THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case Nos: 20230/2014
and
20232/2014

In the matter between:

MARK KROK First Appellant

JUCOOL ENTERPRISES INC. Second Appellant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES Respondent

Neutral citation: *Krok v CSARS* (20230/2014 and 20232/2014) [2015] ZASCA 107 (20 August 2015)

Coram: Maya, Mhlantla, Wallis JJA, Dambuza and Meyer AJJA

Heard: 15 May 2015

Delivered: 20 August 2015

Summary: Double taxation – preservation order granted in respect of a taxpayer's assets under ss 185 and 163 of the Tax Administration Act 28 of 2011 read with article 25A of the Protocol amending the Agreement between the government of the Republic of South Africa and the government of Australia for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income upheld and appeal dismissed.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Fabricius J sitting as a court of first instance): judgment reported *sub nom Commissioner for the South African Revenue Services v Krok* 2014 (3) SA 453; [2014] 2 All SA 66 (GP).

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

JUDGMENT

Maya JA (**Mhlantla, Wallis JJA, Dambuza and Meyer AJJA concurring**):

[1] This appeal concerns the correctness of the confirmation of a preservation order by the Gauteng Division of the High Court, Pretoria (Fabricius J). The order was obtained on an ex parte basis by the respondent, the South African Revenue Service (SARS), against the first appellant (Mr Krok) to secure assets for purposes of satisfying an alleged tax debt and for the appointment of a curator *bonis* in terms of ss 163 and 185 of the Tax Administration Act 28 of 2011 (the Act). The determination of this question depends on the temporal scope of the provisions of a double taxation agreement between the Republic of South Africa and the Government of Australia – the Agreement for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income of 1 July 1999 (the DTA) subsequently amended by a protocol signed on 31 March 2008 (the Protocol) – which made provision for mutual assistance in the collection of taxes. The appeal serves before

this court with the leave of the court below.[1]

[2] The litigation arose from requests made to SARS, in terms of the DTA, by the Australian Tax Office (the ATO) which represents the Commissioner of Taxation of the Commonwealth of Australia (the Australian Commissioner), in January 2012 and again in February 2013.[2] The ATO sought assistance with the collection of income taxes allegedly due by Mr Krok to the Australian Commissioner, in the sum of Australian $25 361 875.79 plus interest,[3] for the period 30 June 2004 to 30 June 2009 (the income years). The ATO thus sought the conservancy of Mr Krok's assets situated in South Africa pending the collection of the tax debt. The request was accompanied by a formal certificate, as envisaged in ss 185(2) and (3)*(a)* and *(b)* of the Act. These provisions deem the allegations contained in the certificate conclusive proof of the existence of the alleged liability and prima facie proof of the allegations it contains; here that Mr Krok's South African assets were at risk of dissipation.[4]

1In terms of s 163(10)(*a*) of the Act, the preservation order remains in force pending the outcome of the appeal.
2 SARS explained the reason for the two requests in respect of the same subject-matter and its failure to act on the ATO's initial request for assistance in January 2012 in its founding affidavit as based on the absence of statutory provisions that entitled it to preserve assets at the time. Its remedy lay only in the common law at the time and it would have had to give the respondent notice under s 93 of the Income Tax Act 58 of 1962 before seeking a preservation interdict upon proof, on a balance of probabilities, that the assets would be diminished with the intent to frustrate a claim. SARS stated that it was out of fear that such notice would likely trigger steps to dissipate the assets that the first request was not implemented. The ATO's second request was thus pursued on the basis of the dispensation created by the Act, which expressly empowers SARS to render assistance to foreign governments to recover taxes by seeking an order in the high court for the preservation of any assets of a taxpayer.
3 Equivalent to approximately R235 705 169,19.
4Section 185 of the Act provides for 'tax recovery on behalf of foreign governments' and reads in relevant part:
'(2) A request described in subsection (1) must be in the prescribed form and must include a formal certificate issued by the competent authority of the other country stating–
(a) the amount of the tax due;
(b) whether the liability for the amount is disputed in terms of the laws of the other country;
(c) if the liability for the amount is so disputed, whether such dispute has been entered into solely to delay or frustrate collection of the amount alleged to be due; and
(d) whether there is a risk of dissipation or concealment of assets by the person.
(3) In any proceedings, a certificate referred to in subsection (2) is–
(a) conclusive proof of the existence of the liability alleged; and
(b) prima facie proof of the other statements contained therein.'

[3] The facts which led to the request may be gleaned from two documents which were attached to SARS' founding affidavit. One is a document entitled 'Submission on Objections to the Assessments' dated 5 April 2012 (the submissions document). It was lodged with the Australian Commissioner on Mr Krok's behalf in response to notices of assessment of his taxable income and liability to pay a penalty in respect of the income years and the ATO's reasons for its decision. (The answering affidavit filed on Mr Krok's behalf which was deposed to by his attorney of record expressly incorporated the contents of this document.) The other document is the ATO's 'Reasons for Decision' dated 7 December 2011, which contains its analysis of the facts, its interpretation of the relevant law as applied to those facts, the issues it identified and its decision on those issues (the reasons document).

