CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 13/19

In the matter between:

BIG G RESTAURANTS (PTY) LIMITED Applicant

and

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

Neutral citation: *Big G Restaurants (Pty) Limited v Commissioner for the South African Revenue Service* [2020] ZACC 16

Coram: Froneman J, Jafta J, Khampepe J, Madlanga J, Majiedt J, Mhlantla J, Theron J, Tshiqi J and Victor AJ

Judgments: Madlanga J (majority): [1] to [32]
Majiedt J (separate concurring): [33] to [48]

Heard on: 12 November 2019

Decided on: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Constitutional Court website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 21 July 2020.

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the Tax Court):

1. Leave to appeal is granted.
2. The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

MADLANGA J (Jafta J, Khampepe J, Mhlantla J, Theron J, Tshiqi J and Victor AJ concurring):

[1] At issue is whether income derived from patrons of certain Spur and Panarottis restaurants is deductible by the Spur or Panarottis restaurateur in terms of section 24C(2) of the Income Tax Act.[1] At the relevant time section 24C provided:

> "(1) For purposes of this section, 'future expenditure' in relation to any year of assessment means an amount of expenditure which the Commissioner is satisfied will be incurred after the end of such year—
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> (a) in such manner that such amount will be allowed as a deduction from income in a subsequent year of assessment; or
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> (b) in respect of the acquisition of any asset in respect of which any deduction will be admissible under the provisions of the Act.
>
> (2) If the income of any taxpayer in any year of assessment includes or consists of an amount received by or accrued to him in terms of any contract and the Commissioner is satisfied that such amount will be utilised in whole or in part to finance future expenditure which will be incurred by the taxpayer in the

[1] 58 of 1962.

performance of his obligations under such contract, there shall be deducted in the determination of the taxpayer's taxable income for such year allowance (not exceeding the said amount) as the Commissioner may determine, in respect of so much or such future expenditure as in his opinion relates to the said amount.

(3) The amount of any allowance deducted under sub-section (2) in any year of assessment shall be deemed to be income received by or accrued to the taxpayer in the following year of assessment."

[2] The applicant, Big G Restaurants (Pty) Ltd (Big G), is a franchisee operating a number of Spur and Panarottis restaurants in terms of written franchise agreements concluded with a franchisor, the Spur Group (Pty) Ltd (Spur Group). It claimed from the respondent, the Commissioner of the South African Revenue Service (Commissioner), a section 24C(2) allowance for the 2011−2014 years of assessment for the future costs of revamping its restaurant premises. These costs were the direct result of a stipulation in the franchise agreements that Big G periodically revamp the premises. Big G claimed the allowance on the basis that for purposes of section 24C(2): income received from customers in terms of individual contracts of sale between it and its customers was income received in terms of the franchise agreements between it and the Spur Group; and costs of revamping the premises[2] constitute "future expenditure" as envisaged in section 24C of the Income Tax Act. Big G's stance was that the income from customers has to be used in whole or in part to finance the inevitable future revamping expenditure which will be incurred by it in the performance of its obligations under the franchise agreements.

[2] The relevant clause reads:

"L. RESTAURANT IMAGE AND OPERATING STANDARDS

L.1 The franchisee agrees:

. . .

L.1.4 to upgrade and / or refurbish the Restaurant at reasonable intervals determined by the franchisor to reflect changes in the image, design, format or operation of Steak Ranch Restaurants introduced by the franchisor from time to time and required of new Spur Steak Ranch Restaurant franchisees subject to approval by the franchisor of detailed plans and specifications for all construction, repair or re-fixturing in connection with such upgrading or re-modelling."

[3] The Commissioner disallowed the allowance and raised an additional assessment for the 2011−2014 years of assessment. The substance of why he did so is this: the income in respect of which an allowance is claimed must have accrued in terms of the same contract that imposes the future expenditure in respect of which the allowance is being claimed; the income in respect of which Big G was claiming the allowance was income that accrued in terms of contracts concluded by it with individual customers at its restaurants; the future expenditure is not imposed by those contracts; and, that the future expenditure is imposed by different contracts, these being the franchise agreements between Big G and the Spur Group.

