IN THE TAX COURT OF SOUTH AFRICA
(HELD AT CAPE TOWN)

Case No.: **14287**

In the matter between:

ABC PROPRIETARY LIMITED	Appellant
and	
THE COMMISIONER FOR THE SOUTH AFRICAN REVENUE SERVICES	Respondent

CORAM:	**HACK, AJ**
	MR B R HILLIARD (Assessor)
	MR Q S JOSEPH (Assessor)
DATE OF HEARING:	**18 and 19 March 2019**
DELIVERED:	**12 June 2019**

JUDGMENT

HACK, A J:

[1] This matter concerns the application of various agreements, being conventions and amending protocols, between the Republic of South Africa and other countries entered into for the avoidance of double taxation and the prevention of fiscal evasion, with respect to taxes on income and or income and capital (referred to herein as a "double taxation agreements" or "DTA"). I refer herein to South Africa without specific references to the individual entities, authorities or departments, unless necessary.

[2] Appellant both resides and is a registered tax payer in South Africa. The owner of all its shares is a company both resident and a taxpayer in the Kingdom of the Netherlands (hereinafter "the Netherlands"). The appellant declared dividends in April 2012 and October 2012 and the shareholder made declarations and undertakings, which were provided to the respondent on 22 March 2012, that the appellant was liable to pay 5% tax on the dividends in accordance with Article 10(2) of the DTA (as amended by protocal) between South Africa and the Netherlands. The amounts were paid by the appellant to the respondent. Subsequently the appellant and its shareholder took the view that the aforesaid declarations and undertakings were incorrect. On 12 August 2013 a declaration and undertaking given by the shareholder was presented to the respondent recording that the liability for a subsequent dividend in March 2013 is 0% in accordance with the provisions of Article 10(10) of the DTA. On 25 November 2014 appellant addressed correspondence to the respondent seeking a refund of the tax paid on the previous dividends declared since 1 April 2012. This was in terms of section 64L(3) of the Income Tax Act, Act 58 of 1962. The terms of this provision are common cause. On 24 March 2016 the respondent rejected this claim for a refund. Respondent rejected the revised interpretation of the DTA which the taxpayer now sought to advance. On 11 May 2016 the appellant filed a formal objection to each of the rejections of the respective claims which the respondent refused to refund, supported by a letter in explanation. The respondent replied to the objections in a single document on 11 July 2016 in which it ruled that the objections are disallowed in full. Thereafter, on 23 August 2016, the appellant lodged its notice of appeal against the disallowance of the objection which it had lodged, with a covering letter. A statement of grounds of assessment and opposing of appeal was filed by the respondent. Appellant filed a statement of its grounds of appeal. All these aforesaid documents comprise the dossier which in civil trial parlance would be the pleadings of the case before the court.

[3] At the hearing the court was advised that the parties had agreed on a statement of agreed facts and that oral evidence would be led by the respondent of one witness, Ms X. She was a significant role player in the events that are relevant. The court was also advised that the parties had furthermore agreed to refer to a bundle of documents. The statements of

agreed facts, the oral evidence and the contents of the documents, it was agreed, would constitute the evidence before the court.

[4] The material and relevant evidence led by the respondent was that some time prior to September 2006, the South African government took the decision to significantly change the corporate tax structure of the country. The decision was made to substitute the existing secondary tax on companies which was payable by a resident company when it paid a dividend to a shareholder to one in terms of which the tax liability was that of the shareholder who received the dividend. To facilitate the collection of the tax, a system providing for a withholding tax mechanism, was to be introduced. This policy decision was to bring the South African corporate tax regime into line with other countries. In doing so, however, the country was creating a new tax which would affect foreign companies operating and or investing in South Africa. The countries in which these companies reside look to these companies for tax income. The policy change of South Africa required the implementation of new terms in international agreements so that South Africa could recover its portion of taxation from foreign shareholders. Accordingly a number of agreements were concluded or more specifically existing agreements were amended by protocols. The stated objective was to conclude agreements in terms of which the tax rate payable in South Africa would be 5% if the South African company was wholly owned by a foreign resident. This was in line with the prevailing norm. Other rates applied under other circumstances but a detailed discussion thereof is not relevant. Having made the policy decision South African government departments commenced a course of action to implement the decision.

