IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)
JUDGMENT

Reportable
Case No: A161/2025
Tax Court Case No: IT 46080

In the matter between:

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES **APPELLANT**

and

MEIRING CITRUS (PTY) LIMITED **RESPONDENT**

Coram: **SALDANHA J, LEKHULENI J AND JONKER AJ**
Heard: **19 January 2026 (supplementary notes filed 28 January 2026, 2 February 2026)**
Delivered: **26 June 2026**

Summary: Insurance Law: Traditional insurance contract - spreading of risk – economic theory of insurance – simulated insurance contract – self structured insurance contract not insurance at all – premium deductions not allowed in terms of section 11(a) of the Income Tax Act 58 of 1962 - Period of limitation for assessment for issuance of assessment and the non-barring of assessment in

terms of section 99(1)(a) and 99(2)(a) respectively of the Tax Administration Act 28 of 2011 – understatement penalties imposition confirmed - appeal upheld.

ORDER

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1 The appeal is upheld with costs on scale C, including costs of two counsel, where so employed.

2 The order of the Tax Court is set aside and replaced with the following:

‘(i) The appeal is dismissed;

(ii) The additional assessment for the 2017 year of assessment is confirmed.

(iii) The understatement penalty for the 2017 year of assessment of 10 per cent is confirmed.

JUDGMENT

The Court

Introduction

[1] Nothing is certain in life but death and taxes. This is an appeal against the whole judgment and order of Janisch AJ handed down in the Tax Court on 5 December 2024. In that judgment, the Tax Court upheld an appeal by the respondent *('Meiring Citrus')* against the decision of the appellant *('Sars')* to disallow a deduction of an amount of R9.6 million that the respondent had claimed as an insurance premium expense in terms of section 11(a) of the Income Tax Act 58 of 1962 *('the ITA').* As a result, the Tax Court directed Sars to alter the additional assessment for the 2017 year of assessment by allowing the full deduction of the insurance premium of R9.6 million claimed by the Meiring Citrus as an expense of its total taxable income, excluding the notional interest components arising from this amount. In addition, the court invoked s 130(1)(a) and (b) of the Tax Administration Act 28 of 2011 *('the TAA')* and found that the decision or grounds of assessment relied on by Sars could not be said to be unreasonable. Pursuant thereto, the Tax Court ordered that there will be no order as to costs.

[2] Aggrieved by this decision, on 11 February 2025, Sars gave notice, in terms of s 133 read with s 134 of the TAA, of its intention to appeal the Tax Court's decision to this Court. Essentially, Sars contend that Meiring Citrus failed to discharge its onus of proving that the premium of R9.6 million satisfied all the elements of deductibility under s 11(a) of the ITA. In addition, Sars asserted that the Tax Court ought to have found, as a matter of law, that the insurance policy which gave rise to the impugned premium did not constitute an insurance contract at least in respect of the part of the premium to warrant a deduction in terms of s 11(a) of the ITA. Sars sought an order in this Court to set aside the decision of the Tax Court and to confirm Sars' additional 2017 assessment of Meiring Citrus.

[3] To give context to the issues that must be determined in this appeal, we deem it proper to set out the relevant facts underpinning this appeal. At the hearing before the Tax Court, the respondent led the evidence of two witnesses. They were Ms Marina Meiring, a director and a *de facto* chief executive officer of Meiring Citrus, and Mr Jeandre van Zyl, a partners at Moore Stephens WK Incorporated

('Moore'), the Meiring Citrus's accountants. The two witnesses dealt with both the genesis and implementation of the contested insurance contract, which is central to this appeal, as well as the procedural aspects involving the respondent's communication with Sars and the circumstances leading up to the issue of the additional assessment impugned in this appeal. The Tax Court provided a detailed account of their versions. For completeness, we will no more than summarise their evidence for the purposes of this judgment. An evaluation of their versions forms part of the findings that we make.

[4] Ms Meiring testified that Meiring Citrus is a citrus farming company that carries on a farming business in the Sundays' River Valley in the Eastern Cape. It produces citrus fruit for the export market, mainly Europe, the Middle East and Canada. The fruits that Meiring Citrus produces include lemons, oranges, soft citrus and mandarins. Ms Meiring testified about the risks inherent in Meiring Citrus citrus farming activities which could lead to a loss of product and income. Apart from issues such as drought, frost and wind, she highlighted two main pests that affect citrus fruits and expose the citrus farming industry to the risk that its produce may be rejected by the export market namely: a cosmetic fungal disease that appears on the outside of the fruit called Citrus Black Spots *('CBS'),* and a pest called False Codling Moth *('FCM')* which lays eggs on citrus.

[5] Ms Meiring mentioned that Meiring Citrus has in the past suffered loss as a result of the FCM. The witness explained that, in fact, it is very difficult to spray and to be guaranteed clean of CBS. It is probably one of their biggest risks on citrus. According to her, if upon inspection of the produce at a port of entry to the export market CBS or FCM is detected on any fruit, the whole batch may be rejected and destroyed, causing Meiring Citrus to suffer a loss of revenue.

[6] Prior to June 2017, Meiring Citrus used its reserves to absorb such losses and did not insure externally against such risks. During April or May 2017, Ms Meiring met with Mr van Zyl, the accountant for Meiring Citrus from Moore, to prepare the provisional tax calculations for Meiring Citrus for that financial year and

that Meiring Citrus was looking for expenses in the amount of R10 million rand to be brought into its books for that tax year. During that meeting, Mr van Zyl informed Ms Meiring that there was a product, a Santam project, described as a structured self-insurance product which he recommended to her as a good crop insurance. Mr van Zyl suggested that Meiring Citrus should consider the self-insurance product offered by Santam to increase the Meiring Citrus's tax-deductible expenditure.

[7] Mr van Zyl had learned of the product during a Santam roadshow during which Mr Ferreira from Santam visited accounting firms advertising in the whole Gamtoos and Langkloof area to introduce them to this self-insurance product with tax-deductible premiums that could be taken at year-end for a period of six months to ensure that it is deductible in terms of section 23H of the ITA. Mr van Zyl explained that Mr Ferreira, the Santam broker, met with him and his fellow directors at Moore and explained the policy to them. Mr Ferreira also indicated that the insurance premium would be deductible for income tax purposes. Mr van Zyl further explained that this was an opportunity for them, as his client, Meiring Citrus, as it was seeking expenditure of approximately R10 million for insurance.

[8] Pursuant thereto, Mr van Zyl gave Ms Meiring the broker's details. Ms Meiring ultimately contacted Mr Ferreira, who explained to her the nature of the policy and the premium she would have to pay. They agreed on a premium of R10 million, payable over six months from June 2017 to December 2017. The premium was exclusive of VAT and provided insurance cover of R12 million plus VAT. Ms Meiring explained that this was a worthwhile expenditure given the risk that Meiring Citrus faced and that it was not sustainable for them as a business to keep using their own reserves. According to her, the tax consequences from this proposed insurance policy were attractive. She testified that it was a well considered expense and that it was attractive to receive cover of more than the amount the respondent would put into the policy.

[9] Following a meeting between Ms Meiring and Mr Ferreira, Ms Meiring decided to accept the product and she signed a pre-populated application form from Santam and the debit order consent on 22 June 2017. A week later, on 29 June 2017, Santam sent her the proposed insurance contract, which she signed and returned to Santam. The policy was effective as from 01 July 2017 to 31 December 2017. Consequently, the respondent concluded the Santam Insurance Contract, which Ms Meiring understood to mean that, by paying R10 million to Santam, Santam would, in return, provide Meiring Citrus, with crop insurance for six months with an indemnity limit of R12 million. Indeed, Ms Meiring paid the premium of R10 million in monthly instalments plus VAT.

[10] Included in the premium of R10 million was an amount of R400 000 described as an underwriting charge payable to Santam. The premium was credited to an experience account operated by Santam on behalf of Meiring Citrus. Expressed differently, the policy was administered by way of the experience account in respect of which monthly statements were provided. The value of the premium was credited to the experience account, and was reduced by the amount of the underwriting fee of R400 000 and any claims.

[11] The difference between R10 million and the R400 000 underwriting charge, was credited into the experience account. Santam would pay claims lodged by Meiring Citrus in respect of the insured risk from the balance in the experience account, up to a maximum of the policy indemnity limit; however, if the total claim exceeds the balance in the experience account, the maximum claim is limited to the policy indemnity limit. The credit balance in the experience account earned interest. On expiry of the contract, the credit balance in the experience account as well as the interest thereon, was refundable to Meiring Citrus. The policy could be cancelled on 30 days' notice at any time. If the experience account is positive, the balance and interest thereon were payable to Meiring Citrus on cancellation or expiry of the contract.

[12] It is common cause that in its 2017 income tax return, Meiring Citrus claimed R10 million paid to Santam under the Santam structured insurance contract as a deduction, reducing its taxable income from R13 583 747 to R3 585 747, resulting in a tax liability of R1 004 009. It is also common cause that in the period between the inception of the policy and the end of the Meiring Citrus's year of assessment, Santam had credited the experience account with an amount of R1 197.52, which was reflected in a statement provided by Santam for the 2017 calendar year as notional interest.

[13] In January 2018, the policy was renewed and further renewed in the subsequent years. However, in June 2021, Meiring Citrus gave notice of cancellation. The reasons for cancellation were that Meiring Citrus was experiencing an unexpectedly smaller crop and lower prices due to the exchange rate, and that it needed the funds. The credit in the experience account at that time was R11 304 932.01, which was duly paid to Meiring Citrus in July 2021. This amount was included in Meiring Citrus' taxable income for the 2022 year of assessment; however, because Meiring Citrus was in a tax-loss position that year, no tax was payable.

[14] On 18 December 2017, Meiring Citrus submitted an ITR14 Income Tax Return for the 2017 tax year to Sars, in which the R10 million premium was claimed as a deduction. Sars' e-filing issued the original auto-assessment for the 2017 tax year, based on the tax return Meiring Citrus filed. On the same day, Sars e-filing issued an auto-request for a verification letter, requiring Meiring Citrus to carefully review its own return and correct any errors it may uncover. Sars also warned Meiring Citrus that it had 30 days from the date of the letter to comply in order to enable Sars to finalise the verification.

[15] Sars flagged the substantial increase in Meiring Citrus' insurance expenses from R220 527 in the 2016 tax year to R10 268 796 in the 2017 financial year. On 5 April 2018, Sars issued a follow-up verification request, seeking additional particulars from the respondent in respect of the 2017 tax year. Moreover, Sars

directed Meiring Citrus to explain the significant increase in insurance expenses. Sars requested Meiring Citrus to provide a schedule and supporting documents in this regard. On 19 April 2018, Mr van Zyl, responded on behalf of Meiring Citrus to Sars's request for information and to the insurance query and stated that the insurance expenses increased because of self-insurance taken out from Santam to the value of R10 million in addition to the R268 796 for the year, and was deducted in full in terms of section 23H of the ITA. In his correspondence, Mr van Zyl referred Sars to a contract attached to it. What Mr van Zyl purported to attach as a Santam structured insurance contract was in fact not the complete contract but an application form and a debit order authority that Ms Meiring signed on 22 June 2017.

[16] On 20 April 2018, Sars issued a letter to Meiring Citrus stating that Sars had finalised the verification of Meiring Citrus's income tax return for the 2017 tax year. In addition, Sars informed Meiring Citrus that no adjustment had been made in respect of its ITR14 income tax return for the 2017 tax year. However, Sars stated that its letter was not a confirmation that the respondent's declaration requirements have been met. Sars emphasised that it reserved the right to conduct any further verification or audit in the future, if required, in respect of the 2017 tax period or any other tax period.

