly endorsed the said opposing view. It rejected the idea of the plain meaning of the text or its primacy, since words without context mean nothing, and context is everything. It accordingly gave a wide remit to the admission of extrinsic evidence as to context and purpose to interpret the meaning of a contract.[33] In cases where there is reasonable disagreement as to whether the evidence is relevant to context and therefore admissible, courts should incline to admit the evidence and limit its reach by assessing its weight as part of the unitary exercise of considering text, context, and purpose.[34]

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[31] See [74] above.
[32] *Capitec Bank Holdings* above n14 at paras 42-44;47.
[33] Id at para 46.
[34] Id at para 40; *University of Johannesburg* n14 at para 68.

[83] The court in *Capitec Bank Holdings*[35] referred to some of the implications of what was decided in *University of Johannesburg.* The following observations of the court are of note:

> [47] ... Since the interpretative exercise affords the meaning yielded by text no priority and requires no ambiguity as to the meaning of the text to admit extrinsic evidence, the parol evidence rule is likely to become a residual rule that does little more than identify the written agreement, the meaning of which must be determined. That is so for an important reason. It is only possible to determine whether extrinsic evidence is contradicting, altering or adding to a written contract once the court has determined the meaning of that contract. Since meaning is ascertained by recourse to a wide-ranging engagement with the triad of text, context and purpose, extrinsic evidence may be admitted as relevant to context and purpose. It is this enquiry into relevance that will determine the admissibility of the evidence. Once this has taken place, the exclusionary force of the parol evidence rule is consigned to a rather residual role.
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> ...
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> [49] ... Neither *Endumeni*, nor its reception in the Constitutional Court, most recently in *University of Johannesburg*, evince *(sic)* scepticism that the words and terms used in a contract have meaning.
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> [50] *Endumeni* simply gives expression to the view that the words and concepts used in a contract and their relationship to the external world are not self-defining. The case and its progeny emphasise that the meaning of a contested term of the contract ... is properly understood not simply by selecting standard definitions of particular words, often taken from dictionaries, but by understanding the words and sentences that comprise the contested term as they fit into the larger structure of the agreement, its context and purpose.
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> [51] ... The proposition that context is everything is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text.

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[35] Id at paras 47-51.

> [53] ... However, on my understanding of *University of Johannesburg*, since the text of an agreement enjoys no interpretational primacy, and the meaning of the text must be determined before a court can decide whether evidence seeks to alter the terms of that contract, the parol evidence rule does not govern admissibility rather, the question is whether the evidence is relevant to context so as to ascertain the meaning of the contract.
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> (emphasis supplied)

[84] A further qualification of the integration rule relates to the admissibility of extrinsic evidence to establish the true nature of the transaction. It is open to a party to show that the document in question was drawn up for a special purpose and that the real transaction was something different from that reflected in the document.[36]

EVALUATION

[85] It follows from the above that extrinsic evidence is admissible both to establish that the document does not constitute the exclusive memorial of the parties' transaction and, in the latter event, to contradict or alter the terms of the document. It is necessary first to establish the meaning of a written contract before it can be determined whether extrinsic evidence contradicts, adds to or alters its terms. As part of the interpretative exercise, extrinsic evidence which is relevant to context and purpose may be admitted. The enquiry into relevance will determine the admissibility of the evidence. In cases of doubt, the court should incline towards admitting the evidence, but limit its reach by assessing its weight as part of the unitary exercise of considering the text, context, and purpose. Extrinsic evidence is also admissible to show the true nature of the transaction and that the document was drawn up for a special purpose that is different from what is reflected in the document.

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[36] Zeffert & Paizes *The South African Law of Evidence* (3ed) p370 para (f); *Moodley v Moodley & Another* 1991(1) SA 358 (D) at 362C-D.

[86] The case advanced by HR Focus was that the tripartite employment contracts were preceded by a verbal services agreement concluded between Mr Butler and the proprietors of the retail clients, which provided that the retail clients would employ the disputed personnel. The designation of HR Focus as the employer in the subsequent employment contracts was for the two-fold purpose of enabling HR Focus to represent the retail clients during labour disputes at the CCMA as well as to stymie attempts by the labour unions to obtain a foothold, acquire representation and recognition, and be able to organise at the clients' workplaces. This much was confirmed by the uncontroverted evidence presented by HR Focus, which was, in my view, correctly admitted and accepted as credible by the Tax Court. It is trite that this finding cannot be disturbed on appeal unless there were material misdirections or irregularities in the proceedings, neither of which has been established.