[5] South Africa identified 10 countries with whom it needed to revise agreements. Those that are relevant to this matter are: the Netherlands, Sweden and Kuwait. Negotiations took place with each individual country. Each have different relationships with South Africa and different interests which they would wish to pursue, preserve or improve. So it was explained in evidence that while negotiating what would be an appropriate tax rate on dividends other matters were placed on the agenda to form part of the terms to be agreed upon. While the documents comprising these treaties or amending protocols do in various respect have similar articles it is necessary to appreciate and understand that this was therefore not a simple process of getting each country to rubber stamp a single treaty document. Each agreement was individually negotiated and contained individual terms. Therefore, to determine the rights and obligations of each contracting country, consideration must be given to the individual terms of each agreement. What is however also important is the process by which such agreements come into formal existence. Each county differs. So it is not simply a matter of signing a document. Each country, including South Africa has its own procedures to ratify and finally bring into being an enforceable, binding agreement. The time line of when each agreement came into force is important to an understanding of

the dispute between the parties herein. In the hearing the emphasis was placed on Kuwait. It should be noted there was also references in the dossier to other countries (Cyprus and Oman) but this need not be dealt with herein.

[6] An overview of the relevant agreements and the time lines is as follows:

a. On 24 May 1995 an agreement came into being with Sweden;

b. On 17 February 2004 and agreement was concluded with Kuwait which came into force on 25 April 2006;

c. On 10 October 2005 an agreement was concluded with the Netherlands.

d. During 2006 the decision was taken to impose taxation on dividends and the process commenced to negotiate amendments to existing treaties where required. Of material relevance is that individual negotiations took place with the Netherlands, Sweden and Kuwait;

e. On 8 July 2008 agreement was reach with the Netherlands to provide for 5% taxation in South Africa on dividends of the category in question herein and the original agreement with the amending protocal came into force on 28 December 2008.

f. On 7 July 2010 agreement was reached with Sweden to provide for 5% taxation in South Africa on dividends of the category in question herein and the amending protocal came into force on 18 March 2012.

g. Ms X stated in her evidence that negotiations with Kuwait were concluded but by the date of the hearing before us Kuwait had not yet ratified the agreement and therefore the amendment of the agreement with Kuwait was not in force. The existing agreement with Kuwait (sub-paragraph (b) above) which came into force on 25 April 2006 provides for 0% taxation in South Africa on dividends. That remained the terms binding on South Africa despite agreement having been reached to amend them at the time South Africa took the steps to change its tax regime.

h. Despite the fact that the Government of Kuwait (and certain other countries) had not yet ratified the amendment of the double taxation agreements between them and South Africa, the South African government proceeded to change the law on taxation on company dividends effective on 1 April 2012.

[7] The appellant's case is that it is not liable to pay tax to South Africa on dividends paid to its Netherland's Shareholder, in accordance with the terms of the double taxation agreement between South Africa and the Netherlands. It is not disputed that the provisions that it relies on are subparagraphs (1); (2) and more importantly subparagraph (10) of article 10 which read as follows:

'Article 10. Dividend

(1) Dividends paid by a company which is resident of a Contracting State [South Africa[1]] to a resident of the other Contracting State [Netherlands] may be taxed in that other State [Netherlands].

(2) However, such dividends may also be taxed in the Contracting State [South Africa] of which the company paying the dividends is a resident and according to the laws of that State, but if the beneficial owner of the dividend is a resident of the other Contracting State [Netherlands], the tax so charged shall not exceed:

a. 5 percent of the gross amount of the dividends if the beneficial owner is a company which holds at least 10 percent of the capital of the company paying the dividends; or

b. 10 percent of the gross amount of the dividend in all other cases.