[17] Thereafter, on 10 December 2018, Meiring Citrus submitted an ITR14 Income Tax Return for the 2018 tax year to Sars. On 12 December 2018, Sars issued an original assessment for the 2018 tax year. Sars notified Meiring Citrus on the same day that it would be conducting a verification exercise into Meiring Citrus' return and declarations for the 2018 tax year. The parties interacted during the verification exercise, during which Meiring Citrus submitted an IT14SD supplementary declaration for the 2018 tax year. Again, the verification did not result in an adjustment. Subsequent thereto, on 8 November 2019, Meiring Citrus submitted an ITR14 Income Tax Return for the 2019 tax year to Sars. On 12 November 2019, Sars issued an original assessment for the 2019 tax year. The

respondent was notified on 12 November 2019 that Sars would conduct a verification exercise of Meiring Citrus' returns and declarations for the 2019 tax year. The parties interacted further in the course of the verification exercise, during which Meiring Citrus submitted an IT14SD supplementary declaration for the 2019 tax year. The verification did not result in an adjustment.

[18] On 28 December 2020, Sars notified Meiring Citrus in a letter that it would be conducting an audit into the respondent's tax affairs for the 2017 to 2019 tax years. The audit scope covered numerous expenses and income items declared by Meiring Citrus in the relevant periods. Sars requested Meiring Citrus to provide all documentary material relating to such declarations. In addition, Meiring Citrus was notified in the said correspondence that the audit would, inter alia, focus on the Meiring Citrus's claim for insurance expenses in the relevant periods. Meiring Citrus was asked to provide a detailed breakdown of the insurance expenses claimed for the 2017 to 2019 financial years, together with all relevant supporting documentary evidence and copies of the 'experience accounts' referred to in relation to the alleged insurance expenses. It was also requested to provide a detailed breakdown of interest expense for the 2017-2019 financial years, along with the relevant supporting documentary evidence.

[19] On 20 January 2021, Mr van Zyl responded, providing, for the first time, the complete Santam structured insurance contract for the 2017 and 2019 tax years, as well as copies of the experience account statements. In his correspondence, Mr van Zyl drew Sars' attention that Sars has 90 days since the requested information is received to finalise the audit. Mr van Zyl noted that if no finding or report indicating the progress of the audit is communicated during this time, the audit is deemed finalised and Sars forfeits the right to issue any further requests regarding the audit. Sars issued additional assessments and a final audit letter with adjustments to Meiring Citrus on the 17 and 19 July 2021, respectively, following the delivery of audit findings and subsequent engagements between the parties.

[20] The effect of the adjustments Sars implemented included that the insurance expenses referred to above were disallowed for the 2017 tax year in the amount of R10 million as a non-deductible insurance premium in terms of s 11(a) of the ITA read with s 99(1)((a) and 99(2)(a)(ii) of the TAA. Sars acknowledged that the assessment had prescribed but insisted that it intended to reopen it, as the failure to assess the full amount of tax chargeable was due to a misrepresentation by the taxpayer, namely failing to declare the notional interest in the 2017 tax return. The notional interest earned in respect of the experience accounts related to the insurance policy and was deemed to have accrued to Meiring Citrus in the 2017, 2018 and 2019 tax years. It was included in the Meiring Citrus's gross income for each of these periods. In addition, Sars imposed an understatement penalty of 10 per cent on the disallowance of the R10 million insurance premium and on the notional interest adjustment to gross income for the 2017 tax year.

[21] Pursuant thereto, on 8 September 2021, Meiring Citrus, through Mr van Zyl, objected to the additional assessment. Meiring Citrus took the view that the 2017 assessment had prescribed and denied that s 99(2) (misrepresentation) of the TAA applied. Meiring Citrus stated that there should be no adjustment for the insurance premium because it is bona fide insurance taken out for crop insurance against the CBS was an ordinary expense in the course of business and was a valid deduction according to s 11(1)(a) of the ITA. Sars considered Meiring Citrus's objection and partially allowed it, waiving the penalties and interest imposed in respect of the underpayment of provisional tax. Further, Meiring Citrus' underwriting fee of R400 000 paid to Santam was allowed as a deduction in terms of s 11(a) of the ITA in respect of the R2.4 million indemnity cover.

[22] The objections in respect of the remainder of the adjustment relating to the R10 million premium were disallowed. As regards to prescription relating to the reopening of the assessment after three years, Sars stated that in terms of s 99(2)(a)(ii) of the TAA, prescription of assessment did not apply because Sars was not able to assess the full amount of tax chargeable due to Meiring Citrus' misrepresentation of innocently claiming premiums paid to the insurer as

deductible, consequently resulting in incorrect taxable income. The outcome of the objection was communicated to Meiring Citrus on 5 October 2021. Subsequent thereto, on 24 November 2021, in terms of s 107 of the ITA, Meiring Citrus appealed against the partial disallowance of the objection to the Tax Court.

Findings of the Tax Court

[23] Meiring Citrus' appeal served before the Tax Court. Pursuant to Meiring Citrus' appeal against Sars' reassessment of its 2017 tax year, the Tax Court was enjoined to consider four disputed issues in relation to that assessment: namely (a) whether prescription applied to the additional assessment raised by Sars for the 2017 tax year; (b) whether Meiring Citrus was entitled to claim the full amount of R10 million alleged as insurance policy premiums paid to the Santam in the 2017 tax year as a deduction in terms of s 11(a) of the ITA; (c) whether notional interest earned in respect of the experience accounts related to the alleged insurance policy is to be deemed to have accrued to the respondent in the 2017 tax year and included in the Meiring Citrus' gross income for each of these periods; and (d) whether Sars was correct in imposing an understatement penalty of 10 per cent on Meiring Citrus for the 2017 tax year.

[24] The Tax Court considered the question of prescription as the logically first question to be decided. The court noted that if the statutory immunity provided by s 99(1) applies, the additional assessment cannot stand, irrespective of the merits. In terms of s 99(1) of the TAA, when a three-year period has lapsed from when an original assessment was issued, that assessment has prescribed and becomes final; no further assessments, whether reduced or additional, may thereafter be issued by Sars. However, the court noted that this rule may only be ignored if the exceptions in s 99(2) of the TAA apply. At the Tax Court, the parties agreed that the three-year period has lapsed insofar as the 2017 tax year is concerned. It was common cause that Sars could have issued the disputed 2017 assessment only if it had proved that an exception under s 99(2) existed.

[25] The Tax Court considered the applicable legal principles and authorities and noted that it was not aware of any authority directly on point. However, in the court's opinion, the sensible, businesslike and purposive interpretation of s 99(2), the aim of which is to achieve finality of assessment, is that the causal link between the conduct complained of and the non-assessment of the full amount of tax chargeable, must be determined on a per item basis. In the Tax Court's view, for Sars to be able to make a new determination through an additional assessment, it must show a causal link between the conduct and the non-assessment of a particular item or amount. The Tax Court found that it is possible for Sars to establish that one instance of misrepresentation or nondisclosure has led to the non-assessment of more than one item, but that does not mean that the establishment of one such causal link is automatically an *'open sesame'* to reconsider the entire assessment. The court found that the full amount of the premium was included under insurance in Meiring Citrus's ITR14 Income Tax Return.

[26] The Tax Court stressed that Meiring Citrus stated it had paid the amount and claimed it as a deduction. Pursuant thereto, the court found that it cannot be said that the 2017 income tax return contained a misrepresentation in relation to the R10 million premium claimed as a deduction. The court also found that, on the assumption that the amount of R1 197 in respect of notional interest was an amount to which Meiring Citrus factually became entitled, their failure to include that amount in the return does not constitute a nondisclosure of that fact. In addition, given the extremely small amount, the court noted that it does not consider this to be a nondisclosure of a material fact.

[27] As far as the deductibility of the insurance premium of R9.6 million is concerned, the Tax Court found that Sars' only substantive reasons for denying the applicability of s 11(a) were that the amount had not actually been incurred. The court dismissed Sars' argument that the amount was not deductible as it had not actually been expended. The Tax Court found that Meiring Citrus' payment of

the premium was of an amount owing under the policy. Even though there was an entitlement, immediately upon payment of the premium, to cancel the contract and to recover the amount in question, this did not mean that the amount was not actually expended. There was a shift in assets. The court found that the money ceased to belong to Meiring Citrus and vested in the insurer subject to the rights under the contract.

[28] The court found that the expenditure in this matter was not of a capital nature. Consequently, the trial court upheld Meiring Citrus' appeal. It is this order that Sars seek to assail in this appeal court. Nonetheless, we will consider the findings of the Tax Court later in this judgment, when addressing each of the disputed issues individually.

Issues to be decided

[29] Pursuant to the discussion above, the issues to be decided in this appeal, to some extent, mirror those that served before the Tax Court. They are the following:

(a) Whether the Santam structured insurance contract between Meiring Citrus and Santam constitute insurance in law *('the insurance issue').*
(b) Whether the deposit made by Meiring Citrus under the Santam Contract qualifies for deduction *('deductibility issue').*
(c) Whether Sars was precluded by the time-bar, ie s 99(1) of the TAA, from issuing the additional assessment *('prescription').*
(d) Whether Meiring Citrus is liable for understatement penalties in terms of section 222 of the TAA *('penalties issue').*

Discussion

[30] For completeness, we will discuss these issues *ad seriatim*. However, before we can traverse these disputed issues, it is worth noting that the dispute

between the parties arises from a Santam structured insurance contract, which is the substratum of the dispute. As this case involves the interpretation of a written agreement, understanding the current state of our law regarding interpretation is necessary.

The insurance issue

[31] It is trite that the principles thereof are now settled and unnecessary to repeat in light of the judgment of the Constitutional Court in *University of Johannesburg,*[1] citing with approval the judgment of the Supreme Court of Appeal (SCA) in *Endumeni.*[2] Suffice it to reiterate that the interpretation of documents is a unitary exercise, which means that the interpretation is to be approached holistically: simultaneously considering the text, context and purpose of the document in question.[3] In this matter, the focus is on the contract between the respondent and Santam, and whether it satisfies the essentialia of an insurance contract.

[32] In *Centriq,*[4] the SCA observed that insurance contracts are contracts like any other and must be construed by having regard to their language, context and purpose in what is a unitary exercise. A commercially sensible meaning is to be adopted instead of one that is insensible or at odds with the purpose of the contract. The court noted that the analysis is objective and is aimed at establishing what the parties must be taken to have intended, having regard to the words they used in the light of the document as a whole and of the factual matrix within which they concluded the contract.[5]

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[1] *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC).
[2] *Natal Joint Municipality Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.
[3] *University of Johannesburg v Auckland Park Theological Seminary and Another* fn 1 above para 65.
[4] *Centriq Insurance Company Ltd v Oosthuizen And Another* 2019 (3) SA 387 (SCA) para 17; See also *Santam Limited, a division of which is Hospitality and Leisure Insurance v Ma-Afrika Hotels (Pty) Ltd and another* [2022] 1 All SA 376 (SCA) para 62.
[5] *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA para 12.