[87] The evidence of Mr Kairuz concerning the conclusion of the services agreement with Mr Butler is admissible as part of the factual matrix and relevant to providing the context to the contents and the purpose of the employment contracts. The evidence of Mr De la Rey is similarly relevant to the context and purpose of the employment contracts and to the question whether HR Focus acted as an agent and not as a principal. Ms Veaudry testified about the implementation of the services agreements. Her evidence served to confirm that the agreements were indeed concluded between HR Focus and its various clients and how these services were rendered. This evidence was equally relevant to the context of the services and tripartite agreements. All of this evidence was accordingly correctly admitted to establish that the tripartite employment agreements were not the exclusive memorials of the agreement between the relevant parties concerning the employment of the disputed personnel, and to determine the meaning of the employment contracts and demonstrate the true nature of the transaction. On the accepted evidence, the employment contracts were thus a subsidiary part of the arrangement between Mr Butler and the proprietors and (in the words of *Capital Building Society*) were in fact 'in the nature of machinery to enable the main agreement to be carried out'. The main agreement in this instance is the prior verbal services agreement.

[88] It also does not appear from either the wording of the employment contracts themselves[37] or from any of the other evidence that the contracts were intended to be the exclusive memorial of the agreement between the parties, in particular concerning the employment of the disputed personnel. It follows that the tripartite employment contracts were not the exclusive memorials of the relevant transaction. As such, the evidence tendered by HR Focus in this regard was admissible both to establish that this was the case as well as to show the meaning of the contracts and the true nature of the transaction (ie that HR Focus acted as the agent of the retail clients) even though the evidence might seemingly contradict or vary the designation of HR Focus as the *'employer'* in the heading of the employment contracts. I accordingly conclude that this evidence was correctly admitted by the Tax Court.

[89] The Tax Court, in the result, found that HR Focus had satisfied the burden to prove that it was not the employer of the disputed personnel (but acted as an agent of the retail clients in paying PAYE and UIF and claiming ETI) and accordingly fell outside the definition of *'employer'* in the Fourth Schedule to the ITA and was not liable for the additional assessments. In my view, this conclusion cannot be faulted. The finding that HR Focus was not the employer is based upon and borne out by the evidence presented at the trial and is factual. It is established law that factual findings *'are unappealable unless they are vitiated by misdirection, irregularity, or the absence of any evidence reasonably warranting them'.*[38]

[90] Apart from the said evidence presented by HR Focus *'reasonably warranting'* this finding, it is not apparent from the text (as opposed to the description of the parties in the heading) of the employment contracts that HR Focus is the employer. In fact, the majority of the contractual terms are more compatible with the fact that the retail client is the employer. It suffices to refer to a few examples:

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[37] Contracts frequently contain a clause expressly recording that the document represents a complete and accurate integration (sole memorial) of the entire contract. An example of a so-called 'whole agreement clause' appears in *University of Johannesburg* at para19 n13.

[38] *Natal Estates Ltd v Secretary for Inland Revenue* 1975(4) SA 177 (A) at 203H-204A.

(a) HR Focus is referred to by name and not as the employer in the body of the agreement [**rec. p730(43-44) & (60); 731(1) & (34)**];

(b) in contradistinction, there are multiple references to the *'Company'* which in the context clearly denotes the retail client as appears more fully from what follows;

(c) it is the Company that determines the place of work, the hours of work and overtime, sick leave, and annual bonuses. The employee must wear the Company uniform and must obey the health and safety regulations of the Company;

(d) till operators and cashiers *'authorise HR Focus to deduct any shortages from ... any monies owed to them by the Company'* [**rec. p730(43-44)**];

(e) the fact that the shortages were paid *'does not mean the Company will not take Disciplinary Action for shortages. The Company has the right to ask you to attend an enquiry, and if found guilty, you may be Dismissed on the first offence'* [**rec. p730(49-50)**];

(f) *'The Employee agrees to abide by the Health, Safety & Security Rules and Regulations of the Company where Employed, as the Company is responsible for Workmen's Compensation. HR Focus is in no way liable for any claims that may arise in respect of your Health, Safety & Security'* [**rec. p730(59-60)**];

(g) *'If the company that you work for is a member of the Provident Fund then, by signing this agreement, it will become compulsory to join R&A Provident Fund* [**rec. p731(44-45)**];

(h) where the employee gives short notice to terminate the employment, he is liable for notice pay as stipulated and agrees *'to have this notice pay deducted from any amounts due to you by the Company. The Company has no right to end this contract during the contract period except for Incapacity, Misconduct, or Operational Requirements. In respect of these reasons, the Company will be required to follow the legally acceptable labour Correctiveness procedure,*

which includes your right to an internal appeal, to be represented by a Fellow employee and to approach the CCMA within 30 days for conciliation and/or arbitration **[rec. p730(56-59)]**;

(i) in the event of dishonesty on the part of the employee, '*you will be in breach of this contract and therefore the Company will have the right to end this contract immediately*' **[rec. p731(16-17)]**.