…

(10) If under any convention for the avoidance of double taxation concluded after the date of conclusion of this Convention between the Republic of South Africa and a third country, South Africa limits its taxation on dividends as contemplated in subparagraph (a) of paragraph 2 of this Article to a rate lower, including exemption from taxation or taxation on a reduced taxable base, than the rate provided for in subparagraph (a) of paragraph 2 of this Article, the same rate, the same exemption or the same reduced taxable base as provided for in the convention with that third State shall automatically apply in both Contracting States under this Convention as from the date of the entry into force of the convention with the third State.'

[8] The appellant says that it does not have to pay tax in South Africa because of the provisions of sub-paragraph 10 of article 10. The respondent says the appellant must pay tax to South Africa because of the provisions of article 10(2) a. If the respondent's contentions are correct, it is common cause, that the applicable proviso would be subparagraph **10(2)a** and not subparagraph **10(2)b** as the Netherland resident company holds more than 10 percent of the shares of the South African resident company, in fact it holds 100%.

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[1] The names are inserted wherever applicable herein to relate only to the place of residents of the parties in this specific matter.

[9] Appellant's case is founded on principles referred to as most favoured nation treatment (hereinafter further referred to as "MFN"). Such a provision is described by the International Law Commission as 'Most-favoured nation treatment is a treatment accorded by the granting State to the beneficiary State…not less favourable than treatment extend by the granting State to a third State…'. The reasons why the appellant submits it is not liable to pay tax in South Africa is because it is exempted therefrom by the provisions in subparagraph 10 of article 10. That contains a MFN clause. The averment is that subsequently to concluding the agreement with the Netherlands [i.e. after 8 July 2008], South Africa entered into an agreement with Sweden to vary an existing DTA agreement by protocal in terms of which it agreed to a rate lower, including exemption from taxation or taxation on a reduced taxable base, than the rate provided for in subparagraph (a) of paragraph 2 of the Netherland's DTA. The agreement with Sweden came into force on 18 March 2012. The provision in that agreement relied upon by appellant is subparagraph (1) of article 10 which appears and remains unchanged in the DTA and subparagraph (2) of article 10 which was changed by the protocal and more importantly subparagraph (6) of article 10 which was introduced by the protocal. The three paragraphs read as follows:

> 'Article 10. Dividend
>
> (1) Dividends paid by a company which is resident of a Contracting State [South Africa] to a resident of the other Contracting State [Sweden] may be taxed in that other State [Sweden].
>
> (2) However, such dividends may also be taxed in the Contracting State [South Africa] of which the company paying the dividends is a resident and according to the laws of that State, but if the beneficial owner of the dividend is a resident of the other Contracting State [Sweden], the tax so charged shall not exceed:
>
> a. 5 per cent of the gross amount of the dividends if the beneficial owner is a company (other than a partnership) which holds at least 10 per cent of the capital of the company paying the dividends; or
>
> b. 15 percent of the gross amount of the dividend in all other cases.
>
> This paragraph shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.
>
> …
>
> (6) If under any agreement or convention between Republic of South Africa and a third state, provides that South Africa shall exempt from tax dividends (either generally or in respect of specific categories of dividends) arising in South Africa, or limit the tax charged in South Africa on such dividends (either generally or in respect of specific categories of dividends) to a rate lower than that provided for in subparagraph (a) of paragraph 2, such exemption or lower rate shall automatically apply to dividends

> (either generally or in respect of those specific categories of dividends) arising in South Africa and beneficially owned by a resident of Sweden and dividends (either generally or in respect of those specific categories of dividends) arising in Sweden and beneficially owned by a resident of South Africa, under the same condition as if such exemption or lower rate had been specific in that subparagraph.'

[10] While they differ in various minor respects subparagraph 10 of article 10 of the South Africa and the Netherlands agreement and subparagraph 6 of article 10 of the South Africa and Sweden agreement there is one crucial difference and that is the presence of the words "after the date of conclusion of this convention" in the Netherlands agreement whereas there is nothing similar that suggest it is only a future provision which will trigger the provisions of subparagraph 6 of article 10 in the Sweden DTA.

