REPUBLIC OF SOUTH AFRICA

IN THE TAX COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION: CAPE TOWN)

Case No.: **VAT 22558**

(1) REPORTABLE: YES / **NO**

(2) OF INTEREST TO OTHER JUDGES: YES / **NO**

(3) REVISED.

11/02/2025
DATE

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SIGNATURE

In the matter between:

FUND Appellant

and

THE COMMISSIONER FOR THE
SOUTH AFRICAN REVENUE SERVICE Respondent

J U D G M E N T

STEENKAMP AJ

Introduction and background

[1] This matter concerns the entitlement of the appellant (**Fund**) to deduct input tax in terms of section 16(3) of the Value-Added Tax Act 89 of 1991 as amended (**VAT Act**), in respect of the professional indemnity insurance premiums paid by the Fund to the Attorneys (later the Legal Practitioners) Insurance Indemnity Fund (**Insurer**). The total input tax deducted on the premiums amounted to R78 054 200 (claimed in 05/2018), R24 130 434.78 (claimed in 07/2018), R27 820 921.04 (claimed in 07/2019) and R27 820 921.04 (claimed in 08/2020).

[2] The respondent (**SARS**) had initially paid the amounts claimed for the first two periods (05 and 07/2018), but in terms of subsequent audit findings SARS disallowed the amounts for all four periods and issued additional assessments and adjustments accordingly. SARS contended that the Fund was not entitled to claim the amounts as input tax inter alia because, (a) no service was supplied by the Insurer to the Fund in the course of making taxable supplies, (b) the consideration paid by the Fund was not in respect of goods or services supplied by the Insurer to the Fund, or the premiums paid by the Fund were not incurred while making taxable supplies, and (c) the Fund could not claim input tax for failing to comply with section 16(2) of the VAT Act, and for failing to produce "documentary proof" that any service was supplied by the Fund to the practitioners.[1]

[3] The Fund objected that the deductions should have been allowed. SARS on 21 September 2022 formally disallowed the objection. On 5 October 2022, the Fund lodged an appeal to this court, against the disallowance.

[4] It is trite that, in terms of section 102(1) of the Tax Administration Act 28 of 2011 (**TAA**), the Fund (as the taxpayer) bears the burden of proof.

[5] The facts and the applicable legislative framework are largely common cause.

[6] The Legal Practice Act 28 of 2014 (**LPA**) came into operation on 1 November 2018 with no retroactive application. As a result, insofar as the disputed assessments are concerned, the Attorneys Act 53 of 1979 (**Attorneys Act**) applies to the input claims for 05/2018 and 07/2018, and the LPA applies to the claims for 07/2019 and 08/2020.

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1 SARS final audit findings 57/1.1 to 60 *(referring to Dossier p 57 paragraph 1.1 to Dossier p 60)*.

[7] The Fund was established in terms of section 8 of the Attorneys Admission Amendment and Legal Practitioners Fidelity Fund Act 19 of 1941. After the repeal of that Act, the Fund continued to exist as a juristic person in terms of section 25 of the Attorneys Act as the Attorneys Fidelity Fund. After the repeal of the Attorneys Act, the Fund continued to exist as a juristic person in terms of section 53 of the LPA as the Legal Practitioners Fidelity Fund.

[8] One of the principal purposes of the Fund under both the Attorneys Act and the LPA (**the Acts**), is to reimburse members of the public who suffer pecuniary loss as a result of theft by practitioners of money or property given in trust in the course of their practice.[2]

[9] The Fund is also empowered in terms of the Acts to collect contributions from practitioners and to arrange group professional indemnity insurance cover (**insurance**) for them, and for purposes thereof to enter into a contract with an insurer.[3] The Fund is also empowered by the Acts to pay the premiums payable under any such contract of insurance.[4]

[10] In terms of the Acts, practitioners conducting a trust account practice (including, under the LPA, advocates contemplated in section 34(2)(a)(ii) of the LPA) are required to be in possession of Fidelity Fund certificates (**FFCs**) in order to practise and to receive or hold funds or property in trust (**practitioners**). Practitioners were also required to apply to the Law Society (**Law Society**) or to the Legal Practice Council (**LPC**) for such FFCs on an annual basis, at the same time making payment to the Law Society / LPC of the attendant contributions set by the Law Society / LPC (**contributions**);[5] the latter having to remit[6] the contributions to the Board of the Fund (**Board**).[7]

[11] Practitioners are required to deposit funds received on trust into approved trust bank accounts, and the interest earned on such funds is required to be paid to the Fund, and forms part of the Fund's revenue, together with inter alia income generated by investments of the Fund,[8] and the aforementioned contributions.[9]

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2 Attorneys Act s 26, LPA s 55 and s 57(*a*).
3 Attorneys Act s 40A and s 40B, LPA s 77(1) and (2).
4 Attorneys Act s 45(*d*), LPA s 57(*g*).
5 Attorneys Act s 43, LPA s 74.
6 Attorneys Act s 43(7), LPA s 74(5).
7 The "board of control" in terms of s 27 of the Attorneys Act, the "Board" in terms of s 61 of the LPC.
8 Attorneys Act s 36(*b*), LPA s 54(*d*).
9 Attorneys Act s 36(*a*), LPA s 54(*b*).

The facts and issues raised in the pleadings

[12] It is admitted on the pleadings or undisputed that:

[12.1] The Fund owns a commercial property, situated at 28 Wale Street, Cape Town, that it leases out part of the building and that it is registered as a VAT vendor.[10]

[12.2] During the periods under review, when the Attorneys Act was in force, the practitioners were only required by the Law Society to pay initial contributions, and no annual contributions were levied or paid.[11] In this regard the Fund's only witness Mr Ndande testified that, after the advent of the LPA in 2018, the LPC commenced levying the contributions payable by practitioners for FFCs on an annual basis.

[12.3] The initial contribution was a once off fee payable by practitioners applying for FFCs for the first time.[12] In respect of the non-levied annual contributions (before the commencement of the LPA), the Fund claimed that the Attorneys Act granted the Fund the discretion to waive the annual contributions when its reserves exceeded R1 million, and that in terms of this provision the Fund did in fact waive the annual contributions during the tax periods in question. Apart from the initial contributions and the annual contributions payable under the LPA, practitioners were not required to pay anything further for the benefits received from the Fund. The payment of the contributions was a prerequisite for all practitioners to receive FFCs, without which they could not validly practise as attorneys, nor access the other benefits (including the insurance cover) arranged by the Fund.[13]

[12.4] The Fund could not present to SARS individual tax invoices and section 54(3) statements from its collecting agents in respect of the levied contributions. In this regard the Fund claimed that it had explained to SARS on numerous occasions that the Fund had overlooked in the past that the initial contributions constituted "consideration" in terms of the VAT Act and that output tax should have been declared thereon. The output tax was adjusted retrospectively, as per the relevant VAT returns that were made available to SARS, as a result of which the output tax was fully paid by the Fund to SARS.[14]

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10 Rule 31: 153/4 *(referring to rule 31 statement Dossier p 153 paragraph 4)*, rule 32: 183/58.
11 Rule 31: 160/21.2.1 - 3 and 161/21.2.5, rule 32: 186/66-68 and 187/70.
12 Attorneys Act s 43(4), LPA s 74(2).
13 Rule 32: 172/16-17.
14 Rule 31: 156/16, rule 32: 184-5/62.

[12.5] The premiums paid by the Fund from time to time to the Insurer, were paid from the revenue of the Fund, and all practitioners in possession of current FFCs qualified for the insurance cover contracted by the Fund with the Insurer.[15]

[13] The Fund called one witness to give evidence, Mr Ndande, its finance manager, whereafter it closed its case. SARS called no witnesses. It is common cause and the parties argued the matter on the basis that the master insurance policy introduced into evidence as TB 299-315 (**policy**),[16] contained the terms whereon the Fund had contracted with the Insurer from time to time to provide the insurance cover to the practitioners.

[14] Against the aforementioned factual and statutory background, SARS pleaded (in its rule 31 statement) that the VAT on the premiums were not deductible as input tax, on essentially the same bases as were relied upon by SARS in its final audit findings,[17] being essentially that:

[14.1] The Insurer rendered no services to the Fund. The Insurer rendered the provision of indemnity insurance directly to the practitioners. The "tri-partite" arrangement between the Fund, the Insurer and the practitioners, did not create a basis for the Fund to claim input tax. Input tax could not be claimed if no service (as a quid pro quo for the premium) was consumed, used or supplied to the Fund, in the course of making taxable supplies.[18]

[14.2] The VAT on the premiums paid by the Fund were not deductible as input tax, because they were not consideration for the supply of goods or services by the Insurer to the Fund. Alternatively, the premiums were not incurred whilst making taxable supplies. There was no supply of a service by the Fund to the practitioners for which consideration was received.[19]

[14.3] The Fund, notwithstanding section 16(2) of the VAT Act, could not produce any documentary proof that any service was supplied to the practitioners by the Fund.[20] The Fund never provided any supporting documentation (including tax invoices and section 54(3) statements), apart from schedules containing figures extracted from annual financial statements of amounts ostensibly paid over as premiums, nor tax invoices issued to the practitioners.[21]

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15 Rule 31: 154/13, rule 32: 184/59.
16 Trial bundle pages 229-315.
17 See n 1 above, and rule 31: 159/21.1 – 162/21.3.
18 Rule 31: 159/21.1 – 160/21.1.3.
19 Rule 31: 161/21.2.8.
20 Rule 31: 161/21.2.9.
21 Rule 31: 156/16.