[4] The assets in issue originated from the Abraham Krok Trust. This trust was formed out of donations made to its trustees in 1973 by Ms Sarah Krok for the benefit of her son, Mr Abraham Krok's six children, of whom Mr Krok was one. In 1994 Mr Krok's father created new separate trusts to which the assets of the Abraham Krok Trust were transferred for the benefit of each of these children. One of the new trusts was the Mark Krok 1994 Trust (the trust) in which Mr Krok accumulated considerable capital assets valued at R71 713 807 as at 28 February 2003. These assets at that stage mainly comprised shares in various listed and unlisted South African companies and cash investments.[5]

[5] The saga began with Mr Krok's emigration to Australia in April 2002. According to the submissions document, prior to this event he sought professional advice on the implications of keeping the assets in the trust having regard to the

5Mr Krok subsequently acquired two immovable properties in Cape Town in 2008, having applied to the South African Reserve Bank on 16 January 2008 for the release of R15,6 million to him for that purpose (para 14 below).

South African Exchange Control Regulations, 1961 (the regulations).[6] Consequent upon that

6Regulations made under the Currency and Exchanges Act 9 of 1933 published in GN R1111 of 1 December 1961 as amended up to GN R445, GG 35430 of 8 June 2012.

advice, the trust distributed the capital assets to him, thus vesting him with the ownership thereof just before he ceased to be resident in South Africa. Accordingly he held these assets in addition to his personal assets arising from income distributions from the trust while he was still resident in South Africa.

[6] The alleged reason for the distribution was that Mr Krok had been advised that the South African Reserve Bank (the SARB) would be more lenient in granting permission for the release of income from South Africa of an emigrant if such assets were owned, not by the trust, but by the emigrant personally. Otherwise the assets would be subject to capital gains tax in South Africa if they remained in the trust whereas gains on assets held by the emigrant would be exempt from capital gains tax except on disposals of interests in South African real estate. Moreover, it was said, Mr Krok could not, in any event, transfer the assets whilst his father, the founder of the trust from whom the assets originated, was still alive.

[7] To prevent the use of trust distribution as a means of externalising capital from South Africa, exchange control consent is not given for the expatriation of capital distributed by trusts less than three years prior to the date of emigration unless the founder of the trust is deceased. Thus, the assets became ‘blocked’, ie they had to be placed under the control of an authorised dealer in foreign exchange,[7] Investec Bank Ltd (Investec), although they could be expatriated from South Africa with the consent of the SARB under the Exchange Control Practice. But they would remain in the name of Mr Krok or his local nominee upon Mr Krok’s emigration.

7 Regulation 4(1) of the regulations.

[8] In furtherance of Mr Krok's scheme to avoid the 'adverse South African Exchange Control implications', as he put it, after he ceased to be a resident of South Africa but before entering Australia, he vested the beneficial interests in both the assets and the income in a British Virgin Islands company, Polperro Enterprises (Polperro) and retained only the legal ownership. The shares in Polperro would be held by a Foundation domiciled in Liechtenstein, of which Mr Krok would be the primary beneficiary, although he would have no rights to the assets or control over the Foundation's actions.[8] To that end, he concluded two agreements on 23 April 2002. In terms of the first agreement (The Deed of Sale of Specified Income) he sold his right, title and interest to the income from the assets, to be derived over a 30-year period, to Polperro for a sum of R65 441 554.65. In terms of the second agreement (the Asset Sale Agreement), he sold all his rights in respect of the assets to Polperro for a sum of R3 444 292.35. The debt arising from these agreements was then assigned to the trustees of an Australian Trust for a sum of R68 885 847. The long and short of all this activity, according to Mr Krok, is that he ceded all his South African income and assets to Polperro, save for the bare *dominium* thereof, and had no income or capital gains on which he could be taxed by the ATO under the agreements.

[9] Then, on 29 December 2008, Mr Krok emigrated from Australia to the United Kingdom. The facts germane to this relocation are set out in the affidavits filed on behalf of the second appellant, Jucool Enterprises Inc. (Jucool), deposed to by Ms Cora Barbara Binchy in her capacity as a director of Chaumont (Directors) Limited alleged to be Jucool's sole corporate director.[9] Jucool was

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8According to Mr Krok, the Foundation's role was merely to hold the shares in Polperro. The latter's director would be GCI Management Limited which would be provided by Insinger de Beaufort, an independent third party responsible for Polperro and remunerated on an arm's length basis for its services.