[11] Appellant contends that the provision in subparagraph 6 of article 10 of the DTA between South Africa and Sweden was, immediately upon it coming into being, applicable because of a prior provision in the DTA between South Africa and Kuwait. The contention further is that when this occurred it then triggered the provision in the Netherlands DTA.

[12] As stated by Ms X, negotiations between South Africa and Kuwait to amend the DTA which was in force from 25 April 2006 so as to bring the tax arrangement in line with the other parties with whom South Africa has contracted, have been concluded. However Kuwait still has to take the final steps in terms of its domestic procedures to give effect to the agreement. So, as matters stood at the time of hearing, the agreement between South Africa and Kuwait remained on the terms as contained in the DTA of 25 April 2006. The relevant section thereof reads:

> 'Article 10. Dividends
>
> (1) Dividends paid by a company which is a resident of a Contracting State (South Africa) to a resident of the other Contracting State (Kuwait) who is the beneficial owner of such dividends shall be taxable only in the other Contracting State (Kuwait).'

[13] Therefore if the appellant's shareholder was resident in Kuwait no tax would be payable on any dividends in South Africa as the agreement currently stands between South Africa and Kuwait.

[14] In summary, therefore, the appellant says the contract between South Africa and the Netherlands provides that if any other contracting state is in the future given better terms, then those better terms also apply to the Netherlands. In so far as the contract with Sweden provides that if any other contracting state has better terms (whether existing or in the future) then those also apply to Sweden. In so far has Kuwait does have better terms, then Sweden is also entitled to the same terms and because Sweden has been benefitted by better terms

after the Netherlands contract was concluded with South Africa the Netherlands must also be given the better benefit. The assertion being therefore that resident companies of both the Netherlands and Sweden who receive dividends from a South African resident company are liable to pay taxes in the Netherlands and or Sweden but there is no liability on the company to make any payment of tax on the dividend to South Africa.

[15] The respondent disputes this contentions in respect of the agreement with the Netherlands on two grounds. Firstly the respondent contends the triggering of the MFN clause in Sweden by the provision of the Kuwait DTA does not amount to a limitation or change and therefore there can be no triggering of the MFN clause in the Netherlands DTA. This argument arises from the fact that in the various DTAs there are different rates of taxation applicable depending on the size (in percentages) of the shareholding of the non-South African country in the South African country. For example a company owing more than 25% of the South African company could be required to pay a lower or a higher rate than one who owns less than 25%. The contention by the respondent was that provisions in the Kuwait DTA, which subsequently became the same in the Sweden DTA amounted to no change in the tax liabilities of a company in Sweden. The evidence is that a shareholder in Sweden who was exempted by the importation of the Kuwait provisions happened already to be exempt in terms of the prior provision in Sweden. The argument then is that there was no change. There was no introduction of a new favoured nation status, so the argument went which could affect the Netherlands' DTA. This argument however related to one specific category of shareholders and not all of them. It related to the specific category of a shareholder holding more than 25% of the capital in a South African resident company which had already been exempted from paying any tax outside of Sweden. The introduction of nil tax on all categories introduced by the Kuwait DTA into Sweden did not affect that specific category but it affected all others. The others had been liable outside of Sweden for tax and the triggering of the Kuwait nil tax provision introduced a better or preferential treatment. I agree with the appellant's submission that the respondent's argument, in reliance on this factual matrix, stands to be rejected. While one category of shareholding might have experience no change in treatment the other categories did, including the one at issue in this matter, namely a category where the shareholder holds more than 10% of the shares. Such a shareholder in Sweden had a change in treatment. From having had to pay tax to South African of 5% it became exempted when Sweden became able to place reliance on the better treatment being afforded to Kuwait. Respondent's reliance on this ground therefore fails.

[16] Secondly the respondent says that regardless of the terms of the agreement with Sweden in relation to companies resident in Sweden, when it comes to the Netherlands the agreement with the Netherlands must be restrictively read to exclude any triggering of the MFN clause in Netherlands by the possibility that Sweden can rely on a prior contract with another contracting party. The contention by the respondent is that subparagraph (10) of clause 10 of the Netherlands agreement must be read as if it is restricted only to circumstances where preferential treatment is being afforded directly to another country in terms of subsequent (i.e. future agreements) and not indirectly through the operation of a provision in an agreement that is dependent upon the existence of another prior existing treaty.