[91] To recap, there was ample evidence reasonably warranting the factual finding that HR Focus was not the employer of the disputed personnel. The only misdirection or irregularity relied upon by SARS, which in its submission had vitiated the factual finding, was the contention that the relevant evidence was allowed contrary to the parol evidence rule. As indicated, there is no merit in this contention. SARS correctly did not contend that even if the evidence were properly admitted, it did not establish that HR Focus was not the employer. The acceptable evidence to the contrary was overwhelming. In my view, there were no misdirections or irregularities vitiating the finding that HR Focus was not the employer, but acted as the agent of the retail clients, which took it outside the definition in the Fourth Schedule to the ITA. This finding is unassailable and determinative of the matter. I proceed to deal briefly with the two related aspects.

(b) Are the employment contracts not what they purport to be?

[92] SARS' counsel contended in this regard that HR Focus attempted to show that the employment contracts were not what they purported to be, contrary to the agreement to the opposite effect recorded in the pretrial minute filed of record. Counsel for HR Focus submitted that this contention is unfounded. I agree. The contention is based on the misconception that the purpose of the evidence presented by HR Focus that it was not the employer of the disputed personnel, was to show that the contracts were not what they purport to be. This evidence patently did not relate to the nature of the contracts but to their terms. HR Focus accepted that the relevant documents were employment contracts. This was clearly what they purported to be. This much was common cause.

However, HR Focus contended that contrary to its designation in the heading of the contracts, it was not the employer of the disputed personnel. This was the purpose of the relevant evidence. HR Focus was patently not precluded from adopting this stance by the terms of the pretrial minute. The latter recorded the standard agreement that the documents in the trial bundle are what they purported to be to obviate the need to present formal evidence confirming the undisputed nature of the documents.

(c) Relying on a defence that was not pleaded:

[93] SARS' counsel submitted that while the case presented in evidence by HR Focus was that the employment contracts were disguised or simulated, this was not part of its pleaded case. This was impermissible, and the evidence should not have been allowed by the Tax Court. Counsel for HR Focus retorted that the submission was unfounded and that the case of HR Focus was fully pleaded. In support of this contention, counsel referred to various averments contained in the Rule 32 Statement of Grounds of Appeal (Plea) of HR Focus to the effect that it was not the employer of the disputed personnel, but provided payroll administration services as the designated agent to its retail clients.[39] Counsel submitted that SARS understood the case of HR Focus in this manner, hence its heavy reliance on the parol evidence rule at the trial.

[94] I agree with the submission of counsel that the case of HR Focus was fully pleaded, that, notwithstanding its designation as the *'employer'* in the employment contracts, it was the designated agent and the retail clients were the employers of the disputed personnel. Hence, it was pleaded that *'[t]he ineluctable conclusion is thus that the client is in fact the employer of the employee and not the Appellant* [HR Focus]'[40]. In any event, even if this was not pleaded, HR Focus was, in my view, not precluded in the present circumstances from relying on such case. While it is trite that a party is confined to the case that it had pleaded, this is not an absolute rule. The court retains a wide discretion, and as it was

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[39] Reference was made to: Rec. Vol.1 p 22 para 4; p 24 paragraph 8; p 25 paras 10-12; p 27 para 17.1; p 28 para 17.2; p 28 para 18.1; p 32 para 18.3; p 33 paras 18.4-18.5; p 34 para 18.7.
[40] Rec. p 34 Vol.1 para 18.7 (Rule 32 Statement).

put, pleadings are made for the court, not the court for pleadings.[41] Accordingly, even a defence that was not pleaded may be relied upon provided it had been ventilated at the trial. The matter was put as follows by the Supreme Court of Appeal in *Umhlathuze Municipality*:[42]

> The appellants did not plead that the municipality acquired control over the cage installed by the body corporate because it had affixed a lock to the cage. This Court in *Minister of Safety and Security v Slabbert* held as follows:
>
> > 'A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case.'
>
> This is subject to the following caveat. This Court has inherent jurisdiction to decide a matter even where it has not been pleaded, provided that such matter was ventilated before it. In *Van Mentz v Provident Assurance Corporation of Africa Ltd*, this Court said that '... where it is clear that the appellant tribunal has all the materials before it on which to form an opinion upon the real issue emerging during the course of the trial it will be proper to treat the issues as enlarged, where this can be done without prejudice to the party against whom the enlargement is to be used'.

[95] The issue that the employment contracts were 'disguised' (to achieve the two-fold purpose referred to in the evidence) was fully ventilated in the Tax Court, where the evidence presented by HR Focus was countered by the evidence tendered by SARS in response. There was accordingly no prejudice to SARS, and the Tax Court did not err in dealing with the issue to the extent that it did.

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[41] *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173 at 198.