[33] Before we can consider whether the contract between Meiring Citrus and Santam constitutes an insurance contract, we deem it proper to set out the general principles of our insurance law in so far as it is relevant to the inquiry whether the Santam insurance contract constitutes a contract of insurance in law. It is incontestable that modern life is fraught with risks of all kinds. The existence of risk and exposure to it compel persons, in whatever form, to enter into insurance contracts to protect themselves against loss. A person who possesses a vested interest in patrimonial assets, such as agricultural crops, risks suffering significant losses if that insurable interest is compromised or damaged; hence the need to take insurance. There are five distinguishing elements of a contract of insurance, namely:

'(a) The insured possesses an interest of some kind susceptible of pecuniary estimation, known as an insurable interest.
(b) The insured is subject to a risk of loss through the destruction or impairment of that interest by the happening of designated perils.
(c) The insurer assumes that risk of loss.
(d) Such assumption is part of a general scheme to distribute actual losses among a large group of persons bearing similar risks.
(e) As consideration for the insurer's promise, the insured makes a ratable contribution to a general insurance fund, called a premium.[6]

[34] These are the essentialia of an insurance contract. In insurance law, the insurer guarantees to indemnify the insured for a risk to which the insured is exposed. By its nature, insurance involves the taking over by a third party, such as an insurer, of the aggregation of independent, individual risks, each comparatively small in amount, and not of one great overwhelming risk. There must be an aggregation of risks so that the financial consequences of the risk materialising for a few of those whose risks have been aggregated can be paid from the large sum

[6] Craighead JG 'Distinguishing Characteristics of Insurance Contracts; Hospitalization' Louisiana Law Review 1939 (4) 809 at 810; See Millard *Modern Insurance Law in South Africa* (2013) at 3.

of the relatively negligible premiums paid by all those. In the locus classicus case of *Lake*,[7] the court defined the contract of insurance as:

> 'A contract between an insurer (or assurer) and an insured (or assured), whereby the insurer undertakes in return for the payment of a price or premium to render to the insured a sum of money, or its equivalent, on the happening of a specified uncertain event in which the insured has some interest.'

[35] Millard points out that this definition overlooks the distinction between indemnity insurance and capital insurance.[8] In the case of indemnity insurance such as car insurance, the insured is covered against and compensated for patrimonial loss. Therefore, should the insured's car be lost or damaged, the obligation of the insurer is to pay to the insured the value of the car at the time of the loss or, in the event of damage, to pay the amount of the repairs. The patrimonial loss, which refers to the calculable financial loss that arises from the reduction in a person's patrimony, is made good by an insurer who has agreed to take over the risk.

[36] On the other hand, with capital insurance, non-patrimonial loss is compensated. Non-patrimonial loss refers to that portion of one's patrimony which does not have an economic value and where there has been harm to the personality right such as one's body, good name or dignity or where there has been pain and suffering or loss of amenities of life. In such a case, the patrimony is affected, and money is paid to the victim. Both indemnity insurance and capital insurance aim to indemnify the insured. In *Sydmore*[9]*,* the court emphasised that the frequently used definition that the insurance contract is a contract of utmost good faith, derives from the circumstance that the insurer undertakes to indemnify

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[7] *Lake and Others, NNO v Reinsurance Corporation Ltd and Others* 1967 (3) SA 124 (W)
[8] Millard D *Modern Insurance Law in South Africa* (2013) at 2.
[9] *Sydmore Engineering Works (Pty) Ltd v Fidelity Guards (Pty) Ltd* [1972] 1 All SA 127 (W) at 131.

the insured against a risk which is wholly outside the control of the insurer but to some extent within the control of the insured.

[37] Against this background, we turn to consider the Santam structured insurance policy to determine whether it meets the essentials of a lawful insurance contract under our law.

Did the contract between Meiring Citrus and Santam constitute an insurance contract in law?

[38] At the risk of repeating ourselves, under the Santam insurance contract, Meiring Citrus was to pay Santam R10 million in premium, excluding VAT. Santam would credit this amount to an experience account, which earns notional interest. The contract provides for an underwriting charge. The amount of underwriting charge imposed was R400 000. Santam would debit the experience account with the said underwriting charge, leaving a balance of R9 600 000 in the experience account. Any amount that Santam pays to Meiring Citrus as a claim for an insured event payment would be debited from the experience account. The balance of the experience account would be refunded to Meiring Citrus on cancellation of the contract. We deal with the salient provisions of this contract hereunder thematically.

[39] In our view, this structured insurance does not amount to an insurance contract. It does not satisfy the essentialia of an insurance contract discussed above. It is an antithesis of insurance. The parties' contract is akin to an investment deposit in a bank account. This conclusion is borne out by the following: a traditional insurance contract is a device for transferring risk. A traditional contract of insurance is a contract in which one party indemnifies another against loss from

specified contingencies or perils. Traditional insurance contracts are perceived as bilateral and/or reciprocal contracts.[10]

[40] This entails an undertaking by the insurer to compensate the insured for a loss in exchange for the payment of a premium by the insured. The insurance company accepts many risks, knowing that some will involve losses. The insured benefits from spreading its potential losses across many insureds' risks, allowing it to purchase coverage at a slight fraction of its potential losses.[11] In other words, a general method of creating financial security is to transfer and spread the risk among several persons, all of whom are prepared to make a relatively negligible contribution to neutralise the detrimental effects of the risk, which may materialise for any one of them.

[41] The contract between Santam and Meiring Citrus was an investment transaction disguised or simulated as an insurance contract. It is now trite that parties may arrange their affairs to avoid statutory prohibitions, provided their arrangement does not result in a simulated transaction and consequently in *fraudem legis*.[12] Whether a particular transaction is a simulated transaction is therefore a question of its genuineness. If it is genuine the court will give effect to it and, if not, the court will give effect to the underlying transaction that it conceals. And whether it is genuine will depend on a consideration of all the facts and circumstances surrounding the transaction.[13]

[42] The Santam structured agreement was not a sham contract. The parties intended it to have effect in accordance with its tenor. However, it must be stressed that the fact that the parties pasted a label on the contract that it is an insurance agreement and that the amount paid, which is labelled a premium, is deductible as

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[10] See Millard D *Modern Insurance Law in South Africa* (2013) at 84 quoting with approval Reinecke MFB Van der Merwe S Van Niekerk JP & Havenga P *General Principles of Insurance Law* (2002) at 73.
[11] See Goode RA 'Self-Insurance as Insurance in Liability Policy "Other Insurance" Provisions' 56 *Washington & Lee Law Review* 1245 (1999) at 1252.
[12] See *Dadoo Ltd and Others v Krugersdorp Municipality Council* 1920 AD 530 at 548.;
[13] *Roshcon v Anchor Auto Body Builders* 2014 (4) SA 319 para 27.

an expense in terms of s 11(a) of the ITA does not, without more, make it a contract of insurance. It is incumbent of a court to strip it off its form and uncover its real nature. As Mr Green contended, when two parties enter into an agreement and label it a lease, that designation does not alter the contract's actual nature if its terms indicate it constitutes a sale. In such instances, the contract should be recognised as a sale agreement, regardless of the label assigned to it.

[43] In considering whether a transation/agreement is simulated the SCA formulated the following test in *Nwk Ltd*:[14]

> 'In my view the test to determine simulation cannot simply be whether there is an intention to give effect to a contract in accordance with its terms. Invariably where parties structure a transaction to achieve an objective other than the one ostensibly achieved they will intend to give effect to the transaction on the terms agreed. *The test should thus go further, and require an examination of the commercial sense of the transaction: of its real substance and purpose. If the purpose of the transaction is only to achieve an object that allows the evasion of tax, or of a peremptory law, then it will be regarded as simulated.* And the mere fact that parties do perform in terms of the contract does not show that it is not simulated: the charade of performance is generally meant to give credence to their simulation.' (emphasis added)

[44] Therefore, it is crucial to interpret the contract of the parties effectively to ascertain its true nature, an analysis the Tax Court unfortunately did not undertake. The Tax Court simply accepted the contract in issue at face value and did not question its real purpose. There are several inexplicable clauses in the agreement, as well as aspects of the entire transaction that require scrutiny.

[45] Crucially, the Tax Court found, at paragraph 99 of its judgment, that it was not Sars' case that the insurance contract was a sham or simulation, that is, that

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[14] *Commissioner For The South African Revenue Service v Nwk Ltd* 2011 (2) SA 67 (SCA) para 55.

one was not in fact dealing with an insurance contract or an insurance premium, but in reality with some other type of transaction. The Tax Court concluded that the contract in question was not a sham but rather an insurance contract that provided Meiring Citrus with immediate coverage. This conclusion was reached without a thorough analysis of the terms of the contract. In our view, this omission amounts to a significant error by the Tax Court.

[46] The Tax Court was required to interpret the nature of the contested contract and to determine whether it constituted one of an insurance. Unfortunately, the court failed to carry out this evaluation. Instead, the court conflated the interpretation question with the sham question, constituting a fundamental error in its approach to the matter. The Tax Court moved from the presumption that this was an insurance contract, albeit unconventional insurance, and that a premium was payable, which is deductible under s 11(a) of the ITA. As we shall demonstrate hereunder, a thorough analysis of the terms of this contract reveals that they conflict with the essentialia of an insurance contract. We will traverse the essential components of an insurance contract and thereafter juxtapose those essentials to the contested agreement.

[47] As foreshadowed above, an insurance contract has certain essential characteristics that set it apart from other contracts. Insurance contracts are about the avoidance of risk. More accurately, as postulated by Sars, insurance contracts are about the avoidance of the consequences of the materialisation of risk. The essential component of insurance is the transfer of the consequence of the risk from the insured to the insurer. From a practical standpoint, when a person insures a vehicle with a company such as BMX (Pty) Ltd, the company does not initially assume any risk associated with that vehicle until the insurance contract is concluded. However, upon the conclusion of the insurance contract, the risk is transferred to BMX (Pty) Ltd. Consequently, BMX assumes the financial risk of insuring the vehicle in accordance with the terms of the agreement.

[48] Another fundamental component of insurance, which is often referred to as the economic theory of insurance, involves the spreading of risk. When an insured insures, for instance, a house or a car, he pays what is often referred to as a 'negligible' premium. When the car is damaged, the insurance company pays the damages from the premiums of multiple insureds. This is built upon the normal probability theory, which holds that the probability of each insured having an accident is about the same; however, the probability of them having an accident at the same time is much lower. This is consistent with the spreading of risk, and that is how insurance works.

[49] In circumstances where the insured's own resources compensate for a loss, or where the contract specifies that risk mitigation will utilise the insured's resources, similar to the arrangement between Santam and the respondent, such a configuration does not qualify as insurance. It is often referred to as self-insurance, a common phrase that has crept into our parlance. Self-insurance is not insurance but an antithesis of insurance, because there is no transfer or spreading of risk. The SCA stressed in *Centriq (supra)* that insurance contracts have a risk-transferring purpose containing particular provisions; as such, regard must be had to how the courts approach their interpretation specifically.

[50] The purported contract between Santam and Meiring Citrus is evidently a self-insurance contract. The risk of harm was not transferred from the insured to Santam. According to the agreement, any damages incurred would be paid from the experience account, which was in fact the funds of Meiring Citrus. For thoroughness, we will now examine the specific provisions of this contract and contrast them with the essential requirements of an insurance contract discussed above.

[51] From the policy summary, the policy records that the policyholder is Meiring Citrus. Regarding the premium, the policy also states that the total annual premium is R11 400 000.00. The policy indemnity limit is R13 680, 00.00. These amounts include VAT. The policy starts on 01 June 2017 and ends on 31 December 2017.

The policy summary suggests that the insured pays a premium of R11.4 million and receives insurance of up to R13.6 million, valid for only six months. As stated above, the economic theory of insurance holds that the premium is negligible. The premium of R13,6 million defies the economic theory of insurance. Payment of damages is not spread among various insureds.