[14.4] There was a direct causal link between the interest income of the Fund and the issuing of the FFCs. If the supply of the insurance was the service rendered, to which the practitioners became entitled for holding FFCs, and provided the Fund could prove that the contributions were the consideration received and that it is entitled to claim input tax, then the service would have been acquired by the Fund to make taxable supplies (the contributions), and partly to make non-taxable supplies (the interest). Therefore, only the part used to make taxable supplies would qualify to be claimed as an input tax deduction, and an apportionment calculation would have to be done to determine the allowable input tax that could be claimed.[22] (Although SARS had here pleaded, in the alternative, the need for such an apportionment calculation, at the hearing, counsel for SARS disavowed the need for any apportionment in the matter. In their written heads and supplementary heads of argument, moreover, neither party submitted that there was, on the facts of the matter, any need for such an apportionment.)

[15] In response, the Fund pleaded essentially that:

[15.1] The Fund supplied "services" (as defined) to the practitioners, by what it did in relation to the insurance procured by it and by making payment of the premiums for the benefit of the practitioners, and the issuing of FFCs to them.[23] In so doing, the Fund carried on an "enterprise" (as defined).[24] The contributions paid to the Fund by the practitioners constituted "consideration" for the "services" supplied by the Fund.[25] The interest which accrued to the Fund, was not "consideration" for any service provided by the Fund to the practitioners.[26]

[15.2] The premiums (which included VAT) paid by the Fund to the Insurer in respect and for the inducement of the provision of the insurance cover by the Insurer to the practitioners, constituted "consideration" paid by the Fund for the "services" provided

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22 Rule 31: 162/21.3.

23 Rule 32: 174/28 – 175/30, 179-180/46 and 180/49. In s 1 of the VAT Act, "services" is defined (in relevant part) as follows:

" 'services' means anything done or to be done, including the granting, assignment, cession or surrender of any right or the making available of any facility or advantage ..."

24 Rule 32: 175/31. In s 1 of the VAT Act, "enterprise" is defined (in relevant part) as follows:

" 'enterprise' means –

(*a*) in the case of any vendor, any enterprise or activity which is carried on continuously or regularly by any person in the Republic or partly in the Republic and in the course or furtherance of which goods or services are supplied to any other person for a consideration, whether or not for profit ..."

25 Rule 32: 176/34.

26 Rule 32: 175/34-36. In s 1 of the VAT Act, "consideration" is defined (in relevant part) as follows:

" 'consideration', in relation to the supply of goods or services to any person, includes any payment made or to be made ..., whether in money or otherwise, or any act or forbearance, whether or not voluntary, in respect of, in response to, or for the inducement of, the supply of any goods or services, whether by that person or by any other person ..."

by the Insurer to the Fund. These "services" included the provision of insurance cover by the Insurer to the persons nominated by the Fund under the policy (i.e. the practitioners), at the request of the Fund and in compliance with the Insurer's obligation to the Fund to do so, and as quid pro quo for the premiums paid. This enabled the Fund to provide the practitioners with insurance cover as quid pro quo for their contributions. As such, the VAT paid on the premiums falls within the definition of "input tax" in terms of the VAT Act.[27]

The hearing of oral argument, and the parties' written submissions

[16] The hearing of evidence was concluded on 18 June,[28] whereafter the matter was adjourned for the parties' exchanging of heads of argument on 19 June, and for the hearing of oral argument on 20 June 2024.

[17] In SARS's heads of argument and oral submissions made on 20 June, certain issues were raised which the Fund claimed were not foreshadowed in the pleadings, such as the *"ultra vires"* argument referred to below. Given that the parties had *exchanged* heads of argument the day before the hearing of oral argument, as opposed to the normal situation, where heads of argument are delivered in a staggered fashion, allowing the parties sufficient time after the receipt of their opponent's heads of argument and before the hearing to consider the other's heads of argument, and to avoid the risk of any prejudice to the parties in the making of their submissions to the court, the court directed that the parties could deliver supplementary submissions to address such issues as they deemed necessary: the Fund by 8 July, and SARS by 22 July 2024. Both parties duly delivered such additional submissions together with additional authorities.

The issues for determination

[18] Arising from the aforegoing, the main issues for determination are the following:

[18.1] The first issue: Whether the Insurer, in the providing of indemnity insurance in terms of the policy, was rendering "services" to the Fund, in respect of which the Fund

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[27] Rule 32: 176/37 – 178/43, 180/47 and 181-2/53. In s 1 of the VAT Act, "input tax" is defined (in relevant part) as follows:

> **" 'input tax'**, in relation to a vendor, means—
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> (*a*) tax charged under section 7 and payable in terms of that section by—
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> (i) a supplier on the supply of goods or services by that supplier to the vendor;
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> ...
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> where the goods or services concerned are acquired by the vendor wholly for the purpose of consumption, use or supply in the course of making taxable supplies or, where the goods or services are acquired by the vendor partly for such purpose, to the extent (as determined in accordance with the provisions of section 17) that the goods or services concerned are acquired by the vendor for such purpose."

[28] Cf paragraph [13] above.

was entitled to deduct, as "input tax", the VAT component of the premiums paid to the Insurer. Subsumed herein, is the question whether or not the Fund, in so doing, was acting as principal, or merely as the agent of the practitioners (**agency argument**).

[18.2] The second issue: Whether SARS's *ultra vires* argument has any merit. SARS in its heads of argument submitted that the Fund's failure to act within the confines of the powers expressly granted to it in the Acts, by not recovering (or waiving) contributions from practitioners in respect of the costs of the insurance as provided for in section 43(1)(a)(i) of the Attorneys Act or section 74(1)(a)(i) of the LPA and, instead, paying the indemnity insurance from its interest income, constitutes conduct ultra vires the Acts which is a nullity, and that no rights and obligations can flow from such conduct (**ultra vires argument**).[29]

[18.3] The third issue: Whether SARS's "invoices" argument has any merit. This is the argument by SARS, made in its heads of argument and in oral argument,[30] and which was crystallised in its supplementary submissions, that the Fund had failed to comply with the requirements of section 16(2)(a) of the VAT Act, therein that it had also not furnished SARS with any invoices issued by the Insurer to the Fund at the time of submitting the returns.[31] The Fund was thus prohibited from claiming the input tax deduction (**invoices argument**).

The first issue – "services" and "input tax"

The agency argument

[19] The Fund was clearly empowered in terms of the Acts to collect the contributions from the practitioners and to arrange indemnity insurance cover for them with the Insurer.[32] The Fund was also expressly empowered by the Acts to pay the premiums in that regard.[33]

[20] It is common cause that the Fund, as a matter of fact and in terms of the Acts, in the period under consideration, did so, and to that end had contracted with the Insurer for the providing of such insurance on the terms stated in the relevant policy, and that the Fund had

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29 SARS heads of argument paragraph 56, supplementary heads paragraph 8.
30 SARS heads of argument paragraph 78.2.
31 SARS supplementary heads paragraph 30 ff.
32 Attorneys Act s 40A and s 40B, LPA s 77(1) and (2).
33 Attorneys Act s 45(*d*), LPA s 57(*g*).

paid the premiums (including VAT) to the Insurer. The preamble to the policy, confirms the arrangement, stating that:[34]

> "The Attorneys Fidelity Fund, as permitted by the Act, has contracted with the Insurer to provide professional indemnity insurance to the Insured, in a sustainable manner and with due regard for the interests of the public ..."

(Underlining supplied)

[21] The parties are agreed that (as it was stated by the SCA in *Respublica*) the general principle to be applied, is that the VAT consequences of a supply and the characterisation of the attendant relationships must be assessed by reference, first and foremost, to the contractual arrangements under which the supply is made, and then one has to consider whether that assessment is vitiated by any relevant facts.[35]

[22] In the preamble to the policy, it is expressly stated that the "Fund, as permitted by the Act, has contracted with the Insurer". As such, ex facie the policy, the contractual arrangement in question and the main legal relationship is between the Fund and the Insurer, acting as principals.

[23] In support of the agency argument, SARS in its heads of argument,[36] made the submission that the contract of insurance was entered into between the Insurer and the practitioners, and not between the Insurer and the Fund, as principals.

[24] On the pleadings, however, it was common cause between the parties that the contract of insurance was concluded between the Fund and the Insurer. SARS pleaded this in terms in its rule 31 statement, stating that, "The Fund has contracted with the LPIIF to provide indemnity insurance to its members." (SARS used the word "members" but a reference to the practitioners was intended).[37] SARS also pleaded that, "The premiums for the indemnity cover are paid by the Fund.".[38]

[25] SARS moreover in its pleadings described the contractual arrangement between the Fund, the Insurer and the practitioners (**arrangement**), as a " 'tri-partite' arrangement",[39] albeit one, which according to SARS, did not create a basis for the Fund to claim input tax. In its supplementary submissions, the Fund similarly submitted that the arrangement could fairly be described as being a contract for the benefit of a third party, or a *stipulatio alteri*, concluded

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34 TB 300.

