bw Case no:

494/94

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between

1) A MEYER CONSULTANTS CC

Appellant

and

ALLIED ELECTRONIC CORPORATION LTD 1st Respondent

STANDARD TELEPHONE & CABLES SA (PTY) LTD 2nd Respondent

ERF 2620 KORSTEN (PTYT, LTD 3rd Respondent

TELECOMMUNICATIONS TECHNOLOGIES (PTY) LTD 4th Respondent

CORAM: Botha, Smalberger, Nienaber, Marais JJA et Zulman AJA

HEARD: 11 March 1996

DELIVERED: 27 March 1996

JUDGMENT

BOTHA JA

I have had the advantage of reading the judgment of my Colleague Smalberger. With respect, I beg to differ from him. strongly. In my opinion the agreement is incapable of bearing the meaning ascribed to it in the judgment of my Colleague.

The agreement consists of ten clauses. Only a few of its provisions are relevant to the issue. These have been quoted in my Colleague's judgment, but for my purposes it will be convenient to set them out again:

"1. DEFINITIONS

1.1 . . . . . .

1.2 . . . . . .

1.3 . . . . . .

1.4 'tax saving' shall include refunds from the ROR and reductions in cash payments to the ROR.

2. PREAMBLE

WHEREAS

2.1 CTC possesses certain knowledge and skill which may result in a saving in income tax payable by the company.

2.2 . . . . . .

2.3 . . . . . .

NOW THEREFORE IT IS AGREED AS FOLLOWS:

3. CTC will endeavour to obtain income tax savings for the company by the application of its skill and knowledge. Such endeavours shall include the following:

3.1 . . . . . .

3.2 . . . . . .

3.3 . . . . . .

4. The company shall pay CTC a fee equal to ten percent (10%) of the gross saving of money by the company as a result of CTCs skill and knowledge, which fee shall be payable on receipt by the company of the cash flow benefit from the Receiver of Revenue. Should CTCs investigations result in an increase in tax payable, arising from such investigations, this increase shall be off set against tax savings for purposes of the calculation of the fee.

5. . . . . ."

On reading the four clauses quoted above, two conspicuous features, which go hand in hand, are immediately apparent. The first is the repeated use in each of the clauses of the words "saving" or "savings", predominantly in the context of tax savings and once in the context of "the gross saving of money". The second is the complete absence of any reference in any of the clauses to interest which may

become payable on overpaid tax.

In my view these two features of the agreement effectively preclude the interpretation which is sought to be put on it in the judgment of my Colleague. One does not need a dictionary to know that the concept of "saving", whether of "tax" or "money", does not, as a matter of language, include the notion of a payment of interest on a refund of overpaid tax. I can see no significance in the fact that the phrase used in the first part of clause 4 is "the gross saving of money" instead of the phrases "tax saving" or "tax savings" used in the preceding clauses. Any possibility that the parties may have intended a change in meaning is immediately negatived by the fact that they at once, in the second part of clause 4, reverted to the phrase "tax savings", thus demonstrating that they regarded the phrases as interchangeable. Nor does it take the matter further to say that

"money" can encompass monetary receipts of any kind, including

interest payments. The operative word remains "saving", which is linguistically incapable of signifying "receipts" of interest. Even businessmen, I imagine, would not quibble about that. It was obviously for that very reason that the draftsman of the agreement found it necessary to define "tax saving" in clause 1 by giving it the artificially expanded sense of including refunds received from the Receiver. As for the word "refunds", I am unable to see how, as a matter of language (and again without the need to resort to dictionaries), it can support an inference that the parties intended it to include payments of interest on overpaid tax. To my mind, if that had indeed been the intention, it is inconceivable that the parties would not have given expression to it when they defined "tax saving". Finally, as far as the wording of the agreement is concerned, the phrase "cash flow benefit" in clause 4 is used simply to stipulate when the fee will be payable and it carries no suggestion that the parties intended

receipts of interest to be included in the computation of the fee.