[52] Under the caption premium review and renewal, the summary of the policy records as follows:

> 'The premiums are for the period of insurance as set out in the policy schedule. *At the policy anniversary, you can review or renew your insurance cover and increase or decrease your premium accordingly for the following period. This process will be repeated at every policy anniversary.* No renewal fee will be levied on the expiry of the policy, save on the new premiums purchased.' (emphasis added)

[53] A careful reading of this provision gives the insured the option to increase or decrease the premium. Under this clause, the insured determines the premium amount, not the insurer. This is clearly against the principles of insurance and sound business practice. Ordinarily, in insurance terms, the insureds are price takers and not price makers. It is the insurer who determines that after assessing the risk. We stress the fact that there is a duty in insurance law for the insured to state and disclose all material aspects which may influence the underwriter's opinion as to the risk he is incurring, and consequently as to whether he will take it, or what premium he will charge, if he does take it. There is an obligation to disclose, and the concealment of a material circumstance known to the insured, whether he thought it material or not, avoids the policy. In simple terms, the premium is determined by the insurer based on a thorough assessment of the associated risks, not the other way around.

[54] On the payment of claims clause, the policy contract records the following:

> 'The policy holder can claim against the policy for risks in categories as specified in the policy contract. *Claims are limited to the amount of the policy indemnity limit.*

> *All claims that are less than the balance of the experience account are paid within 72 hours.* Santam structured insurance reserves the right to appoint an assessor to evaluate claims that are in excess of the balance of the experience account.'

[55] This clause divides the claims into two groups: those that fall within the balance of the experience account and those that exceed it. Claims that are less than the balance of the experience account are summarised as being paid within 72 hours. There is no reference to the adjustment of the claim pursuant to an investigation. However, this is contrasted with claims above the balance of the experience account in which it is specifically recorded that an assessor may be appointed to evaluate such claims. This clause clearly indicates that the insurer bears no prejudice or risk in respect of the amount in the experience account. Hence, no investigation is undertaken to evaluate or ascertain the validity of the claim.

[56] On policy cancellation, the policy summary records as follows:

> 'You can cancel your policy at any time. We require 30 days written cancellation notice when you cancel your policy. If the experience account is positive, *then the balance will be paid to you after the 30 days notice has expired'*.(emphasis added)

[57] Under this cancellation clause, the policy can be cancelled at any time and for any reason, and the insured can recover the balance of the experience account after giving 30 days' notice. The premium paid is refunded to the insured, with interest on demand. This provision is at odds with the principles applicable to a contract of insurance. It makes no sound business or commercial sense whatsoever. An insured may recover the premium if the risk has not attached. The general rule applicable to insureds' claims for the return of the premium is that if the insurers have never been at risk, they have not earned a premium and ought to return it.[15] The insurer shall not receive the price of running a risk if he runs

[15] See Davis DM *The South African Law of Insurance* (1993) at 199.

none.[16] In the present matter, despite the fact that a risk is attached, the insured may still demand the return of the premium, and the insurer must pay it. Evidently, there is considerable substance in the argument proffered on behalf of Sars that this is not a contract of insurance at all.

[58] The policy also establishes the experience account and specifies how payment will be made in the event of a claim. The experience account consists of the purported premium the insured paid to Santam. Monthly notional interest is allocated to the policy's experience account. The notional interest is calculated on the positive cash balance of the experience account at the rate determined by Santam Structured Insurance, based on market conditions. Monthly statements reflecting the account balance are sent electronically to all clients. The policy notes that the notional interest will not be forfeited, even if claims were made against the experience account. Interest on the account is always calculated on the remaining balance. Notional interest is paid to the insured upon expiry or cancellation of the policy.

[59] Clearly, the parties understood that there is a positive cash balance in the experience account. The deposit contributed to Santam's experience account, designated as a premium, represents an investment made by Santam on behalf of the insured, which generates interest for the insured's benefit. This arrangement, in our view, is distinctly not consistent with a contract of insurance. Moreover, the policy contract notes that when the positive cash balance of the experience account is paid on expiry date or cancellation of the policy, reinsurance claims paid will be deducted from the experience account. This provision is at odds with the principles of reinsurance in insurance law.

[60] Perhaps it is apposite to remind ourselves that a contract of reinsurance is an insurance contract under which an insurer transfers, in whole or in part, the risk or risks it has taken over under an insurance contract or contracts to another

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[16] Ibid.

insurer or insurers.[17] The latter insurer receives a premium in exchange for assuming the risk from the direct insurer. By transferring or ceding its primary insurance risks to another insurer, the original or ceding insurer becomes the reinsured, and the insurer to which the risks are ceded becomes the reinsurer. By entering into a reinsurance contract, an insurer can therefore relieve itself of, or partially relieve itself of, the risk it has underwritten and taken over under the primary insurance contract. Reinsurance is one of the risk-spreading mechanisms employed by insurers in the short-term corporate insurance market. Simply put, it is the primary insurer that pays the new insurer's premium, not the insured. It is not the insured who pays the premium to the new insurer, as is suggested in the Santam policy.

[61] What compounds the difficulty here is that the policy explicitly states that Meiring Citrus may pledge the policy as surety. This provision makes it abundantly clear that the funds in the experience account are an asset in the insured's hands. For this reason, the insured can use it as surety to guarantee for something else. If it was not an asset in the insured's hands, it could not be used as security.

[62] Furthermore, the Santam policy provides that it was issued based on previous interaction with the client and on information obtained as a result of those discussions. In addition, the policy states that no risk analysis was conducted at the conclusion of the agreement. These provisions are at odds with the business of insurance. As articulated above, the purpose of insurance is the transfer of an undesirable risk to the insurer. It is trite that insurers want to know what risk they are taking on. As set out above, the insured must disclose every material circumstance bearing on the risk, and the insurer fixes the premium on an assessment of that risk and the information disclosed. The insurer did not undertake a risk analysis in this case because of the policy's structure, in which the bulk of what is to be paid is the insured’s own money, and the risk is upon the insured. There is no transfer of the undesirable risk to Santam. In fact, in the

[17] See *LAWSA* 12 Part 2, 2 edition at 182.

application form, Meiring Citrus did nor disclose previous crop losses in the previous years, which it covered from its own reserves as explained by Mrs Meiring in her testimony.That itself, was contrary to the declaration of disclosure by the insured to the insurer.

[63] The policy provides for premium adjustment, which is uncommon in insurance contracts. The policy provides that the annual premium payable by the insured shall be treated as a deposit premium and shall be adjustable annually based on actual claims incurred. If at any time the claims payable under the policy exceed the net premium received by more than 20 per cent of the premium, Santam may request additional premiums. Such additional premium shall be paid to the insurer prior to the insurer paying or becoming liable to pay any claim in terms of the policy where the claim payable exceeds 120 per cent of the net premium received. Concernedly, this clause is absolutely silent on the limit of indemnity. It is a clause incorporated in the contract to ensure that Santam is only there for the R2 million cover against the R400 000 underwriting charge. Simply, the contract ensures that Meiring Citrus pays all damages arising from the risk from its own pocket; albeit, through the experience account. This does not make business sense.

[64] The entire contract is focused on the experience account and using it to pay any claim for the insured. The general conditions outlined in the policy concerning claims clearly demonstrate that it does not constitute an insurance policy. The policy provides that any claim that is not paid before the expiry date of the policy and the payment of the experience bonus will be forfeited and no longer payable by Santam and all the obligations of Santam in respect of such claims will be discharged when the experience bonus is paid to the insured or rolled over into the experienced account for any new policy which comes into being one renewal of cover. Simply put, once the balance in the experience account is paid, any claim that occurred before the cancellations will be forfeited. This provision clearly indicates that Meiring Citrus is self-insured.

[65] Claims are paid from the balance of the experience account. If there is a positive balance in the experience upon cancellation of the policy, it must be repaid to the insured.

[66] In summary, the contract between the parties is draped as an insurance contract but in our view, in law it is not. Having regard to all circumstances, the parties intended to chlothe what in reality was an investment transaction as an insurance contract. The purported contract does not meet the legal requirements of an insurance agreement. It does not meet the economic theory of insurance.

[67] The fallacy is also compounded by the fact that this alleged expense in the experience account earned interest. Expenses do not earn interest. Undoubtedly, what happened here was that Meiring Citrus had a right against a bank for R10 million. It swapped that right for a right against Santam by depositing R10 million into an experience account. There is an absolute obligation on Santam to return the money, and an absolute right on the taxpayer to demand its return, without any penalty, notwithstanding the attachment of risk.

[68] This does not accord with the principles of an insurance contract; it is clearly not an insurance policy. The Tax Court erred in finding that this was an insurance policy with instant cover. This finding was fundamentally flawed in that, under the contract, regardless of whether the insured event occurred immediately upon conclusion of the contract, the insured contracted to pay R10 million into the experience account. Whatever payment Santam made would ultimately be deducted from the experience account. The relationship between Meiring Citrus and Santam was contractual.

[69] Finally, on this point, the views expressed by Mr Green are worth noting. Mr Green argued that Ms Meiring and Mr van Zyl's evidence before the trial court was that they were looking for an expense of R10 million. If Meiring Citrus had made R10 million in profit and paid tax, it would have put R7.2 million into its pocket and done whatever it wanted with it. By looking for expenses, Meiring Citrus gave away

R10 million to Santam. If that is where it ended, it would have been the most uncommercial and probably absurd result. From the objective facts, Mr van Zyl and Ms Meiring knew they were not giving away R10 million that would never come back. The R10 million was a purported expense they knew would be repaid with interest.

[70] Moreover, Ms Meiring testified that she knew that the money in the experience account would be refunded. Mr van Zyl, on the other hand, asserted that he was unaware of the experience account. The evidence of Mr van Zyl in this regard cannot be accepted. He is a chartered accountant and a distinguished professional. In our view, he would not have advised his client to consider a product that would have resulted in her giving away R10 million without any benefits. Mrs Meiring stated that she was looking for expenses. In his evidence in chief, he testified that he attended the road show where the representatives of Santam, Mr Ferreira, made a presentation on this policy. Mr Ferreira even visited him at his offices ('Moore'). Mr Ferreira explained this policy to him and to some of his co-directors.

[71] Furthermore, at the road show, Mr Ferreira gave a PowerPoint presentation on this policy. Surely Mr Ferreira must have mentioned the experience account, as this is what Ms Meiring found attractive. In our view, Mr van Zyl lacked crebility on his claim about not having known about the existence of the experience account in the product prior to his disclosure of it during the risk audit. He must surely have known about the experience account and that the deposit of the alleged premium was refundable. He could not have advised his client of this policy without explaining the experience account, which is central to the purported policy. From the reading of the record, in our view, he did not come across as a credible witness overall.

[72] The contract between the parties was not an insurance contract. The terminology used, and the description attached to it, are deliberately misleading to avoid paying tax. The R10 million premium was nothing more than an investment

for six months. Ms Meiring was absolutely correct in her description during evidence-in-chief that the product was a structured self-insurance. This is so because out of the R12 million indemnity limit, the true indemnity in respect of which risk was transferred from Meiring Citrus to Santam was R2.4 million. The remaining R9.6 million was self-insured risk. Santam was paid a premium of R400 000 for accepting the risk of R2.4 million. The remaining R9.6 million was a deposit into a self-insurance investment account. Every aspect of the Santam contract discussed above makes it abundantly clear that the R9.6 million is not the premium and cannot be deducted from the respondent's taxable income. Therefore, the Santam contract in respect of the R9.6 million is nothing more than an investment account. Whether the deposit of R9.6 million into the experience account nonetheless constituted expenditure actually incurred within the meaning of section 11(a) of the ITA, and if so whether it was of a capital nature, are the questions to which we now turn.