35 *CSARS v Respublica (Pty) Ltd* [2018] ZASCA 109 paragraphs 12-13 (Fund supplementary heads paragraph 102, SARS supplementary heads paragraph 27).

36 SARS heads of argument paragraph 71.

37 Cf rule 32: 184/60.

38 Rule 31: 155/13.2 and 13.4.

39 Rule 31: 160/21.1.2, and cf the similar claims in earlier SARS correspondence at Dossier 59/1.3(i) and 110/(i).

between the Fund and the Insurer as principals, for the benefit of the practitioners as the third party. If that is a fair description of the arrangement, it must follow that the Fund and the Insurer entered into the contract of insurance and acted in that arrangement, as principals.

[26] SARS also submitted in its heads of argument,[40] that the attendant provisions of the Acts (the Attorneys Act and the LPC), bear out that the Fund acts as agent to "arrange" the indemnity insurance on behalf of the practitioner, as principal, and that "the principal-agency arrangement is created and established in legislation in terms of the Attorneys Act and the LPA".

[27] The court disagrees with the submission. The applicable provisions of the Attorneys Act and the LPA empowering the Board of the Fund to enter into the contract of insurance, do not bear out the "principal-agency arrangement". Quite the opposite. They rather affirm that the intention of the legislator was that the Fund enter into the contract of insurance as principal.

[28] The attendant provisions state that the Board (of the Fund) is empowered to "enter into a contract with any person or company carrying on fidelity insurance", and that such a contract "shall be entered into in respect of practitioners generally" (**contract provisions**).[41] In respect of the payment by the Fund of the insurance premiums, the Acts state that, "the fund shall be applied for the following purposes ... premiums payable in respect of contracts of insurance entered into by the board of control in terms of sections 40 and 40B".[42] There is no suggestion in the language of any of these provisions that the Fund is empowered or required to enter into the contracts as an agent for the practitioners.

[29] The two relevant instances where the Acts refer to the insurance "arranged" by the Fund, are in the provisions empowering the Board to fix the amount payable by the practitioners as a contribution to the cost of the indemnity insurance (**premium contributions**) which the Board had "arranged" in terms of the contract provisions.[43] There is nothing in these provisions to support SARS's argument that a "principal-agency arrangement is created and established" in terms of the Acts.

[30] On the facts and evidence before the court, the court is satisfied that the contract of insurance was concluded between the Fund and the Insurer as principals, and that SARS's agency argument to the contrary must fail, not least because the conclusion of the contract in that manner has always been, and still is, SARS's pleaded case. This was also the basis on

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40 SARS heads of argument paragraph 72.

41 Attorneys Act s 40(1) and (2) and cf s 40B, and cf the similar provisions in LPA s 76(1), (2) and s 77(2).

42 Attorneys Act s 45(1)(*d*), and cf LPA s 57(1)(*g*).

43 Attorneys Act s 43(1)(*a*)(i), LPA s 74(1)(a)(i).

which the trial (excluding legal argument) was run. As such, no injustice is done to SARS if it were to be held to its pleaded case.[44]

"Services" and "input tax"

[31] It is conceded by SARS,[45] that the Insurer made a supply of insurance. Given that the contract of insurance was entered into between the Fund and the Insurer as principals, it must follow that in the making of such supply, the Insurer was rendering some sort of "services" (as defined)[46] to the Fund, as principal. The definition of "services" is in any event sufficiently broad – "anything done or to be done, including the granting, assignment, cession or surrender of any right or the making available of any facility or advantage"[47] – to envelop what the Insurer undertook to or did under the policy such as the providing of insurance cover to the practitioners in terms of the policy, at the behest of the Fund and as quid pro quo for the Fund's payment of the attendant premiums from time to time.

[32] SARS had also pleaded that the Fund could not claim input tax in respect of the premiums, inter alia because no services (as a quid pro quo for the premium) were "consumed, used or supplied by or to the Fund", and the premiums were not incurred, "in the course of making taxable supplies".[48]

[33] The VAT Act in relevant part defines "input tax" as follows:

> **" 'input tax'**, in relation to a vendor, means—
>
> (*a*) tax charged under section 7 and payable in terms of that section by-
>
> (i) a supplier on the supply of goods or services by that supplier to the vendor;
>
> ...
>
> where the goods or services concerned are acquired by the vendor wholly for the purpose of consumption, use or supply in the course of making taxable supplies …"

[34] LAWSA gives the following useful summary of the applicable principles and authorities:[49]

> "In *Consol Glass* (*Pty*) *Ltd v CSARS* 83 SATC 186 Unterhalter AJA pointed out that whether the taxpayer was entitled to deduct as input tax the VAT paid on the services supplied to it by local service providers depended upon whether these services were acquired by the taxpayer for the purpose of consumption, use or supply in the course of making taxable supplies. This

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44 Cf the comments of the SCA per Unterhalter AJA (as he then was) in *Consol Glass (Pty) Ltd v CSARS* 83 SATC 186 paragraphs 43-48.

45 See SARS heads of argument paragraph 65.

46 See n 23 above.

47 Ibid.

48 Rule 31: 160/21.1.3 and 161/21.2.8.2.

49 *LAWSA* vol 22(2) part 2 (2nd ed replacement) paragraph 353 n 6.

enquiry, the court held, raised two issues. First, for what purpose did the taxpayer acquire the services? Second, did the taxpayer do so in the course of making taxable supplies? The court was of the view that the relationship between the purpose for which the services were acquired and the use to which the services were put was the crux of the matter. See also *Commissioner*, *SA Revenue Service v De Beers Consolidated Mines Ltd* [2012] 3 All SA 367 (SCA); *Commissioner*, *SA Revenue Services v Pretoria East Motors* (*Pty*) *Ltd* [2014] 3 All SA 266 (SCA)."

[35] In *Consol* the SCA had held in relevant part as follows:

"[14] Whether Consol was entitled to deduct as input tax the VAT paid on the services supplied to it by local service providers depended upon whether these services were acquired by Consol for the purpose of consumption, use or supply in the course of making taxable supplies. That enquiry raised two issues. First, for what purpose did Consol acquire the services? Second, did Consol do so in the course of making taxable supplies. The relationship between the purpose for which the services were acquired and the use to which these services were put lies at the heart of the matter.

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

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

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

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

(Footnotes omitted)

[36] In its reasoning why, in that matter, the attendant services qualified, the SCA in *De Beers* reasoned in relevant part as follows:

> "[53] The question to be answered therefore is whether NMR's services were acquired for the purpose of making 'taxable supplies' in that 'enterprise'. The answer is clearly no. ... Such services were not acquired to enable DBCM to enhance its VAT 'enterprise' of mining, marketing and selling diamonds. The 'enterprise' was not in the least affected by whether or not DBCM acquired NMR's services. They could not contribute in any way to the making of DBCM's 'taxable supplies'. They were also not acquired in the ordinary course of DBCM's 'enterprise' as part of its overhead expenditure as argued by DBCM. They were supplied simply to enable DBCM's board to comply with its legal obligations."

[37] With reference to these authorities, the question to be answered is:

> [37.1] With reference to *Consol*: whether the services acquired have utility in the making of the taxable supplies; whether there was a "functional link" between the payment of the premiums for the insurance, and the making of taxable supplies by the Fund.
>
> [37.2] Employing the considerations proffered in *De Beers*: whether the services were acquired to enable the Fund to enhance or affect its VAT "enterprise"; contributed in any way to the making of taxable supplies; were acquired in the ordinary course of the Fund's enterprise as part of its overhead expenditure; or whether they were simply supplied to enable the Fund to comply with unrelated legal obligations.

[38] It is common cause that, in respect of the contributions paid by the practitioners during the relevant period, output tax was adjusted retrospectively per the relevant VAT returns, and which output tax was fully paid by the Fund to SARS. That VAT was, in terms of section 7(1)(*a*) of the VAT Act, levied and paid as taxable supplies in the course or furtherance of the Fund's related VAT enterprise (**enterprise**).

[39] There can be little doubt that the Fund, inter alia in its collecting of contributions from the practitioners for the issuance to them of FFCs, and in the arranging of the indemnity insurance with the Insurer and the payment of the attendant premiums, was carrying on an "enterprise".

[40] The payment of such contributions are a prerequisite and quid pro quo for the obtaining by the practitioners of FFCs. The FFCs are a prerequisite to such practitioners being permitted

to practice, or to qualify for insurance cover under the policy. SARS accepted in its heads of argument that the Fund, as one of its statutory functions in terms of the Acts, is enjoined to collect contributions from practitioners and to arrange the insurance.[50]

[41] In the premises, utilising the *De Beers* terminology, the services (insurance) acquired:

[41.1] Enhanced, affected or contributed to the Fund's enterprise or the making of taxable supplies – the intrinsic value of the FFCs to the practitioners, was undoubtedly enhanced by the insurance cover benefit thereby procured, i.e. over and above the benefit of being entitled to practice.