[4] An objection to this additional assessment was unsuccessful. Big G appealed to the Tax Court.[3] In a stated case the parties asked the Tax Court to determine two issues, namely—

(a) whether the income received by Big G from operating the franchise businesses includes or consists of any amount received or accrued to Big G in terms of the franchise agreements as envisaged in section 24C of the Income Tax Act; and

(b) whether the expenditure required to refurbish or upgrade is incurred by Big G "in the performance of the taxpayer's obligations under *such contract*" as envisaged in section 24C.

[5] These questions are interlinked. I say so because under section 24C the contract in terms of which income is received or accrues (income-earning contract[4]) must be the same contract that imposes the obligations the performance of which is to be financed with that income (obligation-imposing contract[5]).

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[3] *B v The Commissioner for the South African Revenue Service* 2017 JDR 1735 (WCC) (Tax Court judgment).

[4] This is a term used in the Supreme Court of Appeal judgment at para 14, *Commissioner for the South African Revenue Service v Big G Restaurants (Pty) Ltd* [2018] ZASCA 179; 2019 (3) SA 90 (SCA).

[5] This too is a term used in the Supreme Court of Appeal judgment id at para 14.

[6] The Tax Court answered the questions in Big G's favour. Paraphrased, its reasoning was that the franchise agreements imposed an obligation on Big G to actively provide and sell meals to customers. Although customers are not parties to those agreements, the proximate cause of those sales is this obligation. In each case this obligation appeared in the same contract that contains the obligation to refurbish the premises. The potential to refurbish is the future expenditure envisaged in section 24C(2). Consequently, the Tax Court set aside the additional assessments raised by the Commissioner. With leave of the Tax Court, the Commissioner appealed to the Supreme Court of Appeal.

[7] The Supreme Court of Appeal upheld the appeal and set aside the decision of the Tax Court. In brief, it reasoned that Big G receives income as a result of the contracts it concludes with individual patrons who come into its restaurants to buy food. That income does not accrue in terms of the franchise agreements.

[8] Big G now seeks leave from us to appeal against the Supreme Court of Appeal judgment. It submits that the matter turns on the interpretation of the words "in terms of" in section 24C. It contends that the general principles of interpretation require a "unitary exercise" of interpretation, which whilst loyal to the text of a document, must make commercial sense. It submits that the interpretation it proffers is the only interpretation that is business-like, consistent with the language of the section and does not undermine the purpose of section 24C. Big G also engages in an interpretation of the franchise agreements and the contracts of sale of food to customers in an attempt to demonstrate that section 24C does, indeed, find application.

[9] Big G pegs this Court's jurisdiction on section 167(3)(b)(ii).[6] It contends that the matter raises an arguable point of law of general public importance which ought to be considered by this Court.

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[6] Section 167(3)(b)(ii) of the Constitution provides:

> "The Constitutional Court—

[10] The Commissioner argues that Big G's case is unsustainable. In this regard, he supports the reasoning of the Supreme Court of Appeal. On jurisdiction he takes issue with the submission that this Court's jurisdiction under section 167(3)(b)(ii) is engaged. According to him, this matter does not transcend the narrow interests of Big G and does not implicate the interests of a significant part of the general public.[7]

[11] Do we have jurisdiction? I believe we do. This matter involves the interpretation of the franchise agreements and the individual contracts of sale of food. In this regard, the question is whether the franchise agreements and the contracts of sale of food are so interlinked that the sale of food income may be held to be income that accrues in terms of each franchise contract; each franchise agreement, of course, being the contract that imposes the obligation to revamp in future and thus creates the future expenditure. This interpretative question is a quintessential point of law. This question is also closely bound up with the interpretation of section 24C(2): what is the nature of the contract envisaged in the section? This element of interpretation adds to the legal character of the question to be determined.