The deductibility issue – s 11(a) of the ITA

[73] Section 11(a) of the ITA permits a taxpayer carrying on a trade to deduct from its income the expenditure and losses actually incurred in the production of the income, provided that such expenditure and losses are not of a capital nature. As the SCA explained in *Armgold/Harmony Freegold Joint Venture*[18], an amount qualifies for deduction under s 11(a) only if it satisfies each of the following requirements: there must be (a) expenditure; (b) actually incurred; (c) in the production of income; (d) for the purposes of trade; and (e) the expenditure must not be of a capital nature.

[74] In terms of s 102(1) of the TAA, the burden of proving that an amount is deductible rests on the taxpayer. The onus is to establish each of the requirements of s 11(a). It is not discharged by proof of some of those requirements, nor by

[18] *Armgold/Harmony Freegold Joint Venture (Pty) Ltd v Commissioner for the South African Revenue Service* [2013] 1 All SA 253 (SCA) para 4.

reliance on the labels attached to the transaction in the contractual documents. Meiring Citrus accordingly bore the onus of proving, on a balance of probabilities, that the R9.6 million was expenditure actually incurred in the production of its income, for the purposes of its trade, and that it was not of a capital nature.

The ambit of the dispute

[75] Before turning to the substance, we must address a preliminary contention advanced on behalf of Meiring Citrus. It was submitted that the only requirement of s 11(a) ever placed in issue was whether the premium constituted expenditure actually incurred. On this argument, Sars confined its attack on the deductibility of the premium, both in the assessment process and in its rule 31 statement, to the question of incurral, having abandoned on appeal the further objections it had raised under ss 23L and 23(e) of the ITA. It was contended that for Sars now to assail the deduction on the footing that the premium was of a capital nature would constitute an impermissible novation of the grounds of assessment under rule 31(3), and would fall outside the issues defined by rule 34.[19] Reliance was placed on the finding of the Tax Court, at paragraphs 150 and 151 of its judgment, that the capital or revenue character of the premium had not been identified as part of the Sars' case and did not appear to be an issue in the appeal.

[76] Sars, for its part, contended that all the requirements of s 11(a) were in dispute. It pointed to its rule 31 statement, in which the issue for determination was formulated as whether Meiring Citrus was entitled to claim the full amount of R10 million as a deduction in terms of s 11(a), and in which it was expressly pleaded that the taxpayer bore the burden of proving that the amount claimed met every requirement of s 11(a) and was not prohibited by any other provision of the ITA. Sars submitted that the capital enquiry rested on the very same facts as the incurral

[19]Rules promulgated under s 103 of the Tax Administration Act 28 of 2011. Rule 31(3) provides that SARS may not include in its statement a ground that constitutes a novation of the whole of the factual or legal basis of the disputed assessment. Rule 34 provides that the issues in an appeal are those contained in the rule 31 statement read with the rule 32 statement and the rule 33 reply, if any.

enquiry, namely the terms of the Santam contract and the operation of the experience account, and that it therefore worked no novation of the factual or legal basis of the assessment.

[77] The starting point is the nature of the proceedings before the Tax Court. An appeal to the Tax Court is not an appeal in the ordinary sense. It is a wide appeal involving a hearing afresh, in which the Tax Court rehears the matter, decides the issues afresh, and substitutes its own decision on the merits for that of Sars.[20] That hearing afresh is conducted within the issues arising from the rules 31, 32 and 33 statements. It follows that, the deductibility of the premium under s 11(a) having been placed in issue, the Tax Court was obliged to determine for itself whether the deduction was allowable, and thus whether each of the requirements of s 11(a) was met. It was not confined to the single requirement, namely incurral, on which Sars chose to focus its argument; and the respondent, bearing the onus, had to establish every element of the deduction it claimed, including that the expenditure was not of a capital nature.

[78] We consider that the better view is that the question whether the premium was of a capital nature was in issue, for the following reasons.

[79] First, rule 34 defines the issues by reference to the rule 31 statement read with the rule 32 statement and any rule 33 reply. The rule 31 statement framed the question as whether Meiring Citrus was entitled to the deduction in terms of s 11(a) as a whole, and pleaded in terms that the taxpayer had to prove that the amount met every requirement of that section. That formulation does not confine the enquiry to incurral.

[80] Second, and more fundamentally, the requirement that expenditure not be of a capital nature is a positive element of the taxpayer's own onus under s 102(1). A taxpayer claiming a deduction under s 11(a) must establish every element of the

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[20] *United Manganese of Kalahari (Pty) Ltd v Commissioner, South African Revenue Service and four other cases* [2025] ZACC 2 paras 26-27.

section, including that the expenditure is not of a capital nature, whether or not Sars has elected to develop that element in argument. Sars did not admit the remaining elements. There is a distinction to be drawn between a ground of assessment, which Sars must raise and which it may not thereafter novate, and the discharge of the onus placed on the taxpayer. The novation principle in rule 31(3) prevents Sars from shifting the factual or legal basis of the assessment; it does not relieve the taxpayer of the burden of proving the elements it has always had to prove. Meiring Citrus could not discharge its overall onus by establishing incurral alone.

[81] Third, the capital enquiry in this case does not cause novation. The factual substratum is identical to that underpinning the incurral enquiry: the single Santam contract, the experience account, the accrual of interest on the balance of that account, the entitlement to a refund on cancellation, and the right to pledge the policy. No new facts are required, and all the relevant evidence, including the evidence of Ms Meiring as to the purpose of the contract, was led before the Tax Court. Meiring Citrus suffers no prejudice from the determination of the capital question on the existing record, and the legal basis of the assessment remains unchanged: it is, and has always been, that the premium is not deductible under s 11(a). Moreover Meiring Citrus lead evidence on the capital issue despite having done so on a without prejudice basis to its claim that the Tax Court was not required to deal with it .

[82] We are accordingly satisfied that the capital question was properly before the Tax Court and is properly before us. To the extent that the Tax Court held otherwise, we respectfully disagree. In any event, as will appear, the appeal succeeds on the question of incurral, which was indisputably in issue, and our conclusion on the capital nature of the premium is reached in the alternative.

Was there expenditure actually incurred?

[83] The starting point is the judgment of the SCA in *Labat*[21], where the following was held:

> 'The term 'expenditure' is not defined in the Act and since it is an ordinary English word and, unless the context indicates otherwise, this meaning must be attributed to it. Its ordinary meaning refers to the action of spending funds; disbursement or consumption; and hence the amount of money spent. The Afrikaans text, in using the term 'onkoste', endorses this meaning. In the context of the Act it would also include the disbursement of other assets with a monetary value. Expenditure, accordingly, requires a diminution (even if only temporary) or at the very least movement of assets of the person who expends. This does not mean that the taxpayer will, at the end of the day, be poorer because the value of the counter-performance may be the same or even more than the value expended.'

[84] The term 'expenditure' thus connotes the action of spending funds: a diminution, even if only temporary, or at the least a movement of the assets of the person who expends. But not every passing of money from one hand to another is expenditure. Our courts have consistently held that the advance of a loan, and its repayment, have no fiscal consequences, precisely because the borrower does not expend what it receives and the lender does not expend what it lays out: it parts with money against an unconditional right to the return of an equivalent sum. In *Genn & Co*[22] the Appellate Division held that money borrowed does not form part of the borrower's gross income, since what is borrowed does not become the borrower's own save in a sense irrelevant for present purposes. In *Felix Schuh*[23], and again in *Brummeria*[24], the SCA reiterated that the advance of a loan and its repayment give rise neither to a receipt or accrual in the hands of the recipient nor to expenditure or a loss in the hands of the payer. The loan, as the court put it, is a neutral factor.

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[21] *Commissioner for the South African Revenue Service v Labat Africa Ltd* 2013 (2) SA 33 (SCA); 74 SATC 1 para 12.
[22] *Commissioner for Inland Revenue v Genn & Co (Pty) Ltd* 1955 (3) SA 293 (A) at 301B-G.
[23] *Commissioner for Inland Revenue v Felix Schuh (SA) (Pty) Ltd* 1994 (2) SA 801 (A) at 812D-E.
[24] *Commissioner, South African Revenue Service v Brummeria Renaissance (Pty) Ltd* 2007 (6) SA 601 (SCA) para 9.

[85] The same reasoning applies to a deposit. A taxpayer who places R10 million in a bank account, or in any other interest-bearing account from which it is entitled to recover the identical sum, has not expended that money. It has merely changed the form in which it holds an asset of unchanged value, parting with cash against an unconditional right to the return of an equivalent amount together with the interest the deposit earns.

[86] That, in substance, is what occurred here. For the reasons given in our analysis of the insurance issue, the R9.6 million was not a premium paid for the transfer of risk but a deposit into the experience account: an account that stood to the credit of Meiring Citrus, earned interest for its benefit, was recoverable in full on 30 days' notice, and could be pledged by it as security. At the moment the premium was paid, Meiring Citrus's net asset position was unchanged, save for the R400 000 underwriting fee. It had parted with R10 million in cash but had acquired, in return, a credit of R9.6 million recoverable on demand, together with the right to the interest accruing on that balance. There was no diminution in its assets, and no movement of assets of the kind contemplated in *Labat*, but only a change in the form in which an asset of identical value was held.

[87] The Tax Court reached the contrary conclusion in reliance on *Boerdery*[25], holding that there had been an actual parting with money in exchange for different contractual rights, and that the present transaction was to be distinguished from a deposit in an accessible bank account because only one of the rights acquired was the potential return of the sums expended, and then only if no claim was made. We are unable to agree, for two reasons.

[88] First, the right to recover the balance of the experience account was not merely a potential or contingent right. It was an unconditional contractual entitlement, subject only to the deduction of the R400 000 underwriting fee and to

[25] *Taxpayer Boerdery v Commissioner for the South African Revenue Service* (IT 45979) (Tax Court, 20 March 2024).

the reduction of the balance by any claims actually paid. No claim was ever made under the policy throughout its existence from 2017 to 2021, and on cancellation Meiring Citrus duly recovered R11 304 932.01, an amount exceeding the premium it had paid. The conditionality on which the Tax Court relied, namely that claims might have reduced the balance, does not convert a deposit into expenditure. A depositor who authorises its bank to debit the account in order to discharge the depositor's own liabilities does not thereby transform the deposit into expenditure: the depositor's right to the balance is in that sense conditional, yet the deposit remains a deposit.

[89] Second, to treat the mere movement of money as sufficient to constitute expenditure, irrespective of whether the payer retains a right to the return of an equivalent sum, would denude the requirement of incurral of all content. On that approach, every loan and every deposit would constitute expenditure, a result squarely at odds with *Genn*, *Felix Schuh* and *Brummeria*. What *Labat* requires is a movement of assets by way of expenditure, that is, a parting with value, and not a mere change in the form in which value is held. The words 'of the person who expends' presuppose that the person is in truth expending; they do not render every movement of assets an act of expenditure.

[90] To the extent that the decision in *Boerdery* holds that the deposit of a premium into an experience account of this kind constitutes expenditure actually incurred, we respectfully differ from it. We observe, however, that the court in *Boerdery*, having found expenditure, nonetheless held it to be of a capital nature and disallowed the deduction. The result in that case, the disallowance of the deduction, is one with which we agree, even though our reasoning on incurral differs.

[91] It follows that the only amount genuinely expended was the R400 000 underwriting fee, which was not recoverable and which Sars in any event allowed as a deduction at the objection stage. The balance of R9.6 million was not expenditure actually incurred. The fact that it was labelled an insurance premium

and held in an experience account rather than a conventional bank account does not alter the substance of the transaction; substance prevails over form. The deduction fails at the threshold, and on this ground alone the appeal must succeed.

Was the expenditure, if incurred, of a capital nature?