[41.2] Were acquired in the ordinary course of the Fund's enterprise as part of its overhead expenditure – it is common cause that the Fund paid the premiums. Indeed, in terms of section 45(1)(*d*) of the Attorneys Act, section 57(1)(*g*) of the LPA, the payment of such premiums by the Fund is expressly provided for, in mandatory terms.

[41.3] Were not acquired by the Fund merely to comply with legal obligations unrelated to the enterprise – the statutory obligation to pay the premiums, was functionally linked to the enterprise.

[42] In the court's view, the services acquired are functionally related or linked to the Fund's making of taxable supplies, and as such, the VAT component of the premiums paid, qualify as input tax in the hands of the Fund.

The second issue – ultra vires

Revenue source of premium payments

[43] SARS's formulation of the ultra vires argument (see para [18.2] above), has as an element, the submission that the Fund had as a matter of fact paid the premiums from its interest income, and that this was ultra vires.

[44] On the facts before the court, however, the payment of the premiums was not only from interest income. SARS had admitted on the pleadings that the Fund paid the premiums from *all* of its income, in the following terms:[51]

> "The insurance premiums are paid from the income generated by the investments of the fund; the interest received from trust accounts and annual contributions (if any) charged by the appellant to legal practitioners."

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50 SARS heads of argument paragraph 11.

51 Admitted by SARS on the pleadings, rule 31: 161/21.2.5.

[45] That accords with the attendant provisions in the Acts, which confirm that the Fund's revenue is diverse, and that it consists of inter alia the interest and the contributions (among others).[52] That accorded as well with the evidence of Mr Ndande, who confirmed that the Fund's revenue included inter alia income from interest, investments, rental income and contributions. In terms of the Acts, the purposes for which the Fund's revenue is to be applied, are equally diverse, making no distinction between, nor placing any constraints upon, which sources of revenue are to be utilised for the funding of which purposes or expenses of the Fund.[53]

[46] It cannot therefore ever be suggested that, as a matter of fact, the premiums were paid exclusively from interest income. They were paid from the Fund's general mixed revenue (including interest). The Fund's paying of the premiums (from its general mixed) is moreover expressly authorised by the Acts in terms of the attendant provisions.[54]

[47] As such, on this basis alone, it cannot be said that the Fund's paying of the premiums in the manner in which it was paid over the period in question, was in any way contrary to or ultra vires the attendant provisions of the Acts. The court considers further below (para [52] ff) the related submission (assuming it is proposed by SARS to be a self-standing one), that the Fund by not recovering (or waiving) the premium contributions from the practitioners was in and of itself ultra vires the Acts.

Link between interest income and FFCs

[48] It was also pleaded by SARS that there was a direct causal link between the interest income of the Fund and the issuing of the FFCs, and that thus, the services would have been acquired by the Fund to make taxable supplies (the contributions), and partly to make non-taxable supplies (the interest). Therefore (so it was pleaded), only the part used to make taxable supplies would qualify to be claimed as an input tax deduction, and an apportionment calculation would have to be done to determine the allowable input tax that could be claimed.[55]

[49] SARS did not persist with this point in legal argument (and thus the alleged link was not further reasoned or explained), and SARS's counsel also in legal argument disavowed that there is any need for such an apportionment in this matter, so there may not be a need to decide the point.

[50] The link between the interest income and the issuing of the FFCs, is alleged to arise from the fact that (so it is pleaded), in terms of the Acts it is a requirement for the issuing of

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52 Attorneys Act s 36, LPA s 54.
53 Attorneys Act s 45(d), LPA s 57(*g*).
54 Ibid.
55 Rule 31: 162/21.3.2.

the FFCs that the practitioners pay over the interest on their trust accounts, and that the practitioners' possession of the FFCs, in turn, entitle them to the insurance "services" rendered to the practitioners.[56] In terms of SARS's disallowance of objection, SARS stated that the link arose from the Commissioner's view that, "the interest is consideration for the supply of the insurance to the attorneys" by the Insurer.[57]

[51] If the court was required to express a view hereon, it would have to be that, on the evidence, and in terms of the Acts, there is no clearly evident "direct causal link" between the interest income and the issuing of the FFCs, not least because the attendant provisions of the Acts do not bear out the premise on which the link is predicated. To wit, there is not in fact any requirement in terms of the Acts that the payment of interest by the practitioners is a precondition or requirement to their being issued with FFCs. The provisions in the Acts stipulating that the interest shall be paid over to the Fund make no reference to and do not link that obligation in any way with the manner of obtaining or the entitlement to FFCs.[58]

"May"

[52] What remains of the ultra vires argument, is to consider whether SARS is correct in its contention that the Fund, as a creature of statute, was legally obliged by the Acts to levy premium contributions in terms of the attendant provisions,[59] in such a way that its neglecting to do so, amounted to ultra vires conduct, and which in turn disentitled the claim for input tax.

[53] In this regard, the Fund had submitted that the use of the word "may" in the attendant provisions,[60] being permissive language, conferred a discretion on the Board to decide whether or not to fix and levy premium contributions, and that the provisions were non-prescriptive and unqualified with regard to the amount so to be levied.

[54] In response, SARS argued that although the attendant provisions state that the Board "may" levy premium contributions, and not that it "shall" do so, in the circumstances the permissively framed power ("may") denotes a duty imposed by the Acts on the Board to levy such contributions.[61] In support of that submission, SARS relied on authorities such as *King.*[62]

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56 Rule 31: 162/21.3.1-2.

57 Dossier 117/1.4.9.2.

58 Attorneys Act s 78(3) states that the interest "shall be paid over to the fund by the practitioner concerned at the prescribed time and in the manner prescribed", and cf LPA s 86(5).

59 SARS heads of argument paragraphs 23 - 56, supplementary heads paragraphs 5.4.5 - 21, with reference to inter alia Attorneys Act s 43(1)(a)(i), LPA s 74(1)(a)(i).

60 Attorneys Act s 43(1)(a)(i), LPA s 74(1)(a)(i).

61 SARS supplementary heads paragraphs 15-20.

62 *CIR v IHB King; CIR v AH King* 1947 (2) SA 196 (A) 209, SARS supplementary heads paragraph 19.

[55] In *King*, the Appellate Division held in relevant part that:[63]

> "And it is true also that the word 'may' confers a power but in some cases the power given is of such a nature that the person to whom that power is given is under a duty to use it. Whether this is so must be ascertained from a consideration of a number of factors, which are set out in a passage from the judgment of LORD CAIRNS in the leading case of *Julius v The Bishop of Oxford* (5 A.C. 214) which was cited with approval in this Court by INNES, C.J., in *Noble & Barbour v SA Railways* (1922 AD 527, at p. 540); see also per LORD BLACKBURN at p. 241, and cf. per WESSELS, J.A., in *Lynch v Union Government (Minister of Justice)* (1929 AD 281 at p. 283)."

(Underlining supplied)

[56] In *Julius*,[64] the Lord Chancellor (Earl Cairns), had in relevant part held as follows:

> "The question has been argued and has been spoken of by some of the learned Judges in the Courts below as if the words "it shall be lawful" might have a different meaning, and might be differently interpreted in different statutes, or in different parts of the same statute. I cannot think that this is correct. The words "it shall be lawful" are not equivocal. They are plain and unambiguous. They are words merely making that legal and possible which there would otherwise be no right or authority to do. They confer a faculty or power, and they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so. ... And the words "it shall be lawful" being according to their natural meaning permissive or enabling words only, it lies upon those, as it seems to me, who contend that an obligation exists to exercise this power, to shew in the circumstances of the case something which, according to the principles I have mentioned, creates this obligation."

(Underlining supplied)

[57] In *Noble* the Appellate Division had said:[65]

> "The contention is occasionally advanced that 'may' in some cases means 'must'. That is an inaccurate statement. As remarked by COTTON, L.J in *Nickalls v Baker* (44 Ch. D at p. 270) 'may' never can mean 'must' as long as the English language retains its meaning. It merely confers a power; but the question may arise as to when it becomes the duty of the person entrusted with the power to, exercise it in favour of an applicant."

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63 *King* 209.
64 *Julius v The Bishop of Oxford* 1880, 5 A.C. 214, 222-223.
65 *Noble & Barbour v SA Railways* 1922 AD 527, 540.

[58] In *Lynch* the Appellate Division stated with reference to *Julius*:[66]

> "He has relied strongly upon the principle laid down in the case of *Julius v The Bishop of Oxford* (5 A.C. 214; 49 L.J.C.L. 577) and other similar cases that where a power is deposited with a public officer for the purpose of being used in favour of persons who are specifically pointed out, and where the Legislature has laid down conditions upon which they can call for its exercise, that power ought to be exercised, and the Court will require it to be exercised. It is, however, made quite clear in this decision that the principle can only be invoked when the person who wishes to rely upon it can show from the language of the whole statute when properly interpreted, from the nature of the thing empowered to be done, or from other relevant circumstances, that the Legislature intended to couple the power with a duty and intended the person in whom the power is reposed to exercise that power when called upon to do so."