In my Colleague's judgment two hypothetical factual situations are postulated in support of the interpretation advanced. The first relates to the phrase "reductions in cash payments to the ROR". The facts postulated show that when a payment of interest claimed is avoided, the sum involved is taken into account in the calculation of the fee. That is so, of course, but only because the situation falls squarely within the wording of the definition that the parties have chosen to give to the phrase "tax saving". This does not afford a spring-board from which to jump to the conclusion that the parties intended interest payments in respect of tax refunds also to be included in the definition. On the contrary, it seems to me that the facts postulated serve only to highlight the fact that the parties have chosen, on the face of it deliberately, not to incorporate any reference to such payments of interest in their definition.

The second situation postulated relates to the set-off provision in the second part of clause 4. It is said that notionally, if the interest component is left out of the equation, the respondent could suffer a net loss and yet be liable to pay a fee to the appellant. With respect, it seems to me that the notional possibility postulated is too fanciful to serve as a legitimate pointer to the parties' intention. It is highly unlikely that such a possibility would have been present to their minds when they agreed on the set-off provision, and even more unlikely that they would have contrived to cater for it in such an oblique and obscure fashion as is reflected in the wording of their agreement. In any event, I do not agree that the result of the situation postulated is anomalous or absurd. It can be described thus only if the exercise is premised on an assumption of that which is still to be determined, viz

whether payments of interest were intended to be taken into account in calculating the fee.

The observation just made leads me to the final matter to be considered. It is said in my Colleague's judgment that the agreement needs to be interpreted in a manner which would make business and commercial sense. I agree, of course. But I disagree most fundamentally with the way in which my Colleague applies that approach to the facts of this case. His reasoning is founded ultimately on the suppositions that, as reasonable businessmen, the parties would have been thinking in overall monetary terms, that they contemplated that the fee would be calculated with reference to the overall financial benefit achieved, and consequently that they intended payments of interest to be included in the calculation of the fee. In my respectful opinion these suppositions are simply not justified by the dictates of business and commercial sense. When the parties negotiated the fee to be payable, they had various options open to them. When they decided on a calculation based on a percentage, they had to fix the

figure and the monetary amounts to which it should be related. Who is to say that it did not make business or commercial sense for them to exclude payments of interest from the calculation? A court interpreting their agreement is no more entitled, in my judgment, to say that, than to say that they should have fixed a figure of 8% or 12% rather than 10%. Having regard to the language used in the agreement, as analyzed above, the suppositions in my Colleague's judgment, to which I have referred, in my judgment rest on nothing' but hypotheses and conjecture.

In the result I consider that the appeal should be dismissed.

The order of the Court is that the appeal is dismissed with costs, including the costs of two counsel.

A S BOTHA JUDGE OF APPEAL

Concur

Nienaber JA

Zulman AJA

CASE NO: 494/94
EB

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(APPELLATE DIVISION)

In the matter between:

D.A. MEYER CONSULTANTS CC

Appellant

and

ALLIED ELECTRONIC CORPORATION LTD 1st Respondent

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TELECOMMUNICATIONS TECHNOLOGIES (PTY) LTD 4th Respondent

CORAM: BOTHA, SMALBERGER, NIENABER, MARAIS, JJA et ZULMAN, AJA

HEARD: 11 MARCH 1996

DELIVERED: 27 MARCH 1996

JUDGMENT

SMALBERGER, JA:

This appeal turns on the proper interpretation of

certain provisions of a written agreement ("the agreement") entered into on 13 July 1988 between the appellant (previously known as Corporate Tax Counsel CC) and the respondents. The appellant carries on business as a tax consultant; the respondents are all companies within a larger group of companies. In the agreement the appellant is referred to as "CTC" and the respondents as "the Company".

The preamble to the agreement (clause 2.1) records that

> "CTC possesses certain knowledge and skill which may result in a saving in income tax payable by the Company."