[92] If we are wrong in concluding that no expenditure was incurred, we turn to consider, on the assumption that the R9.6 million was expenditure actually incurred, whether it was of a capital nature. For the reasons that follow, we conclude that it was, and that the deduction would have failed on this ground too.

[93] The distinction between capital and revenue expenditure is well settled. As the SCA explained in *BP Southern Africa*[26], the purpose of the expenditure is an important and often decisive consideration: expenditure incurred for the purpose of acquiring a capital asset of the business is capital in nature, whereas expenditure forming part of the cost incidental to the performance of the income-producing operations, as distinct from the equipment of the income-producing machinery, is revenue in nature. The true nature of each transaction must be examined,[27] and every case turns on its own facts.[28]

[94] The relevant enquiry is not what risks the policy purported to cover, but what Meiring Citrus acquired in exchange for the R9.6 million. By the payment it acquired a credit of R9.6 million in the experience account, the right to interest on the balance of that account, and the right to recover the balance on termination of the policy. Those rights did not expire with a period of cover, as the contingent rights conferred by a true contract of insurance would. They subsisted from year to year, the policy being renewed annually from 2017 to 2021, and were of

[26] *BP Southern Africa (Pty) Ltd v Commissioner for the South African Revenue Service* 2007 (6) SA 559 (SCA); 69 SATC 79 paras 7-8.
[27] *New State Areas Ltd v Commissioner for Inland Revenue* 1946 AD 610 at 627.
[28] *Commissioner for Inland Revenue v African Oxygen Ltd* 1963 (1) SA 681 (A) at 691A-B.

enduring value. The balance could be pledged as security, which confirms that what Meiring Citrus had acquired was an asset in its hands.

[95] An interest-bearing account of this nature is an income-producing asset. The classic distinction drawn in *Visser*[29], between the tree and the fruit, is apposite: the funds held in the experience account constitute the principal or income-producing asset, the tree, while the interest they generate is the fruit. Amounts laid out to acquire such an asset are capital in nature.

[96] The Tax Court reasoned that the accrual of interest on the experience account did not render the payment one that acquired an independent income-producing concern, and that the proper approach was to identify the role and purpose of the expenditure in the context of the taxpayer's business as a whole. Meiring Citrus supported that reasoning, emphasising Ms Meiring's evidence that the contract was aimed at reducing the risk to its citrus crop, and pointing to the allocation of cover across its different orchards. We accept that the protection of the crop was a purpose of the transaction. But the stated protective purpose cannot be decisive where, in substance, the payment acquired an enduring, interest-bearing asset rather than mere cover against a peril. Many capital outlays serve protective ends, yet remain capital where they secure an asset of lasting value. Nor does the form in which the asset is held determine its character: whether funds are held in a bank account, an investment fund or an insurance experience account, where the taxpayer acquires enduring rights to those funds and to the income they generate, what has been acquired is a capital asset.

[97] In this respect we are in agreement with the conclusion reached in *Boerdery*, that the taxpayer's right to the experience account was an income-producing concern and therefore a capital asset. Accordingly, even if the R9.6 million had constituted expenditure actually incurred, it would have been

[29] Commissioner for Inland Revenue v Visser 1937 TPD 77 at 81.

expenditure of a capital nature, and on that ground too it would not have been deductible under s 11(a).

The remaining requirements

[98] Since Meiring Citrus failed to establish that the R9.6 million was expenditure actually incurred, and since, in the alternative, the expenditure was of a capital nature, it is not necessary to determine whether the remaining requirements of s 11(a), namely that the expenditure was in the production of income and for the purposes of trade, were satisfied. Those requirements were not separately developed in argument, and on the view we take they do not arise for decision. We observe only that the onus in respect of them, too, rested on Meiring Citrus.

[99] For the sake of completeness, and on the assumption, contrary to our primary conclusion, that the R9.6 million constituted expenditure actually incurred, it could in any event not be said to have been laid out in the production of Meiring Citrus's income for the purposes of its trade. Though Meiring Citrus carried on the trade of citrus farming, this outlay formed no part of the cost of its income-earning operations. It secured an enduring, interest-bearing asset, recoverable on demand and capable of being pledged, whose only yield was the interest credited to the experience account. An amount laid out to acquire an asset of that character is not expenditure in the production of the income for the purposes of the trade within the meaning of s 11(a).

Conclusion on deductibility

[100] For these reasons the Tax Court erred in holding that the R9.6 million was deductible under s 11(a) of the ITA. The premium was not expenditure actually incurred and, in the alternative, was of a capital nature. The deduction was correctly disallowed by Sars. We now turn our focus to the the issue of prescription.

Prescription - s 99 of the TAA

[101] Sars's power to have issued an additional assessment for the 2017 tax year, more than three years after the original assessment was issued, was the preliminary question decided by the Tax Court. If the statutory immunity provided by the TAA applied, the additional assessment could not stand, irrespective of the merits related to the determination of the s 11(a) issues.

[102] Sars was unsuccessful on the prescription issue which was determined as a preliminary issue. The additional assessment by Sars was found to be out of time and Meiring Citrus enjoyed immunity provided by the TAA. In effect, that was dispositive of the dispute, nonetheless the Tax Court dealt with both the expenditure and capital issues.

[103] We are of the view that the determination of the prescription issue is informed on the analysis and examination of the insurance and deductibility issues.

[104] In light of the common cause facts in this matter and, in our view, the lack of credibility of Mr van Zyl in his testimony on the section 11(a) issues, it is perhaps appropriate to recall the concluding remarks of Mbha JA on behalf of the court in *The Spur Group,*[30] whose approach the Tax Court extensively relied on in dismissing the appellants claim against prescription and the additional assessment:

> '[64] I should also add that as a matter of policy, a court would be loath to come to the assistance of a taxpayer that has made improper or untruth disclosures in a return. Clearly, this would offend against the statutory imperative of having to make a full and proper disclosure in a tax return'.

The applicable legal principles

[30] *Commissioner for the South African Revenue Service v The Spur Group (Pty) Ltd* [2021] JOL 51291 (SCA)

[105] Sars is authorised to issue additional assessments to increase the tax liability of a taxpayer after the issue of an original assessment. Section 92 of the TAA provides:

> 'If at any time SARS is satisfied that an assessment does not reflect the correct application of a tax Act to the prejudice of SARS or the fiscus, SARS must make an additional assessment to correct the prejudice.'

[106] Section 99 of the TAA provides the time bar provisions as follows:

> '(1) An assessment may not be made in terms of this Chapter -
> Three years after the date of assessment of an original assessment by SARS …
> (2) Subsection (1) does not apply to the extent that -
> (a) in the case of assessment by SARS, the fact that the full amount of tax chargeable was not assessed, was due to -
> (i) fraud;
> (ii) misrepresentation; or
> (iii) non-disclosure of material facts;'

[107] It was common cause that the original assessment for 2017 was made on the 18 December 2017 and the additional assessment on the 19 July 2021. When considering the provisions of s 99(2), the Tax Court correctly pointed out that it was similarly worded to its predecessor, s 79.[31]

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[31] (1) If at any time the Commissioner is satisfied that any amounts which should have been subject to tax have not been assessed to tax either under this Act or any previous Income Tax Act, he shall raise assessments in respect of such amounts, notwithstanding that assessments may have been made upon the person concerned in respect of the year or years of assessment in respect of which the amounts in question are assessable, notwithstanding the provisions of sub-section (5) of section eighty-one and sub-section (18) of section eighty-three or the corresponding provisions of such previous Income Tax Act: Provided that the Commissioner shall not raise an assessment under this sub-section-

> after the expiration of three years from the date of assessment in terms of which any amount which should have been assessed to tax under such assessment was not so assed, unless the Commissioner is satisfied that the amount was not assessed because of fraud or misrepresentation or non-disclosure of material facts; or

[108] Section 79(1) of that Act not only empowered but directed the Commissioner to raise additional assessments provided that the Commissioner was satisfied in regard to the requirements postulated in paragraphs (a,) (b) and (c) of ss 1. The exercise of the power was however subject, inter alia, to the first proviso in s 79(1) which read as follows:

> 'Provided that the Commissioner shall not raise an assessment under this sub-section –
> after the expiration of three years from the date of assessment (if any) in terms of which any amount which should have been assessed to tax under such assessment was not so assessed or in terms of which the amount of tax assessed was less than the amount of such tax which was properly chargeable, unless the Commissioner is satisfied that the fact that the amount which should have been assessed to tax was not so assessed or the fact that the full amount of tax chargeable was not assessed, was due to fraud or misrepresentation or non-disclosure of material facts.'

[109] In the matter of *Trow*[32] the court found as follows:

> 'It followed, in the circumstances of this case, that the additional assessments could only have been raised if the Commissioner were to have satisfied himself (1) that there had been non-disclosure of material facts by the taxpayer, and (2) that the fact that the profit in question was not assessed to tax prior to the expiration of the relevant period of three years was due to such non-disclosure, ie that the non-assessment was causally related to the non-disclosure of material facts.'
> *(our emphasis)*

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if the amount which should have been subject to tax was in accordance with the practice generally prevailing at the time when the assessment was made not assessed to tax; or
in respect of any amount if any previous assessment made on the person concerned for the year of assessment in question has in respect of that amount been amended or reduced pursuant to any order made by special court for hearing income tax appeals constituted under the provisions of this Act or any previous Income Tax Act, unless the Commissioner is satisfied that the order in question was obtained by fraud or misrepresentation or non-disclosure of material facts.

[32] *Secretary for Inland Revenue v Trow* 1981(4) SA 821 (AD) at 825, B-C.

[110] The requirements to establish a causal connection between the conduct and the non-assessment by Sars was the result of the words '*was due to*' in s 79. The same words are used in s 99(2) of the TAA.

[111] The Tax Court however pointed out that the difference between the language of s 79 as dealt with in *Trow* and s 99(2) is that in the former case, the Commissioner only had to show that he was '*satisfied*' with both the existence of the conduct and the causal link. The Tax Court was of the view, that could be fairly easily established. Section 99(2), however does not contain the language of '*satisfaction*' on the part of Sars. The Tax Court remarked that it was therefore not enough for Sars to merely declare that it had formed the view that the requirements for s 99(2) were present, it must actually have been shown to exist. Counsel for the respondent correctly pointed out that s 99(2) required more than just a subjective view by the Commissioner as provided in terms of the old Act but had to be dealt with on an objective basis where the elements, namely conduct and causation had to be established on a balance of probability. Sars was therefore required to prove that had it not been for the conduct of the respondent the assessments would have been made within the three-year requisite time period.

[112] In *The Spur Group (supra)*, Sars also relied on the provisions of s 99(2)(a) for a belated assessment after the three-year period of the original assessment as a result of a misrepresentation made in the tax return. In particular, the taxpayer had incorrectly answered '*no*' to various questions in the return which had a direct bearing on the claimed deduction. The taxpayer, (*The Spur Group*) argued that Sars had failed to establish the requisite causal connection between the incorrect answers in its tax return and the non-assessment. At the hearing in the Tax court, Sars led extensive evidence by an official of Sars to demonstrate what caused the non-assessment. Importantly, the court emphasised that the integrity of the Sars assessment depended largely on the correctness of the information provided in the return and on the ability of Sars to conduct an audit of returns in the ensuing

three-year period to ensure a proper tax assessment. As a result of the taxpayer having incorrectly filled in the original tax-return, Sars was not alerted to the true position until it was picked up in the cause of an audit that gave rise to the additional assessment.

[113] In this matter, the crucial question for consideration under the issue of prescription was whether there were in fact misrepresentations and non-disclosures as asserted by Sars and whether such conduct on the part of Meiring Citrus had in fact caused Sars's failure to fully assess the full amount of tax owed by Meiring Citrus.