9The affidavits comprise an answering affidavit which incorporated Jucool's affidavit filed in support of its application for leave to intervene.

granted leave to intervene

in the application proceedings on the basis of its allegations that its interests would be prejudiced by the preservation order because it is the beneficial owner of the assets in issue. It is a company incorporated in the British Virgin Islands on 23 December 2008, just before Mr Krok's relocation to the United Kingdom. Its sole shareholder is Novatrust Limited (Novatrust), a professional trustee (and trustee of the Jucool Trust) domiciled in Jersey. The Jucool trust is a discretionary trust governed by Jersey law, which was established on 22 December 2008 by way of a declaration of trust executed by Novatrust. Its only material assets are shares in Jucool and a loan receivable from Jucool described below. Its primary beneficiaries are Mr Krok and his children.

[10] In the submissions document and Jucool's affidavits it was alleged that as part of Mr Krok's planning for the relocation, Polperro was liquidated. Mr Krok was further advised to establish a discretionary trust for UK income, inheritance and capital gains tax purposes and the necessity for asset protection. On that basis he concluded certain agreements with Jucool on 29 December 2008.[10] Incidentally, these agreements were not dissimilar to those Mr Krok had earlier concluded with Polperro, which were terminated at his instance leaving him in control of the assets. One was an 'Income Sale Agreement' in terms of which Jucool purchased from Mr Krok certain specified rights and interests in the assets listed in that agreement[11] for a purchase price of R72 500 000. This debt was left outstanding as an interest-free loan owed by Jucool to Mr Krok. Effectively the purpose of this

10 Curiously, these agreements reflect that they were executed on Jucool's behalf by an entity called Montblanc (Directors) Ltd and not the Chaumont (Directors) Ltd referred to in the affidavits deposed to by Ms Binchy and the resolution which empowered her to depose to such affidavits. But nothing turns on this seeming discrepancy.

11 Set out in clause 6 of the agreement as follows:
'6.1. the right to receive all the Income from and other fruits of, the Assets;
6.2. the right to cause the Seller to sell any of the Assets and to cause the Seller to purchase any Asset or Assets which the Seller may legally purchase from time to time with the proceeds of the Income derived from the Assets;
6.3. the right to exercise or to direct the seller how to exercise the voting Rights with respect to any of the Assets possessing Rights;
6.4. the right to cause the Seller to exercise on behalf of the Buyer any other right which the Seller may have with respect to any of the Assets …'
during the period of 30 years from the effective date.'

transaction was to transfer to Jucool the income derived from the assets owned by Mr Krok. The plain objective of this was to separate the right to enjoy the assets from the bare *dominium.* As explained in the affidavit filed on the appellants' behalf by Mr Moverley Smith, an expert on the law of the British Virgin Islands, the notion was that the 'beneficial ownership' of the assets would pass from Mr Krok to Jucool and he would retain only the legal ownership of the assets, which legal ownership he would hold on trust for Jucool.

[11] The other agreement was an 'Asset Sale Agreement' in terms of which Jucool purchased from Mr Krok those rights and interests in the assets which had not been sold by Mr Krok to Jucool in terms of the Income Sale Agreement. The purchase price in this instance was a sum of R217 500 000 which was also left outstanding as an interest-free loan owed by Jucool to Mr Krok. Immediately after the conclusion of these agreements Mr Krok entered into a 'Deed of Assignment' with Novatrust. In terms of this agreement he assigned to Novatrust all of his rights, title and interest in the R290 000 000 debt arising from Jucool's purchase, free of consideration.

[12] In 2009, the ATO launched an audit of Mr Krok's taxation affairs which started with his income tax submission for the income year ended 28 February 2003 and carried through to his application to the SARB in February 2010 for the release of funds to cover his holiday and visiting expenses in the country during 2010. The audit was part of a government initiative investigating participation by Australians in internationally promoted tax arrangements to identify taxpayers involved in significant offshore transactions or large transfers of funds to or from Australia.

[13] Arising from this investigation, the reasons document recorded numerous

instances of Mr Krok's dealings involving the blocked assets. It commenced with his income tax return (ITR) to SARS for the year ended 28 February 2003. In this document Mr Krok declared, inter alia, considerable South African interest income and capital gains running into millions of rand in respect of a distribution from the trust and income from South African dividends which were all exempt from tax in South Africa because he was a non-resident.[12] He also declared South African assets (which included various listed and unlisted securities and cash reserves of substantial value) and liabilities as at 28 February 2003 totalling R71 713 807 and R777 206, respectively. In the following year, he lodged another ITR to SARS for the year ending on 29 February 2004. Yet again, he declared substantial South African exempt interest income and income from dividends and South African assets totalling R67 644 891.74, with a market value of R98 328 827 according to his personal balance sheet. These returns indicated that whatever the nature of the transactions with Polperro, Mr Krok continued to regard these assets as his personal property and the income derived from them as likewise his income.