[42] *Lucas & Another v Umhlathuze Municipality & Another* (Case No.785/2020) [2021] ZASCA 181 (17 December 2021) para 12; *Fischer & Another v Ramahlele & Ohers* [2014] 3 All SA 395 (SCA) at para 13; *Minister of Police v Gqamane* 2023 (2) SACR 427 (SCA) at para 12 -13.

[96] The above conclusions are in effect dispositive of the appeal, and it is not strictly necessary to deal with SARS' other contentions and grounds of appeal. For the sake of completeness, I nonetheless proceed to deal briefly with them.

(ii) *Impermissible tax avoidance scheme*

[97] SARS relied for this contention on the fact that the payments from the retail clients were deposited into the Wage Distribution Account in the name of Mr Butler. Its counsel argued that the personal affairs of Mr Butler were separate from those of the legal entity, and as a consequence, the funds and profits which accrued to HR Focus from its operations should have been deposited into its bank account. This (so it was argued), together with the deliberate and significant understatement of VAT in the invoices rendered to the retail clients, supported the conclusion that Mr Butler was siphoning money from HR Focus, which, according to SARS, constituted an impermissible form of tax avoidance.

[98] This contention is unfounded. The wages paid by the retail clients into the Wage Distribution Account did not accrue to HR Focus, which was required simply to ensure the disbursement thereof to the employees who were entitled to payment. It merely acted as a paymaster. Nothing accordingly really turned on the fact that the payments were deposited into the Wage Distribution Account. The only amounts that accrued to HR Focus were in respect of the fees that were due to it. It is not in dispute that the income tax and VAT payable on these amounts were duly accounted for by HR Focus. It is furthermore trite that VAT is not payable on wages. There was thus no obligation on HR Focus to account for VAT in respect of the wages of the disputed personnel, and there was accordingly no understatement of VAT, deliberate or otherwise, or any question of a tax avoidance scheme as contended.

(iii) *Was the burden of proof in terms of section 102(1)(a) of the TAA discharged by HR Focus?*

[99] As indicated, the burden of proving that the additional assessments were not due was borne by HR Focus. This issue is intertwined with the question of who employed the disputed personnel and the definition of *'employer'* in the Fourth Schedule to the ITA. For the reasons set out above, the short answer is that HR Focus has established that it was not the employer, but acted as the agent of the retail businesses. It accordingly discharged the burden of proof that the additional assessments were not due.

(iv) *Bias of the Presiding Judge*

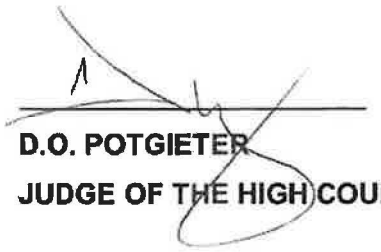
[100] SARS' counsel indicated that the issue of bias on the part of the trial judge is left to the court. No specific relief was sought in this regard. Counsel stated that the matter is left for *'the court to make of it, whatever the court makes of it'*. It strikes me that there is merit in the submission of counsel for HR Focus that this stance effectively amounts to an abandonment of this particular ground of appeal. The case set out in SARS' heads of argument is that the presiding judge erred in refusing the application for her recusal. SARS' counsel, however, did not advance any arguments in support of this contention during his address before us and did not press this matter at all. This, in my view, was well advised. This ground of appeal is bereft of any merit and is not borne out by the record, which does not support the conclusion that the presiding judge was biased and should have recused herself. Nothing further needs to be said about this issue.

CONCLUSION

[101] It follows from what is set out above that the appeal lacks merit.

ORDER

[102] In the result, the appeal is dismissed with costs, such costs to include the costs of two counsel to be determined on Scale C in respect of senior counsel and Scale B in respect of junior counsel.



D.O. POTGIETER
JUDGE OF THE HIGH COURT

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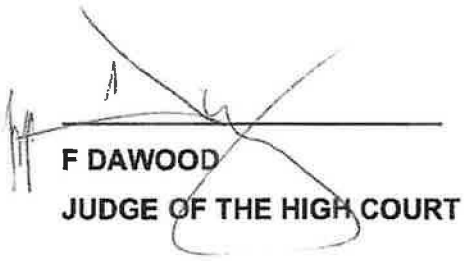

F DAWOOD
JUDGE OF THE HIGH COURT

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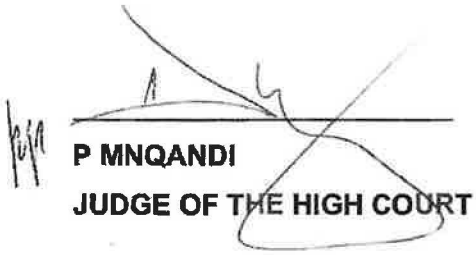

P MNQANDI
JUDGE OF THE HIGH COURT (Acting)

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Date of hearing:	17 March 2025
Date of delivery of judgment:	21 August 2025