[114] At the risk of repitition, the factual chronology relevant to the prescription enquiry and the circumstances that gave rise to the re-assessment must be revisited. As foreshadowed above, on 18 December 2017 Meiring Citrus submitted its tax return claiming the insurance premium as a deduction. Sars e-filing issued an auto assessment based on the face value of the tax return. The Sars e-filing system issued an auto request for verification, requesting Meiring Citrus to carefully review its own return and to correct errors it may uncover. On 5 April 2018 Sars issued a follow-up to the verification request, requesting certain specific documents including an explanation on the increase of insurance expenses. A request for a schedule and supporting documents were made.

[115] What is of particular significance in our view was that the audit in respect of the 2017 returns was part of a broader audit spanning a three-year period of tax assessments (2017 to 2019) and an extensive amount of questions related to all three tax years and not only to the issue of the insurance in respect of the 2017 year.

[116] Sars pointed out that during his evidence both in chief and in cross examination, Mr van Zyl was asked why he did not initially provide the Santam Contract and the experience account statements to the appellant in response to the verification request for information. He claimed that he did not have the copies

of the Contract and the experience accounts on file. Ms Meiring on the other hand in her evidence explained that she had placed complete reliance on Mr van Zyl in dealing with the Sars queries. Mr van Zyl also failed to provide any explanation as to why he had not simply requested the Santam Contract or any other information relating thereto which would have included the experience accounts from his client in compliance with the verification request by the appellant. Moreover he himself referred to the Santam Contract as annexed to his response.

The pleadings on prescription

[117] In its Rule 31 statement Sars pleaded in overview that it had invoked the provisions of s 99(2) '*to indicate that prescription does not apply, due to misrepresentation on the part of the Appellant in relation to the characterisation of the premium as a deductible expense and due to non-disclosure of material facts in the Appellant's failure to declare the notional interest earned as income in the relevant period.'*

[118] In respect of Sars's contention that there was a mischaracterisation of the premium, it pointed out that such misrepresentation was evident from the contract between the respondent and the insurer, Santam, from which it was apparent that the amount paid by the respondent was not expended by the respondent but rather held for its benefit in an account where interest accrued to the respondent and from which the respondent was entitled to withdraw the amount at any time upon request to the insurer. As already determined we do not regard the contract between the respondent and Santam as one of insurance.

[119] In respect of the notional interest amount Sars contended that it was '*earned*' and should therefore been declared in the tax-return. Sars contended that the failure to declare the accrued income and to provide a complete statement in respect of such income, constituted a non-disclosure of material facts relating to the financial affairs of Meiring Citrus at the time of the submission of its return.

[120] The Tax Court pointed out that Sars had only for the first time in the Rule 31 statement contended that there was a misrepresentation in relation to the premium that was claimed as a deduction. In this regard it noted that in all prior correspondence it had relied only on the non-inclusion of the notional interest to enable it to overcome prescription. We point out though, that in the finalisation of audit letter referred to above, the reference to the misrepresentation in respect of the notional interest was given as no more as an 'example' of the misrepresentation.[33] Moreover, as correctly contended on behalf of Sars, it was fully entitled to have elaborated the grounds of the misrepresentations in respect of the premium and the interest in its pleaded case, where, more appropriately the issues in dispute are defined.

[121] Meiring Citrus, in its rule 32 statement, denied that the circumstances for the application of a 99(2) had been established by Sars. It denied that there had either been a misrepresentation or a non-disclosure on its part. It also pleaded that Sars had failed to demonstrate '*why the alleged misrepresentation have caused the incorrect amount of tax to be levied.'* In effect, Meiring Citrus challenged both the grounds under s 99(2) in respect of non-disclosure and misrepresentation and importantly, whether such alleged misrepresentation and non-disclosure had in fact caused the incorrect amount of tax to be levied.

[122] In the Rule 33 statement, Sars correctly pointed out that Meiring Citrus had in fact admitted to not having declared the notional interest income and in fact admitted that the undisclosed interest was taxable. In that regard, it pleaded that Meiring Citrus had admitted to having committed a misrepresentation that caused the full amount of tax chargeable for the 2017 financial year not to be assessed.

Sars's core contentions

[33] As stated in Sars's letter, dated 19 July 2021: "*In the case of prescription, SARS is aware of the fact that the assessment has prescribed. Sars however has re-opened the assessment in terms of section 99(2)(a)(ii) of the TAAct as the failure to assess the full amount of tax chargeable was due to a misrepresentation by the taxpayer e.g. failure to declare the notional Interest in the 2017 tax return."*

[123] Sars contended that the failure on the part of Meiring Citrus not to disclose the Santam Contract and the experience account statements when it was requested of it during the verification of the 2017 return and the follow-up request for information constituted material non-disclosures. Sars further contended that the analysis of the Santam Contract referred to above was demonstrative of the fact that it was not a mere ordinary insurance contract and in fact did not constitute a contract of insurance. It contended that in order to determine that fact it was necessary for it to have actually seen the Santam Contract and the experience accounts statements. Sars contended that the very features of the Santam Contract disqualified it as an insurance contract and was, amongst others, relied upon as a ground for the additional assessment.

[124] We will revert to the issue as to whether Sars established the causation element in order to qualify for the statutory exemption. That appeared to have been an issue that received much of the Tax Court's attention in its judgment on the prescription issue.

Was there any misrepresentation?

[125] As already indicated, Sars contended that Meiring Citrus mischaracterised the nature of the insurance premium as deductible under an insurance contract with Santam in its tax return. We have concluded that it was in fact not an insurance contract for the reasons set out above. The Tax Court however was of the view that there was in fact no misrepresentation in as much as Meiring Citrus, in its original assessment, stated that it had paid a premium which it had in fact done, ostensibly under the insurance contract with Santam. The Tax Court was of the view that the question as to the misrepresentation was one of fact and not one of law. In stating that it had paid a premium of R10 million which it claimed as deductible, the Tax Court was of the view that in doing so, Meiring Citrus expressed a legal opinion and had therefore not made a factual misrepresentation.

[126] However, in as much as it is a legal opinion, such opinion had to be based on a set of facts. The facts that underlined such legal opinion was to be found in the very terms and conditions of the Contract itself between Meiring Citrus and the insurer and in the experience accounts. That had not been disclosed in the original assessment and importantly the characteristics of the contract had not been brought to the attention of the appellant when Meiring Citrus submitted its initial tax return. As Sars correctly pointed out, it could only have arrived at the view that the contract between Meiring Citrus and Santam was not one of an insurance contract in law, based on the provisions of the actual Contract and upon analysis of its peculiar features. Moreover, the fact that Mr van Zyl in his initial response to Sars had stated that Meiring Citrus had taken out '*self-insurance*' did not in itself trigger a question as to whether the so called premium was deductible given that the peculiar terms and features of the contract were not provided to Sars at that stage. The application form and reference to standard terms of insurance in the information part of the documents provided by Mr van Zyl to Sars contained no reference whatsoever to the details and peculiar features of the contract with Santam.

[127] It was intriguing though that Mr van Zyl elected not to provide the Contract despite his specific reference thereto. We are most certainly not convinced that he was not aware of the existence of the experience accounts at that stage related to the Contract after having received a presentation by the Santam representative on the nature and the benefits of the proposed product marketed by Santam and having also received the PowerPoint presentation about the product. It is entirely inconceivable, if not improbable, that Mr Ferreira would not have explained the role of the experience account in the product that made it so attractive and more importantly that interest was to be earned on the balance in the experience account for the benefit of the insured. The explanation provided by Mr van Zyl, in his evidence in chief, as to why the insurance earned on the experience account was not income earned by Meiring Citrus and that, even if he was aware of it he would

not have declared it, was wholly unconvincing and no more than as ex post facto rationalisation for his deliberate failure to have disclosed it in the first place.

[128] The Tax Court and counsel for Meiring Citrus, when dealing with the question of misrepresentation, place reliance on a concession apparently made by counsel for the appellant during argument in the Tax Court that it was not Sars's case that the insurance contract was a sham or a simulation. The context in which the concession was made, and the record thereof were not placed before this court to fully appreciate the context and nature of the concession but moreover the appellant cannot be held to a concession incorrectly made on the law by its counsel. Moreover, as already alluded to, counsel for Sars before us (not the same who appeared in the Tax Court) pointed out, that the contract itself was certainly not a sham and in as much as a concession was made, it was correctly made, but in his view, the contract was certainly not one of insurance.

[129] With regard to the misrepresentation in respect of the gross income of the respondent by the exclusion of the amount of interest earned in the experience account and also the non-disclosure of the experience accounts, Meiring Citrus had itself admitted that it had not made such disclosure. It had also conceded that the interest earned on the experience account was taxable. That it did, to its credit and contrary to the view taken by Mr van Zyl on the interest.

[130] Mr van Zyl also testified that Sars was at some stage alerted to the existence of experience accounts linked to the Santam contracts, possibly through other taxpayers and queries raised by the appellant as other farmers and persons in the region had similarly entered into such contracts. Both counsel for Meiring Citrus and the Tax Court were of the view that it was therefore necessary for Sars to have provided testimony about its knowledge of such experience accounts and how it came about.

[131] As we understood the evidence of Mr van Zyl, it appeared that, at the time in which the audit was raised by Sars in December 2020, there were queries raised

by Sars with other taxpayers about the Santam product. His own firm had even obtained legal advice to respond to Sars on behalf of its other clients. It appeared that a letter was prepared by their attorneys that was used on a cut and paste basis in response to queries from Sars in the other matters. So too, it appeared that letter by the attorneys was used on a similar basis in respect of Meiring Citrus's response to Sars. More importantly though it was not apparent from the audit letter by the appellant to the respondent that it had in fact known that the insurance product between Santam and Meiring Citrus had the feature of an experience account and in that regard, Sars very specifically stated in its request that Meiring Citrus provide experience accounts, '…*where applicable*'. In our view that appeared to be the clearest indication that Sars had not known prior to the disclosure by Meiring Citrus itself in response to the audit letter that the experience account also featured in the respondent's contract with Santam.

Was there a non-disclosure of a material fact?

[132] The Tax Court was of the view that assuming that the amount of R1 197 in respect of the notional interest was an amount to which Meiring Citrus factually became entitled to, the failure to have included that amount in the return constituted a non-disclosure of that fact. However, the Tax Court was of the view that given the small amount involved, it did not consider that as a non-disclosure of a material fact. It relied on the decision of *ABC(Pty) Ltd (in Liquidation) v Commissioner for the South African Revenue Service* (case IT12951) which dealt with negligible amounts and the court found that there was not a material non-disclosure.

[133] In our view, counsel for Sars correctly contended that the non-disclosure was of a fact that had to be material and not the amount. The materiality of the non-disclosed fact was relevant to the determination as to whether the relevant amount was taxable or deductible. The materiality was therefore a matter of relevance into the inquiry into taxability not just the amount. Had the amount been

disclosed in the tax-return, irrespective of its quantum, it would have triggered that the 'premium' accrued interest for the benefit of the taxpayer and would have resulted in the determination of a higher amount of tax liability. As correctly pointed out by counsel for Sars, expenses do not earn interest. It was correctly emphasised that the issues of the accrued interest and the deductibility of R9.6 million were literally the flip side of the same coin and the non-disclosure of one was inextricably linked to the non-disclosure of the other. In our view, the non-disclosure that Meiring Citrus had earned interest on the premium, irrespective of the actual amount, was material to the determination of the full amount of tax chargeable for 2017.