Clauses 3 and 4 then go on to provide:

> "3. CTC will endeavour to obtain income tax savings for the Company by the application of its skill and knowledge. Such endeavours shall include the following:
>
> 3.1 Conducting of negotiations with the relevant Receivers of Revenue;
>
> 3.2 Scrutinising and examining financial documentation; and

3.3 Submitting of claims. 4. The Company shall pay CTC a fee equal to ten percent (10%) of the gross saving of money by the Company as a result of CTC's skill and knowledge, which fee shall be payable on receipt by the Company of the cash flow benefit from the Receiver of Revenue. Should CTC's investigations result in an increase in tax payable, arising from such investigations, this increase shall be off set against tax savings for purposes of the calculation of the fee."

(In the agreement in its original form the concluding portion of the first sentence of clause 4 had read "on receipt by the Company of an assessment from the Receiver of Revenue indicating the extent of the tax saving". Prior to the signing of the agreement the words "the cash flow benefit" were substituted by hand for "an assessment"; the words "indicating the extent of the tax saving" were deleted; and the second sentence was added.)

In terms of clause 1.4 of the agreement (in its form as amended

prior to signature) the phrase "tax saving" "shall include refunds from the ROR [Receiver of Revenue] and reductions in cash payments to the ROR".

It is common cause that as a consequence of the appellant's efforts, and the application of its skill and knowledge, the respondents received income tax refunds in respect of tax overpaid for the tax years 1987 and 1988 in the sum of R7 183 406,00 together with interest thereon, in terms of s 89 quat of the Income Tax Act 58 of 1962 ("the Act"), amounting to R3 438 906,26. The respondents have, as provided in clause 4 of the agreement, paid appellant a fee equal to 10% of the capital sum refunded, but refused to pay any amount in respect of interest. The appellant contended that it was also entitled to a fee of 10% in respect of such interest. This led to the appellant instituting

action against the respondents for payment of the sum of R343 890,62. The matter eventually came before Schabort J in the Witwatersrand Local Division. The parties agreed upon a statement of facts in terms of Rule 33 of the Uniform Rules of Court. The salient facts outlined above were encompassed within such statement. The crisp issue that fell to be determined then (as now) was whether in terms of the agreement, and more particularly clause 4 thereof, the respondents were liable to the appellant for a fee equal to 10% of the amount received by them in respect of interest. The learned trial judge found for the respondents but granted leave to appeal to this Court. Hence the present appeal.

No express reference is made to interest in the agreement. By contrast, the word "saving" (or "savings") appears on a number of

occasions. It does so in the context of "tax saving" (clause 1.4), "saving in income tax" (clause 2.1), "income tax savings" (clause 3) and "gross saving of money" (clause 4). As previously noted, the definition of "tax saving" includes refunds from the Receiver of Revenue ("the Receiver"), The judge a quo set great store by the word "saving". He came to the conclusion that it was the intention of the parties that the appellant "was only to share in a percentage of the moneys actually 'saved'" for the respondents, or refunded to them, as a result of the appellant's efforts. He went on to hold that given their ordinary meaning the words "saving" and "refunds" did not comprehend any notion of interest. Accordingly the terms of the agreement did not entitle the appellant to a fee in respect of any interest payments received by the respondents. In argument before us Mr Solomon, for the respondents,

essentially adopted the same line of reasoning. He pointed to the parties' use of the words "saving" and "refunds", the context in which they appeared and the scheme of the agreement as providing a clear indication that the parties did not intend any interest payment to be included in the calculation of the appellant's fee. He referred to various meanings of the word "save" in the Oxford English Dictionary 2nd Ed including "to prevent the loss of", "to store up or put by (money, goods, etc.) by dint of economy; to reserve instead of spending, consuming or parting with" and "to avoid spending, giving, or consuming (money, goods, etc.)." He submitted that the phrase "saving of money" in clause 4 meant relieving from the need to spend money, abstaining from expending money or avoiding losing or expending money. He contended that any interest paid to a taxpayer in terms of s 89 quat of