[14] It was also recorded that for a period in excess of two years, during 2002 to 2004, Mr Krok used his South African credit cards funded from the blocked assets for his personal expenditure which, when identified by the SARB as unauthorised foreign expenditure, was then recouped from his transferable income account. It appears that between January 2004 and April 2010 he repeatedly applied through Investec to the SARB, which had directed Investec to control his assets for his benefit, to use the blocked funds for his and his family's expenditure in South Africa. These included such diverse matters as the acquisition and decoration of a home in an exclusive suburb of Cape Town; the building, furnishing and equipping of a holiday home in Hermanus; the acquisition of a motor vehicle; the payment of amounts to support his

12 In terms of the Income Tax Act 58 of 1962.

aged mother and to provide pensions for former employees; and the cost of acquisition of tickets for the 2010 football World Cup.

[15] In a 2005 loan application made to St George Bank for the purchase of residential property in Australia, he furnished details to the bank of his capacity to repay and service the loan from amounts remitted from South Africa. These details demonstrated his control over the funds remitted from South Africa, those held by Polperro and the ultimate application of those funds towards the acquisition of his private property. In addition, a personal balance sheet accompanying the application bore information contrary to his statements to the ATO. In an application to the SARB in 2008, Mr Krok apparently submitted management accounts which reflected that he held the rights and interests in the assets claimed to have been disposed of under the Deed Assignment. According to the reasons document, which detailed many other examples said to prove that Mr Krok held beneficial ownership of the assets including that he remitted funds from the Investec accounts directly to his personal offshore bank accounts, none of these transactions paid any heed to the assignment arrangement, the existence of which was never disclosed to SARS and the ATO.

[16] Consequent upon the investigation, the ATO concluded that Mr Krok had intended to conceal foreign income and avoid income tax in Australia as shown, for example, by the use of entities established in banking secrecy jurisdictions such as the British Virgin Island and Liechtenstein. In the ATO's view, Mr Krok had omitted assessable income from his income tax returns that was derived from assets, including those administered on his behalf by Investec, which he held in South Africa whilst an Australian resident and also concealed capital gains on disposals of those assets when he ceased to be an Australian resident. The ATO further determined that Mr Krok retained legal and beneficial interests in the

assets and that 'the purported assignment arrangement' of his rights and interests to the capital and income of these assets to Polperro breached the South African exchange control regulations and was a sham. For these reasons, the ATO accordingly amended his income tax returns for the income years and issued notices of assessment of tax and penalties. Mr Krok's objection to the assessments under the procedures provided by Australian law was disallowed in full.

[17] As indicated, upon the ATO's request for SARS' assistance of 6 February 2013, SARS launched an application in terms of s 163 read with s 185 of the Act for a provisional preservation order which was granted and subsequently confirmed by the court below. The assets specified under the order comprised immovable property, cash investments, a motor vehicle and various listed and unlisted securities of considerable value held in Mr Krok's name or on his behalf by nominees. The rights, title and interest in these assets would vest in the curator *bonis*, to whom Mr Krok was obliged to disclose all his assets and sources of income held in South Africa and their location, until the tax debt was satisfied or proper arrangements for purposes of the tax collection were made.

[18] The issues in the court below were characterised as follows: whether – (a) SARS proved its case in the context of s 185 of the Act and the Protocol; (b) the facts justified a reasonable apprehension of dissipation of the assets; and (c) the introduction of article 25A into the DTA applied to the taxes claimed by the ATO for the income years all which arose before 1 July 2009. Among the defences raised on Mr Krok's behalf was that the tax claimed by the ATO fell outside the scope of the DTA. This was so, it was argued, because the Protocol came into effect on 12 November 2008,[13] and in terms of article 13(2)(a)(ii) thereof, with regard to Australian tax applies to income, profit or gains accrued on or after 1

13In terms of Government Notice No. 31721 dated 23 December 2008 which reads '[I]n terms of paragraph 2 of Article 13 of the Protocol … the date of entry into force is 12 November 2008.'

July on the calendar year following the date on which it came into force. The Protocol, so it was contended, therefore applies only in respect of income, profits or gains of any year of income beginning on or after 1 July 2009.

[19] Jucool aligned itself with Mr Krok's submissions. It further argued that the preservation order should not be confirmed even if these defences failed as it is the beneficial owner of the assets subject to the preservation order. On the basis of Mr Moverley Smith's opinion, it was contended on its behalf that (a) the agreements it concluded with Mr Krok and the Deed of Assignment were valid and binding under the laws of the British Virgin Islands; (b) the agreements created trusts of the assets and rights pursuant to which, upon the agreements coming into effect, legal title to the assets and rights was retained by Mr Krok pending transfer and the beneficial ownership of the rights and assets passed to Jucool; and (c) such trusts were enforceable at the instance of Jucool.