[12] Is the question arguable? In *Paulsen* we held:

> "The notion that a point of law is arguable entails some degree of merit in the argument. Although the argument need not, of necessity, be convincing at this stage, it must have a measure of plausibility. . . . [T]he word 'arguable' is used 'in the sense that there is substance in the argument advanced'."[8]

. . .

(b) may decide—

. . .

(ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court . . ."

[7] Compare *Paulsen v Slip Knot Investments 777 (Pty) Ltd* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) at para 26.

[8] *Paulsen* above n 7 at para 21.

[13] Big G's point meets this test. The well-reasoned judgment of the Tax Court is indication enough in this regard.

[14] The point is of general public importance. It is hardly likely that within the Spur Group Big G's franchise agreements are unique. Also, we can take judicial notice of the obvious fact that Spur restaurants in particular – not so much Panarottis restaurants – are spread across the length and breadth of South Africa. So, a determination of the contested issue is likely to affect Spur franchisees throughout South Africa. The issue "transcend[s] the narrow interests of the litigants and implicate[s] the interest of a significant part of the general public". That general public is the several other Spur franchisees spread across South Africa.[9]

[15] Certainty is required on this point of law and the point bears reasonable prospects of success. For those reasons, the matter ought to be considered by this Court.

[16] I carefully and specifically link the relevance of interpreting section 24C(2) to the legal question of interpreting the contracts so that this judgment should not be read to say it is now open season for appeals on the interpretation of any provision of the Income Tax Act to be brought to this Court.

[17] Leave to appeal must be granted.

[18] At the time, section 24C(2) provided that "the income . . . includes or consists of an amount received by or accrued to [the taxpayer] in terms of *any contract* and the Commissioner is satisfied that such amount will be utilised in whole or in part to finance future expenditure which will be incurred by the taxpayer in the performance of [her or] his obligations under *such contract*". (Emphasis added). On my interpretation, it is a requirement of the section that the contract in terms of which the income that is to

[9] Id at para 26.

finance future expenditure is received or accrues must be the *same* contract under which the expenditure is incurred. So, there is a requirement of "sameness". But I do not read the sameness requirement to connote that there must, for example, in the case of a written contract, be one piece of paper stipulating for the earning of income and the imposition of future expenditure. Two or more contracts may be so inextricably linked that they may satisfy this requirement.

[19] In oral argument Big G's counsel conceded that Big G does not make income until customers start walking in. That concession was well-made. To meet the requirement of the section, Big G submitted that the countless contracts of sale of food are, and have to be read as, part of the franchise agreement. So read, income earned in terms of the sale of food contracts is income earned in terms of the franchise agreement. For a number of reasons, in particular those proffered by the Tax Court, Big G submitted that the sale of food contracts do satisfy this requirement of sameness. Do they? In answering that question, I must deal with the Tax Court's reasoning. I must do so because Big G placed strong reliance on it.

[20] The Tax Court relied on a number of terms of the franchise agreement. One is clause T.16. In terms of this clause the franchisor may cancel the franchise agreement if the franchisee fails to actively operate the franchise business. The Tax Court and Big G read this to mean that the franchise agreement itself imposes an obligation on the franchisee to sell food, something which "constitutes [the franchisee's] sole business in terms of that agreement".[10] The Tax Court concludes this point by saying "[t]he income generated from the sale of those meals is of course the same income that accrues to the taxpayer".[11] The Tax Court also placed reliance on clause E.5 of the franchise agreement which requires the franchisee to "continuously exert its best efforts to promote and enhance the business of the restaurant". The Court read this to support the

[10] Tax Court judgment above n 3 at para 9.

[11] Id.

"inference that an obligation is imposed on the taxpayer [by the franchise agreement] to actively provide meals to its customers".[12]

[21] At first blush this is compelling. But it does not bear scrutiny. A useful way of demonstrating this is using, as comparators, restaurateurs who are not operating under a franchise agreement (unattached restaurateurs). If an unattached restaurateur does not sell food, the business will fail. If serious about the business, the unattached restaurateur has an obligation – call it self-imposed – to make sure that the business succeeds. At the centre of that obligation is selling sufficient volumes of food. In substance this obligation is exactly the same as that of a Spur or Panarottis franchisee.