(Underlining supplied)

[59] On these authorities, and in the context of the present matter, the words "may" (as used in the attendant provisions) are according to their natural meaning permissive or enabling words only. As such, the onus was on SARS to show that the legislator, in the circumstances concerned, despite the use of these enabling or permissive words, had the intention that the words must have compulsory force (**compulsory intention**).[67]

[60] Using the *Lynch* phraseology (see para [58] above), SARS had to show that a compulsory intention arises from the language of the whole statute when properly interpreted, from the nature of the thing empowered to be done, or from other relevant circumstances. In terms of *Julius* (see para [56] above), SARS would have to show that a compulsory intention arises from something in the nature of the thing empowered to be done, in the object for which it is to be done, in the conditions under which it is to be done and/or in the title of the person or persons for whose benefit the power is to be exercised.

SARS's contextual factors

[61] SARS argued that there are several "contextual factors" which indicate that it could not have been the intention of the legislature that the Fund be given a discretion to "levy premiums".[68]

[62] One such factor, according to SARS, is that the Attorneys Act after its 2003 amendment,[69] no longer contained a provision entitling the Fund to waive premium contributions, and that the LPA as well contains no such provision.

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66 *Lynch v Union Government (Minister of Justice)* 1929 AD 281, 283-284.

67 *Lynch* 283-284, and cf *Hartley NO v the Master* 1921 AD 403, 407-408.

68 SARS supplementary heads paragraph 21.

69 In terms of Act 55 of 2002, promulgated in terms of Government Gazette vol 451 no 24277 dated 17 Jan 2023.

[63] What was taken away by the amendment, however, does not answer the real question, namely whether the relevant provisions which were introduced by the amendment (including section 40B and section 43(1)(a)(i) of the Attorneys Act), and the equivalent provisions in the LPA, and the permissive words therein contained, on a proper interpretation, evinced a compulsory intention.[70]

The provisions in question

[64] To answer that question, the starting point is text of the provisions and of the related provisions which featured in argument. The sections read in relevant part as follows:

> **Attorneys Act section 43(1)(*a*)(i)**: "Subject to the provisions of this section, every practitioner ... shall, annually when he or she applies for a fidelity fund certificate, pay to the fund - (i) such amount as **may be fixed** by the board of control from time to time in respect of the cost of group professional indemnity insurance arranged by the board of control pursuant to the provisions of section 40B;"
>
> **LPA section 74(1)(*a*)(i)**: "Subject to the provisions of this section, every attorney ... must, annually when he or she applies for a Fidelity Fund certificate, pay to the Council - (i) the amount as **may be fixed** by the Board from time to time in respect of the cost of group professional indemnity insurance arranged by the Board pursuant to the provisions of section 77(2);"

(Underlining and emphasis supplied)

[65] Two other provisions which also featured in argument, are the following:

> **Attorneys Act section 40A(c)**: "The board of control **may - ... levy premiums and fees** for the provision of such insurance or security, as the case may be."
>
> **LPA section 77(4)**: "The Board **may levy premiums and fees** for the provision of any insurance or security through any scheme established or public company administered by it in terms of the provisions of this Act or legislation repealed by this Act."

(Underlining and emphasis supplied)

[66] When this court refers to the term, "premium contributions",[71] and unless the context indicates otherwise, it is meant as a reference to the Fund's power to levy "premium contributions" (speaking generically) in terms of all four sections, i.e. whether under the two main sections in question (Attorneys Act section 43(1)(a)(i) and LPA section 74(1)(a)(i) – **fixing provisions**), or under the other two sections which also featured in the parties' heads of argument (Attorneys Act section 40A(c) and LPA section 77(4) – **levying provisions**).

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70 Cf *Julius*, Lord Chancellor 222, Lord Penzance 228-229.

71 Defined in paragraph [29] above, albeit there defined only with reference to the fixing provisions.

[67] The parties argued the matter on the basis that it was primarily the fixing provisions and not the levying provisions which apply to the facts before the court, as it was the Fund (via the Board) which had "arranged" the insurance through contracting with the Insurer, which "arranging" is specifically referenced in the fixing provisions:

> [67.1] Attorneys Act section 43(1)(*a*)(i) expressly refers to the insurance arranged by the Board "pursuant to the provisions of section 40B", the latter section (section 40B) being the section which expressly empowers the Board to enter into such a contract.
>
> [67.2] LPA section 74(1)(*a*)(i) in the same way expressly refers to the insurance arranged by the Board "pursuant to the provisions of section 77(2)", the latter section (section 77(2)) being the section which expressly empowers the Board to enter into such a contract.

[68] If this analysis is correct, the levying provisions would not apply to the present scenario where the Board had elected to contract with the Insurer for the providing of insurance in terms of the fixing provisions as referred to in para [67] above (**contracting insurance scenario**). Rather, the levying provisions would apply only to the scenario where the Board elects to provide the insurance through the Insurer to the practitioners directly in terms of Attorneys Act section 40A and LPA section 77(1) (**direct insurance scenario**), in respect whereof the Board is empowered:

> [68.1] Under Attorneys Act section 40A(*c*), to "levy premiums and fees for the provision of such insurance ...", through the Insurer.

[69] Under LPA section 77(4), to "levy premiums and fees for the provision of any insurance or security through any scheme established or public company administered by it", i.e. through the Insurer.

[70] The distinction between the two scenarios are not essential or pivotal to the outcome of this judgment. Put differently, if the above analysis is incorrect, and the Acts were to be interpreted to mean that both the fixing provisions and the levying provisions apply in a contracting insurance scenario, given that word "may" appear in all four provisions, on the analysis of the authorities and facts which follows below, this court would have come to the same conclusions that it does on the question of a compulsory intention.

[71] In all four provisions, the relevant words are "may". As it was stated by the Lord Chancellor (*Julius* 222)[72] in respect of the words there used, and which applies equally to the words "may" in question here, the words,

> "... are not equivocal. They are plain and unambiguous. They are words merely making that legal and possible which there would otherwise be no right or authority to do. They confer a faculty or power, and they do not of themselves do more than confer a faculty or power."

[72] As such, on a plain reading of the four provisions or prima facie, the power to levy premium contributions is entirely discretionary and permissive, and not compulsory.

[73] It remains to be considered, however, whether any of the other contextual factors referred to by SARS or any "other circumstances" (or the factors referred to in para [60] above), indicate a compulsory intention.

[74] SARS submitted[73] that it is not a purpose of the Fund to reimburse losses suffered by the public caused as a result of the professional negligence of practitioners, and therefore (so the argument goes) to contend that the Fund has a discretion *not* to levy premium contributions, and thereby permit the Fund to pay the premiums from its interest income, is inconsistent with the meaning and purpose of the Act.

[75] SARS is correct that the Acts did not expressly make it the purpose of the Fund to reimburse such losses. The Acts did however empower the Fund, in express and mandatory terms, to pay the premiums, and to do so from its own revenue, and which revenue included interest income, among others.[74] It is therefore not the non-levying of premium contributions, which "permits" the Fund to pay the premiums from its income (and which includes interest income), it is the attendant provisions of the Acts which do so, in mandatory terms. The payment of the premiums by the Fund per se, is therefore not inconsistent with the Acts.

[76] The SARS arguments that the premiums were paid by the Fund *exclusively* from interest income or were so paid by the Fund as mere *agent* of the practitioners, have already been addressed herein before,[75] and will therefore not be repeated here. Because the court held that the Fund had contracted with and paid the premiums to the Insurer as principal, and not merely as agent of the practitioners, SARS's related arguments (to the contrary), made in the context of the compulsory intention debate,[76] cannot be sustained. There is in any event

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72 And cf Lord Blackburn *Julius* 241.
73 SARS supplementary heads paragraph 21.1.
74 Attorneys Act s 45(1)(*d*), LPA s 57(1)(*g*).
75 Paragraphs [23]-[30] and 0-[48] above.
76 SARS supplementary heads paragraphs 21.4-5.

nothing in those submissions, which are factors or circumstances clearly indicating a compulsory intention.

[77] SARS also argued that a relevant factor was the peremptory terms of section 43(1)(*a*)(i) of the Attorneys Act (section 74(1)(a)(i) of the LPA). The use of the word "shall" in those provisions is however equally plain and unambiguous. What is compulsory is to *pay* the amount which the Board *may* fix from time to time. Obviously, if no amount is ever fixed, no compulsory obligation to pay arises. The question remains whether the Fund (via its Board) was *obligated* to fix an amount at all. Prima facie, the Board is entitled to fix, or not to fix, *any* amount from time to time. In this regard, the court agrees with the Fund's submission that, prima facie, the text of the provisions place no peremptory obligation on the Board to fix any amount at all, nor an obligation to recover the full insurance cost from the practitioners.[77]

[78] There is nothing in SARS's submissions to the court at the hearing or in its heads of argument which persuades the court that the legislator, despite the use of the (permissive) word "may" in the attendant provisions, had a compulsory intention. On a conspectus of the facts and the relevant provisions of the Acts, and with reference to the aspects considered below, there are moreover no "other circumstances" which indicate such an intention. To that end, the court will consider in what follows if there is an indication of such an intention in (a) the nature of the thing empowered to be done, in the object for which it is to be done, or in the conditions under which it is to be done;[78] (b) the title of the person or persons for whose benefit the power is to be exercised;[79] (c) the language of the whole statute when properly interpreted;[80] or (d) any other relevant circumstances.[81]

[79] In the court's view, there is nothing in the nature of the thing empowered to be done (the fixing of an amount as a premium contribution), in the object for which it is to be done (to contribute to the cost of the insurance), or in the conditions under which it is to be done (no conditions appear to have been imposed), indicating a compulsory intention.