[20] As evidence of the validity of the agreements, it was contended that they required Mr Krok to hold the assets, rights and interest Jucool acquired thereunder in trust on its behalf and for its benefit.[14] They further required Mr Krok to transfer the registered title to the assets into Jucool's name as and when the assets became transferable, at such time as Jucool deemed appropriate.[15] Clause 8 of these agreements further obliged Mr Krok, if any of the assets were sold or the rights and interests they envisaged were realised, to cause the net proceeds attributable to Jucool to be paid to it promptly. Pending such payment, Mr Krok was required to hold, invest and otherwise deal with such net proceeds as Jucool required or directed so as to give effect to the rights acquired by Jucool pursuant to the agreements. According to Jucool's affidavits, its directors were aware that the assets situated in South Africa were blocked under the exchange control

14 Clauses 7.3.1 and 6.4.1 of the Income Sale Agreement and the Asset Sale Agreement, respectively.
15 Clauses 7.2 and 6.2 of the Income Sale Agreement and the Asset Sale Agreement, respectively.

regulations and the agreements were concluded in a manner that ensured that these regulations were adhered to. To that end, so it was argued, the agreements, which recognised that the capital of the assets could not be remitted from South Africa, expressly required proper applications for permissions and consents from the Exchange Control Department of the SARB to remit the assets, which were always held by an authorised dealer in foreign exchange in an account subject to regulation 4(2).[16]

[21] The court below was not persuaded by any of these contentions. With regard to Mr Krok's arguments, it accepted SARS' interpretation of the relevant provisions of the DTA and concluded that '[h]aving regard to the objective facts … the purpose of the relevant legislation and the purpose of the Protocol, and the proper context, I am of the view that ss 163 and 185 of [the Act], in the context of the relevant Protocol, justify the confirmation of the Preservation Order that was provisionally made'. The court below was similarly unimpressed by Jucool's case. It held that examples of the manner in which Mr Krok dealt with the assets as the beneficial owner abounded in the ATO's documentation and Mr Krok's submissions to it and that no effective transfer of rights, or even an intention to do so, was shown to have taken place.

[22] On appeal before us, the only argument persisted in on Mr Krok's behalf was that on a proper interpretation of article 25A of the DTA and article 13(2)(a)(ii) of the Protocol, article 25A can be invoked only if the taxes claimed by the ATO arose on or after 1 July 2009. This was so, it was contended, because in terms of the common law revenue rule, any assistance that can be provided by one State to another under article

16 In terms of regulation 4(2), whenever a person in South Africa is under a legal obligation to make a payment to a person outside South Africa but is precluded from effecting the payment as a result of any restrictions imposed by or under the regulations, the Treasury may order such person to make the payment into a blocked account.

25A is limited to the collection of ‘revenue claims’ ie amounts owed in respect of taxes referred to in article 2 of the DTA. And, in the case of Australia, in terms of article 13(2)(a)(ii) read with article 3(1)(c), which defines ‘Australian tax’ to which the reach of article 25A is confined, the Australian taxes referred to in article 2 only apply to income, profits or gains in relation to years of income commencing on or after 1 July 2009. As the taxes claimed here arose before the latter date, they fell beyond the scope of the DTA and there was thus no basis for the invocation of the conservancy provisions of the Act. So went the argument.

[23] The court below was further criticised for overlooking the general rule of interpretation that in the absence of express provisions to the contrary, statutes should be construed as affecting future matters only. In this regard it was argued that the court erroneously accepted SARS’ contention that article 25A applies retrospectively to all taxes since the inception of the DTA notwithstanding the express provisions of article 13(2)(a)(ii). Jucool supported these contentions, as it had done in the court below, and again argued against the confirmation of the preservation order even if the defences failed on the further basis that it is the beneficial owner of the assets subject to the order.

[24] The DTA and the Protocol, which came into effect on 12 November 2008, were concluded in terms of s 108(2) of the Income Tax Act 58 of 1962 read with s 231(4) of the Constitution of the Republic of South Africa, 1996 (the Constitution).[17] Thus, they became part of South African law as they were approved by the legislature under these provisions and duly gazetted.[18] In its original form, the DTA made no provision for reciprocal assistance in the collection and enforcement of foreign taxes in the courts of the two States. It merely catered for mitigation of double taxation of taxpayers who would otherwise be liable for tax in two jurisdictions in respect of the same taxable gain or income by allocating taxation rights between convention or treaty parties. Furthermore, it provided for the exchange of any information necessary for the carrying out of its terms or the domestic law of the contracting States concerning the relevant taxes. The Protocol amended the DTA by, inter alia, making provision (in article 11 which inserted article 25A into the DTA) for the two States to assist each other in the collection of taxes and securing preservation orders for purposes of recovering taxes.