[17] The respondent's case is that the court must consider the intention of South African and all the other relevant parties with whom it negotiated and contracted and then find that in interpreting the agreement with the Netherlands there must be imputed some provision in terms of which any other agreement and specifically the one with Sweden refers to only a 'future' better deal or treatment for its resident taxpayers.

[18] The respondent can be said to be contending that in interpreting the provisions of the agreement with the Netherlands the court must impute that in sub-paragraph 6 of article 10 of the DTA between South Africa and Sweden it should be read as containing something like or similar to the following bold and underlined words:

> '(6) If, **<u>in the future</u>** any agreement or convention between South Africa and a third state, provides that South Africa shall exempt from tax dividends (either generally or in respect of specific categories of dividends) arising in South Africa, or limit the tax charged in South Africa on such dividends (either generally or in respect of specific categories of dividends) to a rate lower than that provided for in subparagraph (a) of paragraph 2, such exemption or lower rate shall automatically apply to dividends (either generally or in respect of those specific categories of dividends) arising in South Africa and beneficially owned by a resident of Sweden and dividends (either generally or in respect of those specific categories of dividends) arising in Sweden and beneficially owned by a resident of South Africa, under the same condition as if such exemption or lower rate had been specific in that subparagraph.'

[19] The parties submitted, and it is correct, that DTA's have the force of statute in terms of section 108 of the Income Tax Act. While they might have the authority of a statute they remain however the product of an agreement and not legislative decision making. The question to be determined therefore requires this court to apply the legal principles relating to the interpretation of written agreements and more specifically those concluded in the realm of international law. The starting point is South African domestic law and then if appropriate private international law of which the primary source is the Vienna Convention on the Law of Treaties of 1969.

[20] Parties to a written agreement, who approach a court to determine the manner in which the terms of an agreement are to be applied, have differing views in regard to the interpretation of the terms recorded in the written document. It stands to reason that if they were in agreement they would not be before court. The clarity of the terms of the written recordal of an agreement fall in a continuum. On the one end of the spectrum they are entirely unambiguous, clear and detailed. On the other end they are vague, ambiguous and uncertain. Equally the manner in which a court determines such a dispute can also be described as being a continuum. The Supreme Court of Appeal has used the analogy of a pendulum. On the one hand the actual words used are strictly applied and on the other hand the words are a mere guide but what must be applied is the true intention of the parties. So there are potentially two difficulties in the interpretation of written agreements. Firstly, where does the written document appear on the continuum of accuracy? Secondly, what criteria on the continuum of the rules of interpretation, is the court to apply? As is generally the case there are no absolutes and each matter must be determined on its own facts. To quote from a case which will be referred to in detail below: 'It is unrealistic to expect of this court, or, indeed of any court, pronouncements that will end theoretical debates that have raged over many decades and settle for all time, terminology that will obviate confusion.'[2]

[21] In brief summary the appellant says that the terms of the three DTA agreement are clear, unambiguous and there is no scope to look at the intention of the parties or the consequences of the appellant's interpretation or reading of the agreements. It says that the respondent has resorted to emotive and other inappropriate arguments to try to persuade the court to find against the appellant. In particular it argues that the parties to the agreement are not the only affected individuals. The agreement affects a multitude of taxpayers including the appellant. The appellant has read the terms of the agreement, structured its affairs accordingly and there is not scope to penalise it by the imposition of additional words to the agreement so as to give effect to what the respondent calls the true intention of the parties or the avoidance of unexpected consequences. In other words the position of the appellant is to the one end of both the aforesaid continua. The agreement is clear and there is no justification not to enforce it accordance with its written terms.

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[2] *The City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association* [2019] 1 All SA 291 (SCA) at paragraph [60].