[80] The title of the person or persons for whose benefit the power is to be exercised (**beneficiary**), may be a material factor. Lord Blackburn in *Julius* (241-243) articulated the salient aspects of this consideration, with reference to the words there in question, thus:

> "I do not think the words 'it shall be lawful' are in themselves ambiguous at all. They are apt words to express that a power is given; and as, *prima facie*, the donee of a power may either exercise it or leave it unused, it is not inaccurate to say that, prima facie, they are equivalent to saying that the donee may do it; but if the object for which the power is conferred is for the

77 Fund supplementary heads paragraphs 60-62.
78 *Julius* 223.
79 Ibid.
80 *Lynch* 283.
81 Ibid.

> purpose of enforcing a right, there may be a duty cast on the donee of the power, to exercise it for the benefit of those who have that right, when required on their behalf. Where there is such a duty, it is not inaccurate to say that the words conferring the power are equivalent to saying that the donee must exercise it. ...
>
> But there are cases in which the authority or power given is not to do a judicial act, and yet there is a duty on the donee to exercise the power if it appears to be given to the donee for the purpose of making good a right, and he is called upon by those who have that right to exercise the power for their benefit. ...
>
> The word 'may' does not occur in the 14 Car: 2 C.12, nor in the 23 Hen. 6 where in the Norman French version the words are *'lesseront hors de prison'*; and in the English version 'shall let out of prison'; but both are apt illustrations of the rule that though giving a power is *prima facie* merely enabling the donee to act, and so may not inaccurately be said to be equivalent to saying he may act, yet if the object of giving the power is to enable the donee to effectuate a right, then it is the duty of the donee of the powers to exercise the power when those who have the right call upon him so to do. And this is equally the case where the power is given by the word 'may', if the object be clear. ...
>
> The enabling words are construed as compulsory whenever the object of the power is to effectuate a legal right. It is far more easy to shew that there is a right where private interests are concerned than where the alleged right is in the public only, and in fact, in every case cited, and in every case that I know of (where the words conferring a power are enabling only, and yet it has been held that the power must be exercised), it has been on the application of those whose private rights required the exercise of the power. The personal liberty of the person arrested by the sheriff, the rights of the creditors of the bankrupt to their debts, the rights of the plaintiff who had recovered judgment to his costs, the right of the constable out of pocket to be paid by the parish, the right of the creditor of the bank or of the local board to be paid, were all private rights. I do not, however, question that there may be a right in the public such as to make it the duty of those to whom a power is given to exercise that power."

(Underlining supplied)

[81] In sum, the oft-quoted principle as formulated by Lord Blackburn,[82] is that empowering words are more readily construed as imposing a duty where private interests are concerned than where the alleged right is in the public only, and in every cited case (considered by Lord Blackburn) it was moreover so construed *on application* by those whose *private rights* required the exercise of the power. Or as it was formulated by the Appellate Division with reference to the Lord Chancellor's dictum,

> "... where a power is deposited with a public officer for the purpose of being used in favour of persons who are specifically pointed out, and where the Legislature has laid down conditions

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[82] In several South African cases, inter alia *Noble* 540, *King* 209-210, *Grosvenor Motors (Cape) Ltd v Samson* 1956 (3) SA 169 (C) 173E-174A.

upon which they can call for its exercise, that power ought to be exercised, and the Court will require it to be exercised".

[82] When considering the wide range of similar cases evaluated in *Julius*,[83] and the South African cases (referred to in this judgment, or by SARS) which referred to *Julius*,[84] it is evident that in the vast majority of them, the person or interest sought to be served by the mandamus or other relief sought (i.e. **the beneficiary** of the right), was also the applicant seeking the enforcement or effectuation of that right (**the third party**), and which right was – according to the statutory instrument in question – permissively reposed in the public officer (or his equivalent) in question (**the donee**).

[83] In *Julius*, the beneficiary and third party was the appellant (Dr Julius), who had lodged a complaint and who wished to compel the Bishop of Oxford to issue a commission of inquiry. In *Lynch*, that person was the plaintiff, claiming that he was entitled as of right to be re-admitted into the Public Service as a first-class sergeant in the South African Police. In *Noble*, that person was the appellant who was a public servant seeking to compel the respondent to grant him leave. In all three matters, however, the courts found that the legislator did *not* have a compulsory intention.

[84] Lord Blackburn stated[85] that this was the distinguishing feature of *every case* that he knew of where the courts found in favour of a compulsory intention, namely that they were cases on the application of a third party beneficiary whose private rights required the exercise of the power: the personal liberty of the person arrested by the sheriff, the rights of the creditors of the bankrupt to their debts, the rights of the plaintiff who had recovered judgment to his costs, the right of the constable out of pocket to be paid by the parish, the right of the creditor of the bank or of the local board to be paid, were all private rights.

[85] Lord Blackburn did not,[86] however, rule out that there may be a right in the public such as to make it the duty of those to whom a power is given to exercise that power. In *King*, the Appellate Division with reference to Lord Blackburn's approach, preferred, therefore, to draw no inference from the fact that the Commissioner, in exercising his power under the attendant section in that case, was acting in the public interest. Having regard, however, to the factors mentioned in the *Julius* case, it seemed to the Appellate Division that "all considerations of justice and expediency" nevertheless required the court to say that in the relevant section, the word "may" also imported a duty to exercise the power given to the Commissioner.

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83 *Julius* 223-225, 230-231, 241-246.
84 See also *Hartley* 407-408.
85 Julius 244.
86 Ibid.

[86] In *South African Railways & Harbours*,[87] after a thorough analysis of *Julius*, the Appellate Division held as follows:

> "These passages show, in my opinion, that the most weighty consideration, from which a legal duty may be implied in a permissive power, is that the object of the power is to effectuate either a private or a public right – a right requiring that the power conferred shall be exercised and therefore capable of enforcement. ...
>
> It is difficult to conceive under what circumstances a permissive power conferred for the sole benefit of the donee, can be accompanied by legal duty or a right in another to exact performance of that duty."

[87] In the matter before this court, what is notably absent, is the existence of a third-party beneficiary, seeking the effectuation of some private or public right. Here, we have only the donee, the Fund, who is the repository (and sole notional beneficiary) of the permissive power to fix premium contributions (whether under the fixing provisions or under the levying provisions).[88]

[88] *Ex facie* the attendant provisions, the permissive power was conferred by the legislator on the Fund as donee for its own sole benefit. In the words of the Appellate Division forecited, it is difficult to conceive under what circumstances the power so conferred could or should be accompanied by a legal duty or a right in another to exact performance under the provisions.

The Fund's contextual considerations

[89] The Fund in their legal submissions raised several factors and "contextual considerations" which it was submitted mitigated against a compulsory intention. In this regard it was submitted, *inter alia*, that:

> [89.1] If it was the intention of the legislator to require the Fund to recover the full cost of the insurance it would have legislated to this effect, which it could easily have done by (a) including a provision stating that the Fund must do so, and (b) referring, for example, to the amount contemplated in section 43(1)(a)(i) of the Attorneys Act and section 74(1)(*a*)(i) of the LPA as the "full amount" of the expense incurred by the Fund.
>
> [89.2] The permissive language used in the levying provisions,[89] and that section 43(1)(*a*)(i) of the Attorneys Act and section 74(1)(*a*)(i) of the LPA (the fixing

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87 *South African Railways and Harbours v Transvaal Consolidated Land and Exploration Co Ltd* 1961 (2) SA 467 (A) 504E-G, followed and approved in *Schwartz v Schwartz* 1984 (4) SA 467 (A) 473I-474D.

88 See the discussion at paragraphs [66]-[70] above.

89 Attorneys Act s 40A(*c*), LPA s 77(4) of the LPA.

provisions) must be read in the context of the levying provisions, and that if this is done, there can be no suggestion of a compulsory intention.

[89.3] Paying premiums in respect of contracts of insurance entered into in terms of sections 76 and 77 of the LPA is an express purpose of the Fund in terms of section 57(1)(*g*) of the LPA.

[89.4] The Insurer is a non-profit company established by the Fund specifically and only for purposes of providing the insurance to the practitioners.

[89.5] The Fund's revenue is exempt from liability to income tax in terms of section 53(1) of the Attorneys Act and section 60(1) of the LPA.

[89.6] The policy considerations which underpin the relevant legislative provisions are designed to produce / result in a benefit to the public and specifically all persons who make use of legal services.

[89.7] There is no general commercial, profit-making objective or purpose that can be attributed to the Fund and no such purpose is stipulated in the Acts.

[89.8] The Fund's minimising of the cost of FFCs and insurance to practitioners in a manner that diminishes the Fund revenue, is consistent with the Acts and their underlying policy considerations.