[25] The provisions of the Act, which was promulgated after the Protocol came into effect 'to ensure the effective and efficient collection of tax' not only in respect of taxes imposed by South Africa on its subjects, but also on behalf of

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17 Section 108 of the Income Tax Act provides for the prevention of or relief from double taxation and reads in relevant part:
'(1) The National Executive may enter into an agreement with the government of any other country, whereby arrangements are made with such government with a view to the prevention, mitigation or discontinuance of the levying, under the laws of the Republic and of such other country, of tax in respect of the same income, profits or gains, or tax imposed in respect of the same donation, or to the rendering of reciprocal assistance in the administration of and the collection of taxes under the said laws of the Republic and of such other country.
(2) As soon as may be after the approval by Parliament of any such agreement, as contemplated in section 231 of the Constitution, the arrangements thereby made shall be notified by publication in the Gazette and the arrangements so notified shall thereupon have effect as if enacted in this Act.'
Section 231(4) of the Constitution makes provision for international agreements and reads: 'Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament'.
18 In Government Notice 1368 published in Government Gazette No 31721 of 23 December 2008.

foreign governments, are consonant with the Protocol's objectives. Section 185 provides in relevant part:

'(1) If SARS has, in accordance with an international tax agreement, received–

(*a*) a request for conservancy of any amount alleged to be due by a person under the tax laws of the other country where there is a risk of dissipation or concealment of assets by the person, a senior SARS official may apply for a preservation order under section163 as if the amount were a tax payable by the person under a tax Act'.

Section 163 in turn provides:

'(1) A senior SARS official may authorise an *ex parte* application to the High Court for an order for the preservation of any assets of a taxpayer or other person prohibiting any person, subject to the conditions and exceptions as may be specified in the preservation order, from dealing in any manner with the assets to which the order relates.'

[26] Before the enactment of these provisions and the introduction of article 25A into the DTA, the revenue rule prevailed. In terms of this international law rule, which forms part of South African law, the courts of one State are precluded, in the absence of a permissive rule to the contrary from entertaining legal proceedings involving the enforcement of the revenue laws of another State – an attribute of sovereignty. This is so, because international comity does not extend to the recognition of tax liabilities imposed by a State on its subjects for its own domestic management and regulation. Thus, a foreign State may not have a claim for taxes payable to its fiscus enforced in another State as this would be tantamount to derogation of the other State's territorial supremacy.[19] For that reason, South African courts had no power to order the attachment of assets for the purposes of enabling a foreign State to recover taxes owed

19*Re Delhi Electric Supply & Traction Co. Ltd* [1953] 2 All ER 1452 (CA); *Government of India, Minister of Finance (Revenue Division) v Taylor and another* [1955] AC 491; [1955] 1 All ER 292 (HL); *Commissioner of Taxes, Federation of Rhodesia v McFarland* 1965 (1) SA 470 at 474A-B; [1965] 1 All SA 389 (W) at 394.

to it until the rule was abrogated by the introduction of article 25A in the DTA and other double taxation agreements containing similar provisions.

[27] Regarding the approach to be adopted in construing the relevant provisions, consideration must be had to the rules applicable to the interpretation of treaties which are binding on South Africa and all States as rules of customary international law.[20] These rules, which are essentially no different from those generally applied by our courts in construing statutes and agreements,[21] are set out in articles 31 and 32 of the Vienna Convention on the Law of Treaties, 1969 which read:

'Article 31 General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) Any relevant rules of international law applicable in the relations between the parties.

4.

20 *Fothergill v Monarch Airlines Ltd* [1981] AC 251 at 282 C-F; [1980] 2 All ER 696 (HL); *Ben Nevis Holdings Ltd and Metlika Trading Ltd v Commissioners for HM Revenue & Customs* [2013] EWCA Civ 578 paras 17 and 18.
21*Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) 593 (SCA) paras 18 and 19.

5. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.'

[28] It was contended for Mr Krok that the revenue rule, which entitled South African taxpayers to arrange their affairs on its assurance that their assets were protected against foreign tax authorities, has an important role in considering the proper interpretation to be given to the applicable provisions of the DTA. This was so, it was argued, because article 25A abrogated the rule only in respect of Australian taxes in respect of income, profits or gains of any year of income beginning on or after 1 July 2009 and had no retrospective effect as found by the court below. I do not agree. It is established, as the parties acknowledged, that the rule, which is concerned with the enforcement of taxes, does not constitute an absolute proscription of the recognition of foreign revenue laws and may be abrogated by convention or treaty.[22] Evidently, the reason for the rule between South Africa and Australia ceased to exist once the two countries agreed to assist each other in the collection of taxes. In that case the rule itself has no relevance whatsoever in the determination of the meaning and scope of the Protocol.[23]

[29] Similarly wrong is Mr Krok's argument relating to the South African taxpayers' purported expectations based on the revenue rule, were it relevant for present purposes. The argument obviously misconceives the nature of the rule

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22*Government of India v Taylor,* fn 19 at 299.