[22] The business of both will fail if they do not sell food. Without question, income derived from the sale of food by the unattached restaurateur does not entitle her or him to the section 24C(2) allowance. If I must explain, that is so for the simple reason that there is no contract in terms of which the unattached restaurateur has to fund future expenditure from income derived from that same contract. Must a franchisee derive the benefit of the allowance purely because there is the interposition of a franchise agreement which tells the franchisee to do something she or he would have had to do anyway? I think not. An unattached restaurateur faces the same fate as the franchisee if she or he does not run her or his restaurant in a business-like manner: the business will fail. The two are similarly placed and have the same obligation.

[23] The Tax Court then referred to a collection of other clauses of the franchise agreement that dictate a host of other obligations like—

> "the branded products it must use, how its restaurant must be constructed in accordance with the franchisor's requirements, how its staff is to be trained, supervised and even replaced at the franchisor's election, the prices that it can charge, the monthly franchise fee payable, that [the franchisee] must maintain the restaurant in such manner as determined by the franchisor, upgrade and / or refurbish it . . ., play only pre-recorded

[12] Id at para 12.

> music approved by the franchisor, only offer food and beverage items approved by the franchisor, operate during business hours specified by the franchisor, and contribute to the franchisor's marketing fund in the manner specified."[13]

[24] What this quoted detail is about is the manner in which the franchise business is to be conducted. It is understandable why a franchisor insists on how the franchise business must be run. Amongst others, the franchisor wants to maintain standards and its goodwill. That is not an end in itself. Concomitantly, the franchisor wants to guarantee returns for itself on the franchise agreement; a badly run franchise business may well mean less or no income for the franchisor. It makes sense, therefore, that the franchisor must insist on certain minimum or tried and tested standards and requirements. As sometimes is the case with businesses, there may be additions or subtractions to the model. All things being equal, what benefits the franchisor must redound to the benefit of the franchisee as well. After all, the franchisee is in the business to make money. The franchisee's income will also be affected negatively if the franchise business is badly run.

[25] An unattached restaurateur also has her or his personalised requirements on how to operate the unattached restaurant. That may be with a view to building or maintaining goodwill and a patronage base and guaranteeing acceptable levels of income. From the perspective of the two categories of restaurateurs – whether unattached or operating in terms of franchise agreements – the purpose of operating restaurants in a business-like manner is the same. It escapes me why – just because of terms imposed by franchisors in the one category – the situation of the two categories should be any different for purposes of section 24C. In substance, I see no difference at all.

[26] The Tax Court and Big G also relied on clauses that oblige the franchisee to allow the franchisor access to the franchisee's financial information and to information on the franchisee's computer system. That reliance is misplaced. The aim of these

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[13] Id at para 13.

clauses is less about the generation of income by the franchisee but more about the protection of the franchisor's interest. In any event, as I have said, even if this had something to do with the franchisee's generation of income, that is still not income of a nature envisaged in section 24C.

[27] Big G emphasised that it is in a similar position as building contractors and manufacturers for whose benefit section 24C was originally intended.[14] It then made the point that – if the allowance were to be denied – it would find it difficult to perform its periodic upgrade or refurbishment obligations under the franchise agreement. If her or his restaurant is not to ultimately become a dump that eventually fails, an unattached restaurateur also has obligations that relate to the upkeep of the restaurant. She or he may also face the same difficulty Big G is referring to. The magnitude and frequency of expenditure relating to upkeep will depend on a variety of factors. A few examples of these are the level at which the restaurant is operating, the size of the restaurant and how busy it is. An unattached so-called fine dining restaurant may even have standards that are more exacting and costly than those of a Spur or Panarottis restaurant. Thus in substance, I see no principled basis which sets apart restaurants operated under Spur or Panarottis franchise agreements.