[22] The respondent, on the other hand, is confined to admit that the terms of the agreement are clear and unambiguous. It places the written agreement at the same end of the continuum as the appellant does. But it says the rules of interpretation which should be applied are those that fall closer to the end of the continuum which says the task of the court is to find the true intention of the parties and if the written words do not mirror that intention, the words should be either ignored, augmented and or supplemented to give effect to the true intention. In coming to a finding that the words do not reflect the true intention of the parties the court must consider whether the words result in absurd or unanticipated consequences or consequences that are contrary to what a contracting party and or all contracting parties were wanting to achieve. To that extent the respondent led evidence regarding what the intention of South Africa was in concluding the tax treaties and also that the Netherlands had the same intention.

[23] In summary therefore the respondent's case on this ground, is that South Africa made a decision to change its tax system in regard to the payment of tax on dividends. This was properly and legitimately motivated to bring it in line with other countries including in particular its principle trading partners. It studiously, timeously and with considerable effort renegotiated the terms of existing DTA agreements. The various amending protocols or new agreements contained terms which are virtually identical but some countries sought minor variations. When negotiations on all such amendments had been finally concluded South Africa amended its law. It anticipated that the countries, and in particular Kuwait, who had concluded agreements with South Africa would imminently ratify the agreements despite the fact that this had not yet happened. The oral evidence was that South African has vigorously used all possible avenues to remedy the situation. Respondent continued and argued that the appellant is now exploiting what is an entirely unanticipated, unforeseen and unfortunate occurrence to refuse to pay tax in South Africa despite the fact that the contracting parties (South Africa and the Netherlands) never meant this to happen. The consequences are potentially financially disastrous for South Africa. Respondent's case on this grounds relies on persuading the court that it needs to emphasize the true intentions of South Africa in entering into the agreements and act to prevent the consequences of what has or will occur as a result of the failure of Kuwait to ratify the protocal.

[24] As stated, the rules of interpretation may be described as being a continuum. Appellant relies on a position in this continuum which the respondent says is no longer applicable. Respondent quotes and relies extensively on the judgment of *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA). The judgment commences by referring to the then prevailing principles of interpretation or to use my analogy the prevailing position on the continuum, as being in accordance with the decision of *Coopers & Lybrand and Others v Bryant* 1995 (3) SA 761 (A). The court in

Bothma-Batho at page 499 says that the position in *Coopers* was as stated at paged 768 A-E of that judgment to be:

> 'The correct approach to the application of the 'golden rule' of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking to have regard:
>
> (1) to the context in which the word or phrase is used with its interrelation to contract as a whole, including the nature and purpose of the contract …
>
> (2) to the background circumstance which explain the genesis and purpose of the contract, ie to matters probably present to the minds of the parties when they contracted…
>
> (3) to apply extrinsic evidence regarding the surrounding circumstance when the language of the document is on the fact of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions.'

[25] The court in *Bothma-Batho* then continues at paragraph [12] to say:

> '[12] That summary is no longer consistent with the approach to interpretation now adopted by South African courts in relation to contracts or other documents, such as statutory instrument or patents. Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being, The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise'. Accordingly it is no longer helpful to refer to the earlier approach.'

The court based its aforesaid conclusions on a series of cases culminating in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

[26] On the basis of this authority the respondent is asking this court to find that the appellant cannot rely on the words of the Sweden DTA as triggering the provisions of the Netherlands MFN. The respondent is effectively asking the court to find that the Netherlands treaty must be interpreted that any other agreement which gives better treatment to its residents must be in respect of the future only and not the past. Therefore, on the authority of the above quoted passage, the court must, not only look at the words used but must inevitably also look to the intention of the parties utilising the various criteria comprising 'the circumstances in which the document came into being'. In doing that the court must find that the change of South African tax regime was the purpose of the agreement and if they were able, by some form of crystal ball, foresee that Kuwait would not timeously ratify its

agreement with South Africa they would have included more precise provisions in the treaties and the agreements must be read as if they were incorporated.

[27] Appellant submit that the aforesaid authority has been redefined by a recent decision *The City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association* [2019] 1 All SA 291 (SCA) and referred the court to the following paragraphs:.