[90] The court is in agreement that the contextual considerations aforementioned, mitigate against a compulsory intention rather than for it. To these can be added or supplemented, the following.

[91] In respect of the legislator's chosen wording in the scheme of the Acts, the legislator was careful in the wording of the various sections in both the Attorneys Act, and in its successor, the LPA, to spell out when a power of the Fund was to be mandatory ("shall"), and when merely discretionary ("may"). The Fund's payment of the premiums was made compulsory. In respect of the Fund's discretion to recover the cost of the insurance, the legislator chose markedly different wording, "such amount as may be fixed by the board of control from time to time in respect of the cost".[90] If the legislator had in mind that the Fund must be compelled to from time to time to fix the premium contribution payable in respect of the insurance cost, or to fix it in an amount equal the premiums paid from time to time, very different wording would have been required.

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[90] Attorneys Act s 43(1)(a)(i), LPA s 74(1)(*a*)(i).

[92] Even if one uses the word "shall" instead of "may" in the fixing provisions, as SARS is suggesting one must, that will not achieve the goal SARS is contending for, to wit, a mandatory recovery of the full insurance cost from time to time (**the insurance cost**), in order to avoid the "subsidising" of the premium cost with interest income. By way of example, LPA section 74(1)(a)(i) would read in relevant part that,

> "every attorney ... must, annually when he or she applies for a Fidelity Fund certificate, pay to the Council - (i) the amount as **shall be fixed** by the Board from time to time in respect of the cost of group professional indemnity insurance".

(Emphasis supplied)

[93] Even with that amendment, the section would still read as if a discretion were given to the Board to fix *an* amount, and that it shall fix the amount *from time to time*. But neither the amount nor the time periods (for fixing the amount) are prescribed. That wording would therefore still envelop a discretion as to what the amount should be (as the amount could notionally be set at any, or even a nominal, level), and how often it is to be set. Such amendment would not, in and of itself, ensure that the amount fixed equates proportionally[91] to the full insurance cost. To achieve that, one would have expected wording such as, for example, the following:

> "Every attorney ... must, annually when he or she applies for a Fidelity Fund certificate, pay to the Council - (i) the amount as **shall be fixed** by the Board from time to time <u>to ensure the recovery of the full</u> ~~in respect of the~~ cost of group professional indemnity insurance."

(Deleted words struck through, added words underlined)

[94] If the words "in respect of the cost" are not deleted or altered, the section, even with the word "shall", still gives the Board the notional discretion to fix the premium contribution in *any* amount, or even in a nominal amount, or fix it at zero. The retaining of the words "from time to time" moreover, leaves it in the discretion of the Board as to when or how often to fix the amount. As such, even if "shall" were substituted for "may", discretionary language remains.[92]

[95] The scheme of the Acts was clearly to leave the vast majority of these types of matters pertaining to its own administration, within the permissive discretion of the Board / the Fund or the LPC. And where the legislator meant to make a thing compulsory or discretionary, as

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[91] I.e. in the proportion which each practitioner has to contribute, to ensure the recovery of the insurance cost, given that in the nature of the profession, the total number of the practitioners so contributing will be constantly changing in every successive years, as practitioners cease to practice, or new ones commence doing so.

[92] Cf *Hartley* 408.

the case may be, suitable wording was used to make it so, as is apparent from the various related provisions of the Acts referred to in this judgment.

[96] The court agrees with the Fund that the fact that the legislator also used the word "may" in the levying provisions in respect of the levying of "premiums and fees" for the provision of insurance,[93] is an indicator against a compulsory intention. As is the fact that the making of the payment of the premiums are clearly compulsory, whilst making their recovery permissive in all four of the related sections of the Acts.[94]

[97] In the same way, when the Acts provided for the Board to levy annual or other contributions in respect of the issuing of FFCs, or other annual amounts, the Acts stipulated that they were in the amounts as "may be fixed" by the Board from time to time (i.e. permissive language).[95] The discretionary power to fix the amount of the FFC contributions, is a further indicator against a compulsory intention in the fixing provisions.

[98] Having regard to the factors mentioned in the *Julius* case, and those referred to in the South African cases referred to in this judgment, the considerations of justice and expediency require this court to say that in the attendant sections, the word "may" do not import a duty on the Fund to exercise the power given by the sections. There is, moreover, also no self-evident "absurdity or injustice" which would follow the court giving the permissive words their natural discretionary meaning.[96] The court finds that in the attendant provisions there is no compulsory intention, and to the extent that a burden rested on SARS to show otherwise, it failed, and as such, the ultra vires argument also in this respect cannot succeed.

[99] Whether SARS is correct on its invoices argument, and whether on that basis alone the court can or should find that the Fund's input tax claims are disentitled, or the appeal must fail, is considered in the following section of this judgment.

The third issue – the invoices argument

[100] SARS's invoices argument was to the effect that the Fund had failed to comply with the requirements of section 16(2)(*a*) of the VAT Act, therein that it had not furnished SARS with any invoices issued by the Insurer to it in respect of the Fund's premium payments to the Insurer, at the time of the submitting of the VAT returns. The Fund was thus prohibited from claiming the related input tax deduction.[97]

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93 Attorneys Act s 40A(*c*), LPA s 77(4).
94 Attorneys Act s 40A(*c*) and s 43(1)(a)(i), LPA s 74(1)(*a*)(i) and s 77(4).
95 Attorneys Act s 43(1)(*a*)(ii) and s 43(4), and LPA s 74(1)(*a*)(ii), or "may determine" in terms of LPA s 74(2) and s 74(3).
96 Cf Lord Penzance *Julius* 230, *Lynch* 285.
97 SARS supplementary heads paragraph 31 ff.

[101] Section 16(2)(*a*) of the VAT Act provides in relevant part as follows:

> "(2) No deduction of input tax in respect of a supply of goods or services ... or any other deduction shall be made in terms of this act, unless—
>
> (*a*) A tax invoice ... in relation to that supply has been provided in accordance with section 20 or 21 and is held by the vendor making that deduction at the time that any return in respect of that supply is furnished;"

[102] The Fund submitted, also with reference to *Pretoria East Motors*,[98] inter alia that:

[102.1] SARS had never placed in dispute the validity or the quantum of the payments made by the Fund to the Insurer for the insurance cover.

[102.2] SARS never requested copies of the invoices issued by the Insurer to the Fund in respect of the Fund's premium payments to the Insurer (**Insurer premium invoices**), but at all times insisted that the Fund provide it with copies of the invoices which SARS contended the Fund should have issued in relation to the receipt of the contributions paid by the legal practitioners (**contribution invoices**).

[102.3] Mr Ndande had testified that the Insurer issued invoices to the Fund in relation to all payments made by the Fund to them (i.e. the Insurer premium invoices). SARS had not adduced any evidence to contradict this, nor had it made any allegations in its rule 31 statement or its heads of argument to suggest otherwise.

[102.4] The Fund had therefore discharged the burden of proof with reference to the dispute as framed in the rule 31 and rule 32 statements. It had demonstrated that it was subject to VAT, that it did not issue and had no obligation to issue the documentation incorrectly requested by SARS, and that all the requirements under the VAT Act necessary to entitle the Fund to claim the input tax in fact claimed have been met.

[102.5] It bore emphasis that SARS had previously subjected the Fund to a verification in relation to the same input tax claims that form the subject matter of this dispute. The Fund provided the documentation requested by SARS on that occasion and after considering same, SARS conceded the appeal in full pursuant to alternative dispute resolution proceedings (referring to the rule 32 statement paras 10-11).

[102.6] The fact that the Fund did not discover or otherwise provide copies of the invoices issued to it by the Insurer in terms of these proceedings is therefore no reason to penalise the appellant and certainly does not mean that the Fund failed to discharge

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[98] *CSARS v Pretoria East Motors (Pty) Ltd* 2014 (5) SA 231 (SCA) paragraphs 13-14 (Fund supplementary heads paragraphs 8-9, 116-122).

the burden of proof it bore with reference to the scope and ambit of the dispute set out in SARS's rule 31 statement (referring to *Pretoria East Motors* paras 13-14).

[103] In *Pretoria East Motors* the SCA held in relevant part, as follows:

> "[6] ... The present appeal must therefore be approached on the basis that the onus was on the taxpayer to show on a preponderance of probability that the decisions of SARS against which it appealed were wrong (*Commissioner for Inland Revenue v SA Mutual Unit Trust Management* Co Ltd 1990 (4) SA 529 (A) at 538D). That, however, is not to suggest that SARS was free to F simply adopt a supine attitude. It was bound to set out the grounds for the disputed assessments and the taxpayer was obliged to respond with the grounds of appeal, and these would serve to delineate the disputes between the parties.
>
> ...
>
> [14] ... Whilst there are disputes in tax appeals, such as the entertainment expenditure in the present appeal, where the production of invoices or vouchers is called for if the taxpayer is to discharge the onus of proof resting on it, that is not always the case. Everything will depend upon the nature of the dispute between the parties as defined by the grounds of assessment and the grounds of appeal. Where, for example, the SARS auditor has based an assessment upon the taxpayer's accounts and records, but has misconstrued them, then it is sufficient for the taxpayer to explain the nature of the misconception, point out the flaws in the analysis and explain how those records and accounts should be properly understood. That can be done by a witness such as Dr Gouws who, as a qualified chartered accountant, is capable of giving such an explanation after a full and proper consideration of the accounts. If there are underlying facts in support of that explanation that SARS wishes to place in dispute, then it should indicate clearly what those facts are so that the taxpayer is alerted to the need to call direct evidence on those matters. Any other approach would make litigation in the tax court unmanageable, as the taxpayer would be left in the dark as to the level of detail required of it in the presentation of its case. It must be stressed that SARS is under an obligation throughout the assessment process leading up to the appeal, and the appeal itself, to indicate clearly what matters and which documents are in dispute, so that the taxpayer knows what is needed to present its case."