the Act amounted to compensation for tax previously overpaid and would not in ordinary parlance constitute a "saving of money". In its proper context, and with due regard to the scheme as a whole, "saving of money" meant saving of tax money, and the phrase "gross saving of money" in clause 4 was synonymous with "tax saving", which included refunds. "Refund" is defined in the English Oxford Dictionary as, inter alia, "to give back, restore" or "to make return or restitution of". Mr Solomon accordingly argued that neither "saving" nor "refund", given their ordinary meaning, could comprehend the notion of interest which, he pointed out, is an amount paid by one person in return for the use of money belonging to another, or as compensation for the retention by one person of a sum of money belonging to or owed to another. (Halsbury: Laws of England: 4th Ed, Vol 32, para 106). Consequently, on a

proper interpretation of the agreement the parties intended the appellant's fee to be calculated only with reference to a tax saving, or a tax refund, in the above sense, and interest would not figure in any calculation of the appellant's fee under the agreement.

Mr Slolmon's argument is a persuasive one, but in my view it is premised on too narrow and rigid an approach and does not accord with what I perceive to be the true intention of the parties as reflected in the agreement.

It is trite law that when dealing with written contracts the golden rule of interpretation is to ascertain and give effect to the intention of the parties at the time of the contract. In determining such intention regard must be had to the language used by the parties. The words in which they have recorded their contract should normally be given their

ordinary, grammatical meaning within their contextual setting. But the ultimate aim remains to ascertain their intention. As was stated by Kotzé JA in West Rand Estates Ltd v New Zealand Insurance Co Ltd 1925 AD 245 at 261:

> "The parties must be regarded as having meant a business transaction; and it is the duty of the Court to construe their language in keeping with the purpose and object which they had in view, and so render that language effectual. Such is the clear principle of our law. Thus Pothier (Obligations par.91 ff), citing the lex 219 de Verborum Signif.,observes: In agreements we should examine what is the common intention of the contracting parties, rather than the grammatical sense of the terms. Moreover we must construe the words in that sense which is most agreeable to the nature of the agreement.'These rules, which Van der Linden has taken over in his Manual, speak for themselves and are universally recognized."

In similar vein are the words of Jansen JA in Cinema City (Pty) Ltd v Morgenstern Family Estates (Pty) Ltd and Others 1980 (1) SA 796 (A) at 803 G-H to the following effect:

> "The matter is essentially one of interpretation. At the risk of stressing the obvious, it must be pointed out that the first step in interpreting a written contract is to read it. This entails attaching to each word that ordinary meaning (of the several which the word undoubtedly will bear) which the context seems to require and applying the common rules of grammar (including syntax). Thus we may arrive at a prima facie meaning of each word, phrase and sentence. The document must, however, be read and considered as a whole and in so doing it may be found necessary to modify certain of prima facie meanings so as to harmonize the parts with each other and with that whole. Moreover, it may be necessary to modify further the meanings thus arrived at so as to conform to the apparent intention of the parties."

Furthermore, in a matter such as the present, where great emphasis has been placed by the respondents on the meaning of the word "saving" it is appropriate to bear in mind what was said by Diemont JA in List v Jungers 1979 (3) SA 106 (A) at 118 D - E:

> "It is, in my view, an unrewarding and misleading exercise to seize on one word in a document, determine its more usual or ordinary meaning, and then, having done so, to seek to interpret the document in the light of the meaning so ascribed to that word.

> Apart from the fact that to decide on the more usual or ordinary meaning of a word may be a delicate task .... it is clear that the context in which the word is used is of prime importance."

In determining what content should be given to the agreement regard must be had to the fact that it was apparently drawn up and entered into between businessmen. The agreement, in its amended form, lacks the degree of precision and care for language that should be the hallmark of a legal document. It needs to be interpreted in a manner which would make business and commercial sense.