23*Labuschagne v Labuschagne; Labuschagne v Minister van Justisie* 1967 (2) SA 575 (A) at 578D-F.

which does not exist for the benefit or protection of taxpayers.[24] As was pointed out in *Government of India v Taylor*,[25] the rule has two likely sources. One is a State's autonomy as the 'enforcement of a claim for taxes is but an extension of the sovereign power which imposed the taxes and … an assertion of sovereign authority by one State within the territory of another, as distinct from a patrimonial claim by a foreign sovereign, is (treaty or convention apart) contrary to all concepts of independent sovereignties'. The other has to do with the court's powers. Scrutiny of the public order of another State, to which revenue laws are analogous, involves enquiring into whether they accord with its own public policy. This affects the relations between the foreign States which obviously fall beyond a court's purview as this is an area entrusted to the executive. A court's application of the rule or its abrogation is therefore not concerned with any rights of a taxpayer.

[30] Turning to the relevant provisions of the Protocol, article 13.1 thereof makes provision for Australia and South Africa to 'notify each other in writing through the diplomatic channel of the completion of their domestic requirements for the entry into force of this Protocol'. Article 13.2 provides:

'The Protocol, which shall form an integral part of the [DTA], shall enter into force on the date of the last notification, and thereupon the Protocol shall have effect:

(a) in the case of Australia:

(i) with regard to withholding tax on income that is derived by a non-resident, in respect of income derived on or after the first day of the second month following the date on which the Protocol enters into force;

(ii) with regard to other Australian tax, in respect of income, profits or gains of any year of income beginning on or after 1 July in the calendar year following the date on which the Protocol enters into force'.

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24 *Ben Nevis (Holdings) Ltd*, fn 20.

25 Above, fn 20.

[31] Article 25A reads:

‘1. The Contracting States shall lend assistance to each other in the collection of revenue claims. This assistance is not restricted by Article 1. The competent authorities of the Contracting States may by mutual agreement settle the mode of application of this Article.

2. The term “revenue claim” as used in this Article means an amount owed in respect of taxes referred to in Article 2, insofar as the taxation thereunder is not contrary to this Agreement or any other instrument to which the Contracting States are parties, as well as interest, administrative penalties and costs of collection or conservancy related to such amount.

3. When a revenue claim of a Contracting State is enforceable under the laws of that State and is owed by a person who, at that time, cannot, under the laws of that State, prevent its collection, that revenue claim shall, at the request of the competent authority of that State, be accepted for purposes of collection by the competent authority of the other Contracting State. That revenue claim shall be collected by that other State in accordance with the provisions of its laws applicable to the enforcement and collection of its own taxes as if the revenue claim were a revenue claim of that other State.

4. When a revenue claim of a Contracting State is a claim in respect of which that State may, under its law, take measures of conservancy with a view to ensure its collection, that revenue claim shall, at the request of the competent authority of that State, be accepted for purposes of taking measures of conservancy by the competent authority of the other Contracting State. That other State shall take measures of conservancy in respect of that revenue claim in accordance with the provisions of its laws as if the revenue claim were a revenue claim of that other State even if, at the time when such measures are applied, the revenue claim is not enforceable in the firstmentioned State or is owed by a person who has a right to prevent its collection.

…’.

[32] In turn, article 2 of the Protocol, which substituted the original article 2 of the DTA and to which reference is made in article 25A.2, provides:

‘1.The existing taxes to which this Agreement shall apply are:

(a) in the case of Australia:

the income tax, including the resource rent tax in respect of offshore projects relating to exploration for or exploitation of petroleum resources, imposed under the federal law of Australia;

(b) in the case of South Africa:

(i) the normal tax;

(ii) the secondary tax on companies; and

(iii) the withholding tax on royalties.

2. The Agreement shall apply also to any identical or substantially similar taxes, including taxes on dividends that are imposed under the federal law of Australia or by the Government of the Republic of South Africa under its domestic law after the date of signature of the Agreement in addition to, or in place of, existing taxes. …

3. For the purpose of Article 23A, the taxes to which the Agreement shall apply are taxes of every kind and description imposed on behalf of the Contracting States, or their political subdivisions or local authorities.

4. For the purposes of Articles 25 and 25A, the taxes to which the Agreement shall apply are:

(a) In the case of Australia, taxes of every kind and description imposed under the federal laws administered by the Commissioner of Taxation; and

(b) In the case of South Africa, taxes of every kind and description imposed under the tax laws administered by the Commissioner for the South African Revenue Service.'