[134] In its judgment, the Tax Court also dealt with what it referred to as the 'per item assessment' raised by the counsel of Meiring Citrus. In effect, it related to whether the fact that Sars has raised a basis for non-assessment of a particular item, such as the non-disclosure of the interest accrued on the premium that enabled it to conduct a re-assessment of the entire amount of tax paid. As already stated, the non-disclosure of the interest earned on the premium, that was credited to the experience account was linked to the misrepresentation of the very nature of the contract between Santam and Meiring Citrus and the fact that the Meiring Citrus's gross income had been under stated without the proper declaration of the interest earned on it. The two grounds of misrepresentation in respect of the premium and interest were in our view inextricably linked, and the appellant having raised one such ground was entitled to raise an audit assessment in respect of the entire amount levied as tax for the 2017 year. Sars correctly contended that even the if the assessment was re-opened because of a misrepresentation or non-disclosure that resulted in an under assessment of one item (such as interest), once re-opened Sars was authorised under the Act to correct it's under assessment of all other components to ensure that the full amount of tax due was assessed.

The element of causation

[135] Much emphasis was placed by the Tax Court on what it regarded as Sars's failure to have proved the element of causation, in that it had not lead any oral evidence to meet the onus on it.

[136] Sars accepted that it bore the onus to prove that, but for the misrepresentation(s) and the non-disclosure(s) by Meiring Citrus, it would have conducted an assessment of the full amount owed by Meiring Citrus within the three-year period as provided by s 99(1).

[137] As already alluded to, much reliance was placed by both Meiring Citrus's counsel and the Tax Court on the approach adopted by Sars in the matter of *The Spur Group,* where evidence was extensively lead with regard to the internal processes of Sars and, in particular, the structure of its tax return form that would trigger an alert(s) for the need for a verification or audit, where necessary.

[138] Sars, for its part, contended that in the particular circumstances of this matter and unlike that in the matter of *The Spur Group*, it was not necessary to have led any such evidence to meet its onus on prescription.

[139] Sars claimed that it principally relied on the uncontested documentary evidence that was received by the Tax Court and the testimony in the respondent's case in support of the appellant's claims under s 11 (a).

[140] Counsel for Sars relied on the decision of *Technology Corp Management*[34] with regard to the assessment of uncontradicted documentary evidence and the discharge of the onus of proof. In that matter, the plaintiff, De Sousa a majority shareholder carried the onus under the 'oppression remedy' in s 163 of the Companies Act 71 of 2008, of proving unfair prejudice after being excluded from management and locked into his shareholding. The defendants elected not to lead

[34] *Technology Corp Management v De Sousa* 2024 (5) SA 57 (SCA)(TCM).

any evidence and argued that the documentary record and the common cause facts did not support a finding of unfair prejudice.

[141] On appeal, the SCA held that it could deal with the matter on the basis of the documentary record and undisputed facts. The fact that the defendants had elected not to testify was not treated as an admission nor was any adverse inference drawn therefrom. Counsel for Meiring Citrus contended that the decision was of no assistance to Sars in this matter as it was distinguishable and the defendants in that matter had not carried the onus. The approach by the SCA was nonetheless instructive. Sars relied largely on the documentary evidence with regard to the issue of causation and contended that it was self-evident that the assessment of the full amount could only have taken place if it was possessed of the necessary documents which the respondent was required to have placed before it in its original assessment and in the verification process.

[142] Sars also referred to the evidence of Mr van Zyl with regard to the proposition put to him by counsel for Sars in cross-examination that had Sars been provided with the contract between Meiring Citrus and Santam, Sars would have been able to 'scrutinise' the contract.

[143] It is perhaps necessary to quote that part of the record to obtain a fuller appreciation as to how the issue arose in the cross examination of Mr van Zyl.

> *'Mr Vadachia: Now, would you agree now that you claim to have become aware of it only now only when SARS started investigating that that information would have been relevant and material to be included in the financial statement?*
> *Mr van Zyl: For 18 & 19 and 20, yes*
> *Mr Vadachia: And 17 sir?*
> *Mr van Zyl: No, because there was no … [intervenes]*
> *Mr Vadachia: There was R1 197 [?] of income, sir, that is not reflected in your financial statements.*
> *Mr van Zyl: But the client was not entitled to it,*
> *Mr Vadachia: Well, that has been, that … [intervenes]*

Mr van Zyl: [Indistinct – speaking simultaneously]. The obligation has not been [Indistinct – speaking simultaneously]

Mr Vadachia: Sorry, sir. That has been conceded by your client on that point. So, were you aware of the income in 2017 and chose not to disclose it?

Mr van Zyl: No, I was not aware of it.

Mr Vadachia: Okay. So then what is the difference between 2017 income and 2018 and 2019?

Mr van Zyl: in 2018 the contract, obviously, paid out and there was a new insurance taken out on it. So, the income would have been in there, but still there is no taxable profit.

Mr Vadachia: Yes, but you did not disclose it.

Mr van Zyl: yes

Mr Vadachia: So, you agree that it would have been relevant and material to disclose at least in 2018 and 19, we intend to argue of course that all of it is relevant and material, but you concede at least that it was, that that would have been relevant?

Mr van Zyl: Yes.

Mr Vadachia: Now, if you had disclosed in your financial statements for 2018 and 2019 that the policy refunds its full amount at the conclusion period, and then processes a separate premium to launch a separate longer period immediately thereafter that if SARS had been aware of that they would have been able to scrutinise it. Do you agree?

Mr van Zyl: I do not know

Mr Vadachia: You do not know that if someone is aware of something they can scrutinise it?

Mr Botma: M'Lord, this sounds very speculative. It is, its is impossible for this witness to testify on the subjective intention of the SARSA (sic)officials if they were confronted with certain information as opposed to supposed to others. That is my objection. As the court pleases.

Court: Mr Vadachia, what do you say, but it sounds to me like your question was a bit broader than with reference to, in other words you were not putting to the witness something(sic) proposition that…

Mr Vadachia: M'Lord, the question is would he at least been able to inquire about it. By not being aware of it, they are not able to inquire about it, he has not made SARSA (sic)aware of it.
Court: Well, is that not a statement of the obvious…
Mr Vadachia: Yes, M'Lord, it is
Court: In that sense? I am not sure that the witness' testimony in that regard will make much of a difference to that proposition.[35]'

[144] In our view, it was clear from the intervention by the Tax Court itself, that the proposition raised by the counsel for Sars was obvious. Sars could only scrutinise the facts that were revealed to it and, as Sars correctly contended, were deliberately concealed from it by Mr van Zyl, who acted as the agent for Meiring Citrus in the submission of its provisional tax return for the year 2017.

For all of these reasons, we are satisfied that Sars's failure to have timeously made the assessment was, on a balance of probability, caused by the misrepresentations and the non-disclosures of material facts by Meiring Citrus. Consequently, Sars was entitled to reopen the assessment of the respondent's entire taxable income on account of Meiring Citrus' non-disclosure of material facts that were uncontested by Meiring Citrus.

Understatement penalties

[145] The remaining issue is whether Meiring Citrus is liable for the understatement penalty of 10 per cent that Sars imposed for the 2017 year of assessment. Sars levied the penalty on the basis that Meiring Citrus's understatement was a 'substantial understatement' as contemplated in s 221 of the TAA.

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[35] *The record, volume 19 pages 1673, line9 to 1675 line22*

[146] Section 222(1) provides that, in the event of an understatement by a taxpayer, the taxpayer is liable for the understatement penalty determined under s 222(2), unless the understatement results from a bona fide inadvertent error. An 'understatement' is defined in s 221 as any prejudice to Sars or the fiscus arising, among other things, from a default in rendering a return, an omission from a return, or an incorrect statement in a return. The penalty is the shortfall, as defined in s 222(3) and (4), multiplied by the percentage fixed in the table in s 223(1) according to the relevant behaviour. The first and lowest behaviour category in that table is a substantial understatement, which attracts a penalty of 10 per cent in the standard case. Unlike the higher categories, a substantial understatement does not depend on any culpable conduct on the part of the taxpayer. It is defined in s 221 as a case in which the prejudice to Sars or the fiscus exceeds the greater of five per cent of the amount of tax properly chargeable for the period, or R1 million.

[147] We have held that the R9.6 million claimed as an insurance premium was not deductible under s 11(a), and that the notional interest credited to the experience account accrued to the respondent and fell to be included in its gross income for the 2017 year. We have also held that s 99 did not preclude Sars from raising the additional assessment. It follows that the additional assessment stands, and that the respondent's 2017 income tax return both claimed a deduction to which it was not entitled and omitted income that ought to have been declared. That is an understatement which prejudiced the fiscus.

[148] The threshold for a substantial understatement is plainly met. The disallowance of the premium gave rise to an amount of tax in dispute exceeding R1 million, and it was common cause that this was more than five per cent of the tax properly chargeable for the 2017 financial year. The 10 per cent rate for the standard case therefore applies. Sars did not contend for any higher behaviour category, and on an appeal against the setting aside of the assessment it is in any event not open to this court to impose a penalty greater than the one Sars levied. The penalty as imposed accordingly stands.

[149] It follows that Meiring Citrus is liable for the understatement penalty of 10 per cent imposed by Sars for the 2017 year of assessment. The penalty must be reinstated together with the additional assessment.

Costs

[150] The position in this court differs from that in the Tax Court. In the Tax Court the award of costs is governed by s 130 of the TAA and is confined to cases in which a party's grounds are held to be unreasonable. On appeal to this court, by contrast, costs lie within the ordinary discretion of the court, in the exercise of which costs follow the result. Sars has succeeded in the appeal, and we see no reason to depart from the general rule that the successful party is entitled to its costs.

[151] The matter was one of complexity and importance. It raised difficult questions as to the characterisation of a structured insurance product, the deductibility of the resulting payment under s 11(a) of the ITA, and the operation of the statutory time bar in s 99 of the TAA, and the amount of tax in issue was substantial. The employment of two counsel was a reasonable and prudent measure, and the complexity and importance of the matter warrant a costs award on scale C.

[152] As to the proceedings before the Tax Court, Meiring Citrus's grounds of appeal, on which it succeeded before the Tax Court, cannot be said to have been unreasonable within the meaning of s 130. There is accordingly no basis to disturb the position that each party bears its own costs of the proceedings in the Tax Court.

Order

[153] In light of the above, we hereby order that:

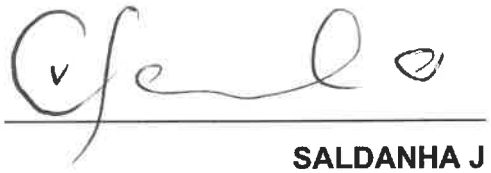
1. The appeal is upheld with costs on scale C, including costs of two counsel, where so employed.

2. The order of the Tax Court is set aside and replaced with the following:

   '(i) The appeal is dismissed;

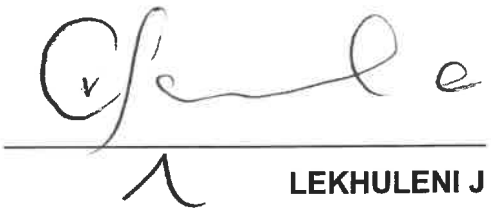
   (ii) The additional assessment for the 2017 year of assessment is confirmed.

   (iii) The understatement penalty for the 2017 year of assessment of 10 per cent is confirmed.



SALDANHA J

JUDGE OF THE HIGH COURT



LEKHULENI J

JUDGE OF THE HIGH COURT

JONKER AJ

ACTING JUDGE OF THE HIGH COURT

Appearances

For appellant:	I P Green SC with N K Nxumalo and L Molete
Instructed by:	CMS-RM Partners Inc.
For respondent:	P Myburgh SC with PS Bothma
Instructed by:	Pieterse Sellner Erasmus TRM