Central to the appeal is the proper interpretation of clause 4 of the agreement. As previously noted, neither in it nor in any other clause is there any specific reference to interest. It does not, however, necessarily follow that the parties did not have interest payments in mind when agreeing to the basis on which the appellant's fee would be

calculated. In terms of sec 89 quat of the Act interest attaches ex lege to any underpayment or overpayment of tax. It is reasonable to assume that the representatives of the parties, being persons engaged in business, would have been aware of the fact that any tax refund would automatically be accompanied by a corresponding payment of interest and that any underpayment of tax would also have to be made good with interest. That being so, it would not be far-fetched to infer that by the use of the word "refunds" they had in mind any capital sum that might be repaid, plus interest. This is an inference, certainly not the only one, and not necessarily the most likely one, when viewed in isolation. But there are, in my view, other indications in the agreement which point to the parties having had an interest component in mind with regard to the computation of any fee to which the appellant might be entitled.

The definition of "tax saving" includes "reductions in cash payments to the ROR". One may postulate a situation where the Receiver seeks payment from the respondents of an amount of R500 000,00 in unpaid tax, including interest, by a stipulated date. The appellant detects an error in the basis of calculation, negotiates with the Receiver, and succeeds in getting the amount payable reduced to R300 000,00, inclusive of interest. The difference of R200 000,00 would, in ordinary parlance, amount to a "reduction in cash payment" to the Receiver, and if that is so it is common cause that the appellant would be entitled to a 10% fee on that amount. Yet if one were to exclude interest (assuming a consistent rate) the difference in the capital sums involved would of necessity be less than R200 000,00, The appellant would therefore be paid a fee that was partly interest-related.

The set-off provisions in clause 4 also throw considerable light on the question. There it is stipulated that for the purposes of calculating the appellant's fee any increase in tax payable resulting from the appellant's investigations shall be set off against any tax savings effected by it. That shows that the parties realised full well that those investigations could impact upon respondents negatively as well as positively and neither would have known in advance what the net outcome would be. Leaving aside any question of interest, where the latter exceeds the former, the appellant would be entitled to a fee calculated on the balance. But notionally, if one imports an interest component into the equation, the overall amount payable could exceed the overall amount saved, resulting in a net loss to the respondents. Mr Solomon conceded that this could be so. But despite this fact, on the

respondents' argument, which excludes all consideration of interest, the appellant, notwithstanding respondents' net loss, would still be entitled to a fee based on the difference between the capital sum saved and that payable. It is inconceivable that reasonable businessmen could have intended or agreed to such an anomalous and absurd situation - one which would flow from the respondents' interpretation of the agreement. Even therefore if one should equate "gross saving of money" in clause 4 with "tax saving" (as the respondents seek to do) it is arguable that "tax saving" was intended to encompass any overpaid tax plus interest, and any credit balance resulting from setting off against such overpaid tax plus interest any underpaid tax plus interest.

But in my view the two phrases should not be equated. The wording of clause 4 in its unamended form might have supported an

argument that they should be regarded as synonomous. But the phrase "tax saving" was deleted and substituted by "cash flow benefit". A deleted word or phrase cannot be taken cognisance of as an aid in interpreting the rest of the contract (Commercial Union Assurance Co of South Africa Ltd v KwaZulu Finance and Investment Corporation and Another 1995 (3) SA 751 (A) at 759 B-C). The difference in wording between the phrases "gross saving of money" used in clause,4 and "tax saving" used elsewhere prima facie suggests a change in underlying concept. The former phrase now takes on a meaning of its own. It is wider in import than the words "tax saving". The word "gross" in its contextual setting means "total" or "entire" and "money" can encompass monetary receipts of any kind, including interest payments. In my view the parties intended, by the use of the phrase "gross saving of money"

to make it clear that the appellant would be entitled to a fee calculated in relation to whatever overall financial benefit was achieved by the respondents as a consequence of the appellant's efforts, in other words, 10% of the amount to which they were better off financially. And in the present instance the respondents were better off financially as a result of the appellant's efforts not only in respect of the capital sum refunded, but also the interest thereon, which it would otherwise, not have received. The reference in clause 4 to the appellant's fee being payable on receipt of "the cash flow benefit" fortifies the perception that the parties, as businessmen could be expected to do, were thinking in overall monetary terms. In my view therefore the intention of the parties, as evidenced by their agreement, was that the respondents would be liable to the appellant for a fee in respect of the capital sums

refunded plus interest thereon. I do not regard this interpretation to be in conflict with any other provisions of the agreement.