> '[62] Since this court's decision in *Endumeni*, we are seeing a spate of cases in which evidence is allowed to be led in trial courts beyond the ambit of what is set out in the preceding paragraph. We are increasingly seeing witnesses testifying about the meaning to be attributed to words in legislation and in written agreements. That is true of the present case in which, in addition, evidence was led about negotiations leading up to the conclusions of the ESA.
>
> [63] This court has consistently stated that in the interpretation exercise the point of departure is the language of the document in question. Without the written text there would be no interpretive exercise. In cases of this nature, the written text is what is presented as the basis for a justiciable issue. No practical purpose is served by further debate about whether evidence by the parties about what they intended or understood the words to mean serves the purpose of properly arriving at a decision on what the parties intended as contended for by those who favour a subjective approach, nor is it in juxtaposition helpful to continue to debate the correctness of the assertion that it will only lead to self-serving statements by the contesting parties. Courts are called upon to adjudicate in cases where these [*sic*] is *dissénsus*. As a matter of policy, courts have chosen to keep the admission of evidence within manageable bounds. This court has seen too many cases of extensive, inconclusive and inadmissible evidence being led. That trend, disturbingly, in on the rise.
>
> [64] This court's more recent experience has shown increasingly that the written text is being relegated and extensive inadmissible evidence has been led. The pendulum has swung too far.'

[28] The court proceeded to say that It is necessary to reconsider the foundational principles set out in *KPMG Chartered Accountants (SA) v Securefin Ltd & another* [2009] ZASCA 7; 2009 (4) SA 399 (SCA) where the court was concerned about the extent of evidence led in relation to the interpretation of written texts. At paragraph [65] the court quoted the following from *KPMG:*

> 'First, the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning (*Johnson v Leal* 1980 (3) SA 927 (A) at 943 B. Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses (or, as said in common-law jurisprudence, it is not a jury question: Hodge M Malek (ed) *Phipson on Evidence* (16 ed 2005) paras 33-64). Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether

> statute, contract or patent (*Johnson & Johnson (Pty) Ltd v Kimberly-Clark Corporation and Kimberly-Clark of South Africa (Pty) Ltd* 1985 BP 126 (A) ([1985] ZASCA 132 (at www.saflii.org.za)). Fourth, to the extent that evidence may be admissible to contextualise the document (since "context is everything") to establish its factual matrix or purpose or for purposes of identification, "*one must use it as conservatively as possible*" (*Delmas Milling Co Ltd v Du Plessis* 1955 (3) SA 447 (A) at 455B-C. The time has arrived for us to accept that there is no merit in trying to distinguish between "background circumstance" and "surrounding circumstances". The distinction is artificial and, in addition, both terms are vague and confusing. Consequently, everything tends to be admitted. The terms "context" or "factual matrix" ought to suffice. (See *Van der Westhuizen v Arnold* 2002 (6) SA 453 (SCA) ([2002] 4 All SA 331 paras 22 and 23, and *Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd & another* [2008] SASCA 94; 2008 (6) SA 654 SCA (SCA) para 7.).'

(Our emphasis.)

[29] The court continued to say further that the idea expressed in *Delmas* and in *KPMG* that extrinsic evidence should be used as conservatively as possible, has been criticised. The court says that insofar as the admonition to use extrinsic evidence as conservatively as possible is concerned, in *KPMG* the court was intent on ensuring that extrinsic evidence to contextualise a document was just that, and did not extend beyond established parameters. The court went on in paragraph [66] to say that 'It is clear that our courts have never permitted parties to testify about how they understood the words used in written text. The parol evidence rule, as expounded by Corbett JA in *Johnsons v Leal* 1980 (3) SA 927 (A) at 943B, namely, to prevent a party from altering, by the production of extrinsic evidence, the recorded terms of a contract in order to rely upon the altered contract, continues to be a part of our law. At paragraphs [68] and [69] the court says:

> '[68] In *KPMG* this court, as we are now, was expressing judicial frustration at how hitherto recognised inadmissible evidence, which, in any event, is invariably inconclusive, was being led in support of a party's contentions in relation to written text. The criticism set out above, in our view, is unjustified.
>
> [69] Before us it was not suggested that the foundational principles set out in *KPMG* no longer apply or should be abandoned. Nor is such a suggestion sustainable. Those principles continue to be applicable. *Endumeni*, at 603F, reaffirmed those principles and did not detract from them.'