[28] It would be absurd in the extreme to allow Big G to enjoy the benefit of an allowance under section 24C whilst denying it to unattached restaurateurs who, as I find, are similarly placed.[15] Likewise, an interpretation that gives rise to that differential treatment of unattached restaurateurs would be unjust. An interpretation that avoids an injustice should be preferred to one that does the opposite.[16]

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[14] The parties were agreed on the original purpose of the section.

[15] Compare *SATAWU v Garvas* [2012] ZACC 13; 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC) where it was held at para 37:

> "[A]n interpretation of a statutory provision that gives rise to an absurdity or irrationality should be avoided where there is another reasonable construction which may be given to that provision."

[16] Compare *Liesching v S* [2016] ZACC 41; 2017 (2) SACR 193 (CC); 2017 (4) BCLR 454 (CC). There the Court had this to say at para 33:

[29] In sum, I am not satisfied that Big G has been able to place the contracts in terms of which it earns an income from its customers within the ambit of the income-earning contract envisaged in section 24C. And, quite clearly, the obligations that Big G has to perform are imposed, not by the sale of food contracts, but by the franchise agreements. This lack of correlation between the income-earning contracts and obligation-imposing contracts plainly makes section 24C inapplicable.

[30] It is not as though Big G will not derive a benefit from expending monies towards its upgrade or refurbishment obligations under the franchise agreements. It will be entitled to a deduction in terms of section 11 of the Income Tax Act. It is just that it will not be able to make an upfront deduction under section 24C.

[31] Thus the questions in the stated case must be answered in the Commissioner's favour.

[32] The following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed with costs, including the costs of two counsel.

MAJIEDT J (Froneman J concurring):

[33] I have had the pleasure of reading the succinct, well-reasoned judgment of my colleague, Madlanga J (the main judgment). While I support the outcome and proposed order, regrettably I am unable to support his finding that this matter engages this Court's jurisdiction. I agree that Big G must fail on the merits, but in my view, we do not get

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"If a defined word or phrase is used more than once in the same statute it must be given the same meaning unless the statutory definition would result in such injustice or incongruity or absurdity as to lead to the conclusion that the Legislature could never have intended the statutory definition to apply."

there due to the antecedent jurisdiction hurdle. The application must be dismissed for lack of jurisdiction and costs must follow the result. In what follows, I adopt the factual matrix and nomenclature of the main judgment. I restrict the narration of the facts to the essential and to the aspects which bear emphasis.

[34] The Commissioner's disallowance of the section 24C allowance claimed by Big G resulted in an additional assessment, excluding the claimed allowance. Big G objected to the additional assessment and the Commissioner disallowed the objection. Big G appealed against this disallowance and, having failed to resolve this issue,[17] the matter was referred to the Tax Court for its adjudication. As appears in the main judgment, the matter came before the Tax Court as a stated case, with the request that it resolves the two issues outlined in the main judgment.[18]

[35] There are two issues raised in this matter. The first issue concerns the proper interpretation of the words "in terms of any contract" in section 24C(2) and, the second issue is whether the patron and franchise contracts should be interpreted as constituting a "contract" for purposes of this section. The first issue conceivably may be a constitutional or legal question which engages this Court's jurisdiction but, as will be shown shortly, it does not fulfil the requirements of the Constitution to qualify in that regard. The second issue does not involve a constitutional or legal question that would engage this Court's jurisdiction. It merely involves the interpretation of two contracts to determine whether the relevant section applies to them. The test for jurisdiction in section 167(3)(b) of the Constitution is twofold.[19] I restrict myself here to the question whether this Court has jurisdiction in terms of section 167(3)(b)(ii) of the Constitution, that is, whether this matter raises an arguable point of law of general public importance. Although Big G faintly raised an alleged deprivation of property as a potential constitutional issue, it has expressly abandoned this unpleaded afterthought. In the absence of a constitutional issue that arises in the interpretation of legislation, this

[17] In terms of the Alternative Dispute Resolution process set out in Part C of the Tax Court Rules.

[18] See [4] of the main judgment.

[19] See above n 6.