In the result I would allow the appeal with costs, including the costs of two counsel, and substitute an appropriate order for that made by the court a quo.

J W SMALBERGER
JUDGE OF APPEAL

Case No: 494/94

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CORAM: Botha, Smalberger, Nienaber, Marais JJA

ef Zulman AJA

HEARD: 11 March 1996

DELIVERED: 27 March 1996

JUDGMENT

MARAIS JA

MARAIS JA

Notwithstanding the advantage I have had of reading the judgments of my learned brethren Botha and Smalberger, I have not found it easy to reach a conclusion in the correctness of which I have confidence. On balance I prefer the view of Smalberger JA. There is, with respect, nothing in his approach to the matter which I regard as illegitimate or logically unsound. It is of course so that businessmen are as free as any one else to make foolish or unwise bargains and if the language which they have chosen to reflect their bargain shows plainly and unambiguously that that is what they have done, then so be it. But it is not a conclusion which a court should be quick to embrace unless the language chosen by the parties is intractable.

The parties were both familiar with the ways of the Receiver of Revenue. Respondents were multimillion rand taxpayers. Appellant

was a professional tax consultant. All concerned realised full well that it was possible that appellant's ministrations might (I put it no higher) even result in respondents' liability increasing rather than decreasing. The set-off provision makes that abundantly clear and the possibility cannot be dismissed as fanciful and not present to the minds of the parties when they themselves adverted to it and made provision for it in their agreement. That all concerned probably considered such a result to be unlikely is no doubt a correct and realistic appraisal of the situation but the fact remains that they catered for the possibility that appellant's investigations might turn up both debits and credits. How they intended to deal with appellant's remuneration in that event is also beyond dispute. If on balance they were better off for appellant's ministrations, appellant would be rewarded. If they were not, appellant would not be rewarded, no matter how long and hard it had

laboured. What is more, appellant's reward would be calculated not on the sum of the credits which appellant had achieved but on the credit balance (if any) which might exist after debits had been taken into account. In short, it was a speculative transaction from the point of view of both parties with appellant carrying the greater risk for it might labour mightily and receive no reward whereas respondents would only have to pay appellant a fee if its activities resulted in a credit balance. It is true of course that respondents bore the risk of appellant's activities resulting in a debit balance in which event respondents' liability to the Receiver would have been increased rather than reduced but that was inherent in the transaction and specifically recognised as a possibility by the parties.

To postulate that interest was not present to their minds at all appears to me to be quite unrealistic. Appellant was, as I have said,

a professional tax adviser. Clause 5 of the agreement reads:

> "The company shall allow access by CTC to all documentation held by it or its agents relating to income tax paid by it in the past and extending to all assessments of taxation not yet completed or submitted to the Receiver of Revenue. Furthermore the Company shall allow CTC access to its financial statements."

This plainly contemplates inter alia an examination ex post facto of tax paid in the past. Respondents could hardly have been unaware of the fact that if they were found to have overpaid or underpaid tax in the past that would have to be remedied and that interest would come into the reckoning.

