



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**  
**MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF**  
**APPEAL**

**From:** The Registrar, Supreme Court of Appeal

**Date:** 26 March 2021

**Status:** Immediate

*The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal*

*Massmart Holdings Limited v The Commissioner for the South African Revenue Service (Case no 84/2020) [2021] ZASCA 27 (26 March 2021)*

---

Today the Supreme Court of Appeal (SCA) dismissed an appeal against an order of the Tax Court of South Africa, Gauteng (Tax Court) with costs, including the costs of two counsel.

In 2000, the appellant, Massmart Holdings Limited (Massmart) resolved to adopt and implement a share incentive scheme for its key management personnel. The scheme was to be conducted through the Massmart Holdings Limited Employee Share Trust (the Trust). On 12 June 2000, the Trust Deed for the Trust (the trust deed) was adopted by Massmart.

Before the Tax Court, Massmart sought to claim capital losses of some R954 million for the period 2007 to 2013 by virtue of its dealings with the Trust, which the respondent, the Commissioner for the South African Revenue Service (SARS), had disallowed. Massmart's appeal to the Tax Court was dismissed and the assessments raised by SARS confirmed.

Massmart initially claimed the loss as its capital loss, on the basis that it was a vested beneficiary of the Trust. Massmart subsequently altered its case to contend that when it issued instructions to the trustees of the Trust to offer share options to specific employees that amounted to an asset for Capital Gains Tax (CGT) purposes. Massmart called three witnesses: Mr Hayward, its CEO and, at the relevant time, its CFO; Mr Franklin, one of the first trustees of the Trust; and Ms Farquhar, the assistant to the share Trust administrator. The evidence of the three witnesses appeared to have bolstered SARS' contention that the notion that the so-called right constituted an asset was illusory and an ex post facto reconstruction by Massmart to establish a basis for a claim for capital gains.

In consequence, the SCA held that there could be no loss to speak of as what Massmart purported to do was to account for the Trust's losses in its books. In the circumstances the appeal was accordingly dismissed with costs, including those of two counsel.

~~~~ends~~~~