Court's jurisdiction will not be engaged. It is well-established that jurisdiction must be determined on the pleadings.[20] In relation to the other leg that engages this Court's jurisdiction, an arguable point of law postulates a dual enquiry: is the point one of law and is it arguable?[21] Then follows the next enquiry: is it of general public importance?

[36] *Paulsen,* decided after the expansion of this Court's jurisdiction through the Seventeenth Amendment of the Constitution in section 167(3)(b)(ii), made reference to earlier cases and did not elucidate further, as it was not necessary to do so.[22] In *Tiekiedraai*,[23] this Court confirmed its earlier approach in *Paulsen*. *Tiekiedraai* concerned a right of pre-emption in a lease agreement. The applicant, Tiekiedraai Eiendomme, contended that this Court's jurisdiction was engaged, as the interpretation of that particular clause concerning the right of pre-emption (clause 21 in the lease) raised an arguable point of law of general public importance as envisaged in section 167(3)(b)(ii) of the Constitution.[24] Writing for a unanimous court, Cameron J held that—

> "Tiekiedraai cannot be correct that the contractual interpretation before the High Court and the Supreme Court of Appeal raises an arguable point of law of general public importance. *The sole issue in clause 21 is the interpretation of its specific wording. Nothing of general or wider importance flows from it*."[25]

[37] The fundamental difficulty for Big G is that here we are simply concerned, with an interpretation of section 24C, more particularly the phrase "in terms of" contained in section 24C(2). Big G's case is that an interpretation should be followed which permits

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[20] *General Council of the Bar of South Africa v Jiba* [2019] ZACC 23; 2019 JDR 1194 (CC); 2019 (8) BCLR 919 (CC) at paras 38-9; *Mbatha v University of Zululand* [2013] ZACC 43; (2014) 35 ILJ 349 (CC); 2014 (2) BCLR 123 (CC) at para 157; and *Gcaba v Minister of Safety and Security* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC) at para 75.

[21] *Paulsen* above n 7 at paras 20-1.

[22] Id at para 20. This Court held that there were clear points of law in that matter.

[23] *Tiekiedraai Eiendomme (Pty) Limited v Shell South African Marketing (Pty) Limited* [2019] ZACC 14; 2019 JDR 0719 (CC); 2019 (7) BCLR 850 (CC).

[24] Id at para 10.

[25] Id at para 13.

"reliance . . . *where the facts show* that there are inextricably linked contracts, such as the present." This submission amounts to a concession that an interpretation of the two agreements must be done on the facts, which were in any event, common cause.

[38] In essence, we are concerned here with two separate, self-standing contracts; namely, the patron contract and the franchise contract. That has remained common cause throughout. Big G contends that, *on the facts*, these two contracts are so inextricably linked that it matters not that the income (which will eventually be employed to effect the future improvements to refurbish the restaurants) is derived from the patron contracts and not the franchise agreement. Big G states that—

> "whether contracts are inextricably linked or income derived 'pursuant to' a franchise agreement is, in all cases, *a question of fact* and there can be no concern that a wider interpretation would open any floodgates or abuse of the section 24C allowance".

[39] So, from Big G's own mouth, we are told that this is a factual enquiry and nothing more. It calls for a purpose driven and fact-specific approach to the interpretation of the phrase "in terms of". Big G says further that—

> "a taxpayer wishing to rely on the section must establish – *on the facts* of the contract in question – that there is an inexorable link between the contract in terms of which the income is produced and the contract in terms of which the obligation is imposed such that the income is produced pursuant thereto."

[40] Here, the facts were not in issue and the case was presented and argued in the Tax Court as a stated case on common cause facts. It is patently obvious that there is no law involved in determining—

(a) from which contract the income is derived (Big G concedes that it is from the patron contract); and

(b) whether the two contracts are so inextricably linked that it matters not from which one the income is derived.

[41] These are purely factual enquiries and nothing more. The attempt to dress them up as questions of law is untenable and ought to be rejected without more. That leaves the enquiry regarding the interpretation of section 24C.