To postulate that interest was present to their minds but that they deliberately decided to leave it out of account in assessing what fee (if any) might be due to appellant is, to my mind, even more unrealistic and well nigh absurd. Quite apart from the fact that it

could result in appellant becoming entitled to a fee when respondents had not gained but lost as a result of appellant's ministrations, it is quite plain that interest was not to be ignored when it was a component in a "reduction in (a) cash payment". So much is acknowledged by my learned brother Botha. This point cannot be met, in my opinion, by asserting that but for the fact that this phrase appears in the definition of "tax saving" the interest component would have fallen to be ignored. What requires an answer is, if interest was intended to be taken into account in such a situation, for what conceivable reason could the parties have intended it to be otherwise ignored? Is one to attribute to parties such as these so irrational and inconsistent a desire? Is one really to say that in applying the set-off provision in clause 4 the parties intended that appellant was to get the benefit of interest saved for respondents in the example quoted but

respondents were not to be permitted to set-off against that interest the interest which they might have become liable to pay the Receiver as a consequence of appellant's activities? I cannot bring myself to subscribe to so perverse a conclusion unless the language of the parties plainly shows that to be what they intended, or alternatively, that they simply failed to make provision for the interest factor. I do not think it does.

Once the parties have shown that they do not intend a particular word to bear only what might be regarded as its ordinary meaning there is little to be gained by invoking dictionaries. Here the parties have defined the words "tax saving" as including refunds from the Receiver and reductions in cash payments to the Receiver. As we have seen, a "tax saving" consisting of a "reduction in cash payments" to the Receiver could include an interest component in particular

circumstances. Why then should one be so ready to conclude that a "tax saving" consisting of a "refund" from the Receiver cannot have been intended to comprehend the accompanying interest? A fortiori is that so when the interest is a necessary incident of such a refund in the sense that it is not a discretionary additional payment having an independent existence but an accessory obligation arising ex lege which has no independent existence. Indeed, in a notoriously inflationary environment such as ours, a "refund" of tax overpaid in previous years which did not include interest would be more apparent than real.

That the parties had more in mind than the entirely artificial exercise of comparing reductions in assessed amounts of tax payable with increases in assessed amounts of tax payable with no regard whatsoever being paid to the impact of interest on the calculation of

appellant's fee is shown by the first sentence in clause 4 and in particular by the use of the expressions "gross saving of money" and "on receipt-------of the cash flow benefit". That, to my mind, demonstrates that it was not the result of an entirely artificial exercise which would be largely irrelevant to the ascertainment of the cash flow benefit to respondents which was to determine appellant's fee, but the result of comparing what money had been received from the Receiver and what money respondents had been spared from having to pay the Receiver with what money respondents had had to pay to the Receiver. The word "gross" was presumably used for a purpose and the only conceivable purpose was to make it clear that it was not on the net saving of money that the fee was to be calculated. Notionally, if interest was to be excluded from the calculations, there could be no difference between the gross sum saved and the net sum

saved and the use of the word "gross" would have been meaningless. One does not lightly assume that a word like "gross" was not intended to have any meaning. However, if interest was to be included, there would be a difference between the gross and the net sum saved because respondents would have to pay tax on the interest. The use of the word "gross" therefore also tends to show that the parties had interest in mind.

It is of course so that the reference to cash flow is primarily to indicate when appellant is to be paid but it is the choice of language to convey that which is instructive. Plainly respondents were not prepared to pay appellant upon the mere accrual of a right to a refund. They would do so only when the refund was actually received. However, the set-off provision had also to be taken into account so that it would have been too simplistic and indeed contradictory of the

entire thrust of the agreement to provide merely that appellant was to be paid upon actual receipt by respondents of any tax saving as defined. The words "cash flow benefit" were deliberately used to take account of the fact that a balancing of debits and credits would have to take place before appellant's fee could be quantified. They reinforce the conclusion that the overall actual result of the entire exercise was what mattered to the parties and not an artificially distorted and purely notional result which could even entitle appellant to be paid for increasing respondents' overall liability to the Receiver.

The fact that interest is nowhere specifically mentioned in the agreement is, in my view, of little significance when in at least two instances it cannot be gainsaid that interest was to be taken into account in computing appellant's fee. One of those instances has already been discussed in both of the other judgments in this matter.