[104] The Fund submitted that SARS had previously subjected the Fund to a verification in relation to the same input tax claims that form the subject matter of this dispute; that the Fund had provided all the documentation requested by SARS on that occasion and after having considered that documentation, SARS had conceded the appeal in full pursuant to alternative dispute resolution proceedings (referring to paras 10-11 of its rule 32 statement).[99]

[105] When regard is had to the paras of the rule 32 statement referred to, however, it is apparent that the submission made by the Fund, only encapsulates two of the four VAT

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[99] Rule 32: 170/10-11.

periods in question, namely the periods 05/2018 and 07/2018, and not as well the other two periods which feature in this appeal, to wit 07/2019 and 08/2020.

[106] Aside for that discrepancy, the court is in agreement with the Fund's general submissions made in this regard, and on the authority of *Pretoria East Motors*, forecited,[100] further agrees that the Fund should not be non-suited in this appeal merely because the premium invoices were not produced at the hearing. As the SCA said in *Pretoria East Motors*, it is not always the case that the production of invoices is called for if the taxpayer is to discharge the onus of proof resting on it. Everything will depend upon the nature of the dispute between the parties as defined by the grounds of assessment and the grounds of appeal.

[107] In the pleadings, SARS's main focus, insofar as it concerned the matter of invoices, section 54(3) statements or related documentary evidence of the payments concerned (**documentation**), was twofold:

> [107.1] First, such documentation in respect of the practitioners' payment of the initial and/or annual contributions to the Fund from time to time, and in particular, the contribution invoices, if any, issued by the Fund to the practitioners.[101]
>
> [107.2] Second, such documentation in respect of the practitioners' payment of the premium invoices *issued to the practitioners* by the Fund and/or by the Insurer (as the agent of the Fund) from time to time, if any, in respect of premium contributions levied with reference to the insurance cover arranged by the Fund with the Insurer (**Fund premium invoices**).[102]

[108] It will be recalled that, in respect of contribution invoices, it was the Fund's pleaded case and the evidence of Mr Ndande, that such invoices were never issued by the Fund, as

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100 And cf *South Atlantic Jazz Festival (Pty) Ltd v CSARS* 2015 (6) SA 78 (WCC) paragraph 19.

101 See rule 32: 156/16, querying the documentation in respect of the "contributions received"; 160/21.2.2, querying the documentation "in relation to the initial contributions";
164/26.5 read with 122/1.10-11, querying the documentation in respect of the "initial contributions";
165/30 read with 137/5.1-2, querying the documentation in respect of the "initial contributions".

102 See rule 32: 156/16, where SARS recognised that, in respect of the premiums, etc), there were "schedules containing figures extracted from the annual financial statements, of amounts ostensibly paid over as premiums" – referring to the Fund's payment of premiums to the Insurer. Then the pleading continues, stating that, "The appellant could also not confirm **whether any tax invoices were issued to practitioners**." (Emphasis supplied) – referring to the (non-existent) Fund premium invoices;
161/21.2.9, where SARS pleaded that, "The appellant, notwithstanding section 16(2) could not produce any documentary proof that any service was supplied **to the legal practitioners by the appellant**." (Emphasis supplied) – again here raising the absence of the documentation or Fund premium invoices evidencing the postulated or notional "insurance service" rendered by the Fund to the practitioners.

the monies were collected from the practitioners by the Law Society or the LPC, as agents of the Fund.[103]

[109] It is clear from the pleadings and the evidence, that the Fund also never issued any Fund premium invoices to the practitioners, as the Fund had waived or elected not to recover premium contributions from the practitioners.[104] It will also be recalled that such non-recovery formed the heart of SARS's *ultra vires* argument.

[110] Further, as is also common cause, the Fund did account for and pay to SARS the output tax in respect of its rental income and contributions income from time to time, while no such accounting or payment was ever necessary or made in respect of any premium contributions or premium invoices, as this was never levied, and thus no such invoices were ever issued.

[111] The main focus of SARS invoices argument, as it was formulated in its heads of argument, is however not the contribution invoices or the Fund premium invoices, which *did* feature prominently in the pleadings, but rather, it is the Insurer premium invoices, which did not, and to which there was only a slight reference in the evidence of Mr Ndande.

[112] As was the case in *Pretoria East Motors*, where the SARS auditor had based assessments upon the accounts and records (such as they were) of the taxpayer, but has misconstrued them or the applicable legal principles, it should be sufficient for the Fund, as the taxpayer in this matter, to explain the nature of the misconception, point out the flaws in the analysis and explain how those records and accounts and the attendant legal principles, should properly be understood and applied – as the Fund has done inter alia through a witness such as Mr Ndande who explained various aspects of the Fund's approach to and dealing with the matters and issues at hand.

[113] If there were underlying facts or documentation in support of that explanation – pertinently the Fund premium invoices – that SARS wished to place in dispute, then it should have indicated clearly what those facts were – in their pleadings and in the cross-examination of Mr Ndande – so that the Fund was alerted to the need to call direct or further evidence on such matters.

[114] This was not done by SARS, during the evidence of Mr Ndande in respect of the Insurer premium invoices or in respect of their physical absence from the proceedings, or at least not pointedly. Mr Ndande confirmed under cross-examination that the Insurer had issued tax invoices (i.e. Insurer premium invoices) to the Fund in respect of the premium payments.

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[103] Rule 32: 184-185/62.

[104] Rule 32: 172/16-17 and 186/66-68.

As far as the court recalls, to that SARS's counsel responded, as an aside, that these were never seen and that there was no evidence of that, and whereafter the matter of the Insurer premium invoices was not again revisited in Mr Ndande's evidence.

[115] As the Fund argued and pointed out, SARS had also never placed in dispute the validity, or the quantum of the payments made by the Fund to the Insurer for the insurance cover. Mr Ndande had testified that the Insurer issued invoices to the Fund in relation to all payments made by the Fund to them. SARS had not adduced any evidence to contradict this.

[116] As the SCA held in *Pretoria East Motors*, SARS is under an obligation throughout the assessment process leading up to and in the appeal, to indicate clearly what matters and which documents are in dispute, so that the taxpayer knows what is needed to present its case. Any other approach would make litigation in the tax court unmanageable, as the taxpayer would be left in the dark as to the level of detail required of it in the presentation of its case.

[117] Given that the input tax claims were previously vetted and approved by SARS, only to be reversed in later updated assessments, without the apparent need or call for the production by the Fund of the Insurer premium invoices, the obligation on SARS to call for them and call for them clearly in these proceedings (in the pleadings and/or in the evidence) was, respectfully, even more pronounced.[105]

[118] SARS's invoices argument was that the Fund was prohibited from claiming the input tax deductions in question, and that the appeal should fail, for failing to comply with the peremptory requirement of section 16(2)(a), in that it had not furnished SARS with any invoices issued by the Insurer to it at the time of submitting the return.[106] SARS's reliance on s 16(2)(a) is new, and featured for the first time in its heads of argument. That was not the basis on which it was pleaded by SARS, that the additional assessments were raised and the deductions were disallowed.

[119] In respect of the factual and legal grounds which were pleaded by SARS, the Fund has succeeded in showing on a preponderance of probability that the decisions of SARS against which it appealed were wrong, and hence the appeal must succeed, and the assessments must be set aside.[107]

[120] It goes without saying that SARS, in its reconsideration of the matter of the assessments or otherwise, would be free to utilise such powers as are available to it under

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[105] Cf *South Atlantic Jazz Festival* paragraph 19.
[106] SARS supplementary heads paragraphs 32-33.
[107] Cf *Pretoria East Motors* paragraph 6.

fiscal legislation, to obtain such documents or related invoices from the Fund or the Insurer as it deems fit.

Conclusion

[121] For all of these reasons I have concluded, and the other members of the court agree, that the appeal must be upheld and the additional assessments set aside. Neither party sought costs. I therefore make the following order:

[121.1] The appeal is upheld.

[121.2] The additional assessments raised for the 05/2018, 07/2018, 07/2019 and 08/2020 VAT periods, are set aside.

[121.3] There is no order as to costs.

M Steenkamp
Acting Judge / President

Concur:
Y Mohamed (accounting member)
Adv M Titus (commercial member)

Coram: Steenkamp AJ
Accounting member, Mr Y Mohamed
Commercial member, Adv M Titus

Hearing: **18 and 20 June 2024.**

Further submissions: **8 and 22 July 2024**

Judgment: **11 February 2025**