[42] What requires determination is whether a fact-specific interpretation of an unambiguous term in the tax statute engages our jurisdiction. I think not. The meaning of the phrase "in terms of" is plain. It can only, in its ordinary meaning, refer to a single contract. In relevant part, section 24C(2) reads—

> "the income . . . includes or consists of an amount received by or accrued to [the taxpayer] in terms of any contract and the Commissioner is satisfied that such amount will be utilised in whole or in part to finance further expenditure which will be incurred by the taxpayer in the performance of his obligations under such contract".

[43] The phrase "any contract" and "such contract" self-evidently only refer to a single contract. Ultimately then, what we are called to determine, on the facts, is which contract applies here.

[44] It cannot be that an enquiry into (a) which of two contracts give rise to the income, or (b) whether they can be regarded as a single contract for the purpose of interpreting the phrase "in terms of", amounts to a constitutional issue or an arguable point of law of general public importance. The meaning of that phrase seems to me to be quite obvious. It plainly equates to "concerning", "regarding", "relating to", "pertaining to", or "with regard to". The Supreme Court of Appeal's reasoning and conclusion on this meaning cannot be faulted. The main judgment also accepts that reasoning and conclusion, preferring it over the contrary finding of the Tax Court. Once that finding is made, there is no basis on which it can be contended that an enquiry into a narrow or wide interpretation of the phrase constitutes a jurisdictional basis for hearing the matter. I therefore conclude that, as is the case with the interpretation of the two agreements, the interpretation of "in terms of" in section 24C(2) involves no law, but simply facts.

[45] The Tax Court is routinely seized with the need to determine whether a particular factual matrix fits within the ambit of a tax provision. But it cannot, without more, engage this Court's jurisdiction under section 167(3)(b)(ii) as an arguable point of law of general public importance, as concluded in the main judgment. The main judgment finds that determining whether the income that accrues is income in respect of which the section 24C(2) allowance may be deducted, is a legal question. And it states that the ensuing question of the interlink between the contracts "interpretative question is a quintessential point of law."[26] I respectfully disagree. These are plainly questions of fact. That approach will, with respect, result in a deluge of litigants claiming that this Court has jurisdiction in matters which involve purely factual determinations.

[46] Last, even if this issue is one of law, it cannot be said to be of general public importance. *Paulsen* is the first instance where this Court laid down a standard as to when a point of law would qualify as being of general public importance. Borrowing from the Kenyan Constitution and the English courts, Madlanga J concluded that—

> "for a matter to be of general public importance, it must transcend the narrow interests of the litigants and implicate the interest of a significant part of the general public. It will serve a litigant well to identify in clear language what it is that makes the point of law one of general public importance."[27]

[47] I have alluded above to how much emphasis Big G has placed on the fact specific nature of this enquiry.[28] It has repeatedly stated that every taxpayer will have to persuade the Commissioner that, based on the particular set of facts, she or he or it falls within the purview of section 24C, thus qualifying for that allowance. In my view, it matters not that we are dealing here with a taxpayer (Big G) who is a Spur franchisee. No evidence was adduced that all franchisee agreements with the franchisor are identical. There clearly cannot be a "one size fits all" approach. Moreover, and in any

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[26] Main judgment at [11].

[27] *Paulsen* above n 7 at para 26.

[28] See [38] and [39].

event, that was never Big G's case. It has consistently adopted the contrary, fact-specific approach outlined above.

[48] In conclusion, save for arguability, this matter falls short in every respect of the jurisdictional standard set out in section 167(3)(b)(ii). It can be said to be arguable, due to the conflicting judgments of the Tax Court and the Supreme Court of Appeal, but even if it does entail a point of law, it is not one of general public importance. I would therefore dismiss the application for leave to appeal on the basis that this matter does not engage this Court's jurisdiction and issue a concomitant costs order.

For the Applicant:	A Gabriel SC, M du Plessis SC and T Palmer instructed by Potgieter Joubert Incorporated
For the Respondent:	K W Lüderitz SC and K D Magano instructed by RW Attorneys