Yet another instance in which it would feature would be an instance where allegedly underpaid tax had been made good, with interest, by respondents in the past. If appellant succeeded in having that payment reversed the interest component would obviously have to be refunded and equally obviously it would have to be taken into account in any set-off calculations which might be necessary and in quantifying appellant's fees. Once it is clear that the parties intended interest to be taken into account despite their failure to mention it by name in the agreement, the inference to the contrary to which the absence of any specific reference to interest might have given rise, is neutralised. And once it is clear that interest is to be taken into account in the instances to which I have referred, why should one attribute to the parties either a deliberate intention to exclude it in all other instances, or an unwitting failure to cater for it in their agreement?

Where, as here, the parties were contracting in a context in which refunds of tax had by law to include interest, it is of little moment that the word "refund" in other contexts might not include interest. Moreover, as I have already pointed out, a refund by the Receiver of a previously allegedly underpaid amount of tax which had been made good, with interest, by respondents would obviously have to include the overpaid interest as well. I appreciate that this is because the interest itself was an overpayment but the fact remains that that interest would have to be taken account of in quantifying appellant's fees. I appreciate too that that does not necessarily mean that the further interest which accompanies the refund of the overpaid tax and interest is also to be taken into account. However, when one realises that what was undoubtedly intended to happen in such a case is that appellant was potentially to benefit from the refunded interest,

it is no longer possible to maintain that it was only tax savings stricto sensu which the parties intended to be taken into account in quantifying appellant's fees. It is but a short step from there to the conclusion that no distinction was intended to be drawn between different kinds of payment of interest and that all interest was to be taken into account. Indeed, the contrary conclusion involves attributing to the parties so subtle and convoluted a sense of discrimination and is calculated to produce such artificial results, that I cannot subscribe to it.

Finally, and with respect, I cannot agree with the observation of my learned brother Botha regarding the business and commercial sense of the interpretation of the agreement which he favours. The analogy he postulates of a court presuming to fix a higher or lower percentage fee is in my respectful opinion inapposite for the simple reason that

the court cannot rewrite a clear and unambiguous provision to make it conform to the court's assessment of what a fair and reasonable fee would be. What confronts us here is a very different question. It is not immediately and unambiguously apparent that interest was to be excluded. In at least some instances it was plainly to be included. Refunds of overpaid tax and supplementary payments of underpaid tax must always ex lege be accompanied by interest and the parties knew that. Whether or not appellant earned a fee at all was contingent upon there being a credit balance in respondents' favour upon completion of appellant's mandate. In these circumstances it is quite legitimate to examine the consequences of the competing interpretations in order to test them against the touchstone of commercial common sense. If one such interpretation produces in circumstances which might reasonably arise results which are destructive of the manifest purpose of the

transaction and the other does not, then the latter is to be preferred. It goes without saying that the language which the parties have used must be capable of accomodating that interpretation. In my respectful opinion the language is so capable. In the case of Alenson v AB Brickworks (Pty) Ltd 1993 (1) SA 62 (A) it was taken for granted by all concerned that a clause in a contract which obliged a party "to refund- - - - -50% of any additional taxation which the company- - - - is obliged to pay to the Receiver of Revenue arising from the reopening or reassessment of any assessment of the company" meant that the party concerned was obliged to pay 50% of the interest as well. As for the rhetorical question posed by my learned brother Botha: "Who is to say that it did not make business or commercial sense for them to exclude payments of interest from the calculation?", I think the answer is that the courts have for generations taken it upon

themselves to answer the question if the need arises. How else does one explain the evolution of the principle of interpretation that a commercial contract is to be construed whenever possible in a businesslike manner which makes commercial sense? If a court is not free to assess for itself the commercial sense or nonsense inherent in a preferred interpretation, the principle may as well be abandoned.

I too would allow the appeal with costs and substitute an appropriate order for that made by the Court a quo.

R M MARAIS