[30] Relying on these views expressed by the Supreme Court of Appeal the appellant argued that the court should not consider the evidence that was led by the respondent in regard to the intention of South Africa, Netherlands, Sweden and for that matter Kuwait in considering whether the appellant was liable to pay tax in South Africa. The argument, with which I agree is that the provisions of the Netherlands agreement are clear and provide that

in the event of another state receiving preferential treatment from South African in the future, the Netherlands resident must be given the same preference. It is equally a clear fact that when the agreement was subsequently concluded with Sweden the provision in that agreement that the residents of Sweden should receive the same preferential treatment as any other party contracting with South Africa applies regardless of when such other state's residents obtain such preference, i.e. irrespective of whether it was before the agreement was concluded with Sweden or afterwards. When the agreement was concluded with Sweden the residents of Kuwait already had preferential treatment and therefore the residents of Sweden were entitled to the same treatment. That is what the three agreements say. There is no denying that. That having been determined, there are therefore no grounds upon which this court can find that certain words were missing from the Netherland's agreement unless the court jettisons the parol evidence rule. This court cannot do so. It is bound by the rule and prevailing decision of the Supreme Court of appeal. The foundational principles set out in *KPMG* do apply and as found in Blair Athol there is no ground upon which they can be abandoned. Those principles continue to be applicable and as the court in Blair Atholl said; *Endumeni*, at 603F, reaffirmed those principles and did not detract from them.

[31] The respondent in its argument addressed the appellant's claim that it is also entitled to relief regardless of its claim on the merits in terms of section 64 and in particular 64L of the Income Tax Act. In light of the courts finding on the merits this does not require further comment.

[32] Sitting as a court in South Africa it is difficult but necessary to refrain from expressing views at the unfortunate consequences to the county's fiscal wellbeing of what has occurred. But I will say, that the appellant's criticism of the tone of the respondent, as set out in its note on argument and pursued in court, is not justified. The court does understand that the tone is a justified reflection of the frustration of the respondent. However, it is the role of the executive and, or, the legislature to remedy the problem. The court cannot rewrite the international treaties concluded between South Africa and other countries to remedy a problem that has occurred.

[33] The appellant placed significant reliance on decisions that have already been taken in courts in the Netherlands. This court has made its decision on South African domestic law, which in my view is the appropriate course, and there is no purpose served, on the merits of the decision, in referring further to either international law or the prior decisions of a foreign court or the principles of comity. The parties are *ad idem* that the principles applicable to the interpretation of international tax treaties in South African law and International Law are the same as those applied by our courts in construing statutes and agreements. This is also in accordance with the principles enunciated in *Krok and Another v CSARS* 2015 (6) SA 317

(SCA) in particular paragraph [27]. Only in respect of one issue does this court need to refer to the decisions of the Dutch Court's in the Netherlands and that is the issue of costs. Appellant submitted that it would be appropriate to order the respondent to pay applicant's costs on the basis of its persistence with its opposition to the appeal in the face of the prior judgments in the Netherlands which included a decision of its highest court. I agree with this submission.

[34] Accordingly the order I make is:

a) **The respondent is ordered to refund to the appellant the amount of dividends tax it has overpaid in terms of section 64L of the Income Tax Act, Act 58 of 1962;**

b) **The respondent is ordered to pay to the appellant interest on the amount in paragraph a) calculated in accordance with sections 187, 188 and 189 of the Tax Administration Act, Act 20 of 2011 from date the amount was paid by appellant until the date of repayment;**

c) **The respondent is ordered to pay the appellant's costs including the costs of two counsel where employed.**

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HACK, A J