[33] The new article 2 amended its predecessor in a number of ways but only slightly with regard to taxes applicable to Mr Krok in Australia.[26] Of real significance was the amending article 2.3 which provided that for purposes of the new article 23A the taxes to which the DTA shall apply are taxes of any kind and description. And more pertinent is the new article 2.4 dealing with the exchange of information and reciprocal assistance in tax recovery provisions: it provided that for the purposes of

26 For example, the original articles 2.1 and 2.2 were amended (a) by the replacement in article 2.1(a) of the word 'and' between the words 'income tax' and 'the resource rent tax' in the case of Australia with the word 'including'; (b) in the case of South Africa, by the addition in a new subparagraph (iii) of the words 'withholding tax on royalties' as a tax to which the DTA applies and (c) by the inclusion in article 2.2 of the words 'including taxes on dividends that' and the deletion of the word 'which' after the word 'taxes' in the first sentence, and the respective replacement of the words 'substantial' and 'which' with the words 'significant' and 'that' in the fifth sentence.

articles 25 and the new 25A, the taxes to which the DTA applies are taxes of every kind and description imposed under the taxes administered by the Australian Commissioner of Taxation and the Commissioner for SARS.

[34] The express reference in articles 2.3 and 2.4 to 'taxes of every kind and description' is obviously deliberate and unambiguous. A plain reading of the wording of article 2, which says nothing whatsoever about any time limitations, makes it clear that for purposes of articles 25 and 25A the taxes to which the DTA applies are not limited by articles 2.1 and 2.2. The reference in article 25A.2 to a revenue claim (in respect of which the contracting States shall assist each other for its collection) as 'an amount owed in respect of taxes referred to in article 2' cannot be directed at article 2.1 alone. Neither does it mean that only article 2.1 identifies the taxes to which the DTA applies as contended by the appellants. Such reference must also include article 2.4 which refers back to article 25A and gives the DTA's scope the widest latitude in this regard. As was correctly argued on SARS' behalf, it is precisely the wide application provided in article 2.4 that gave rise to the need to add the words 'in so far as the taxation thereunder is not contrary to [the DTA] or any other instrument to which the Contracting States are parties'.

[35] Article 13 on the other hand, quite contrary to the appellants' contentions, does not purport to form part of the DTA. Its plain wording merely pronounces that the Protocol shall form an integral part of the DTA and provides the dates from which the amendments to the DTA provided by the Protocol in respect of the matters specified in article 13 would come into effect, ie on the date of last notification. Article 13(2)(a)(ii), the mainstay of the appellants' argument on how article 25A should be construed, makes reference to 'other Australian tax'. This can only mean Australian tax other than the withholding tax on income mentioned

in article 13(2)(a)(i). The DTA defines 'Australian tax' in article 3(c) as tax to which the DTA applies by virtue of its article 2. And as indicated above, such tax would be that specified in articles 2.1(a) of the DTA. It must follow that the 'the other Australian tax' referred to in article 13(2)(a)(ii) is 'income tax, including the resource rent tax' envisaged in article 2.1 but excluding the withholding tax on income referred to in article 13.2(a)(i). This starkly illustrates the fallacy in the appellants' interpretation of article 2 and in particular the term 'revenue claim'.

[36] Interestingly, in terms of article 10 of the Protocol, article 25 of the DTA was replaced with the new article 25 mentioned in article 2.4. The amending article included new subparagraphs providing for additional powers in relation to the exchange of information. These provisions expressly expanded the scope of such exchange in light of article 2.4 beyond the taxes previously envisaged in articles 2.1 and 2.2 to taxes of every kind and description. Article 25 provides no temporal limitations relating to exchange of information. In terms of article 13(2)(c) the Protocol would have effect for purposes of article 25 from the date on which the Protocol entered into force. Thus, article 25 would take effect simultaneously with the Protocol, on 12 November 2008, in respect of taxes of every kind and description and without any limitation regarding the time periods in relation to which information would be exchanged. This inevitable result certainly does not accord with what would be produced by the appellants' interpretation of article 2, ie that only information concerning 'other Australian tax' in respect of income profits or gains arising after 1 July 2009 may be exchanged.

[37] Mr Krok further relied on the official commentary on the OECD Model Convention on Double Taxation, on which article 25A is based, to bolster his

argument.[27] He contended that the commentary's explanation that States are entitled to restrict the application of article 25A to taxes arising or levied from a certain time, ie that article 25A can be subject to limitation, supports his interpretation of its provisions. But a similar argument was raised and properly dismissed in *Ben Nevis (Holdings) Ltd and Metlika Trading Ltd v Commissioners for HM Revenue & Customs*.[28] There, the court considered the provisions of a tax treaty between South Africa and the United Kingdom in an appeal in which issues similar to those raised here were considered in the context of a similar article 25A in a 2002 convention between the two countries as amended by a 2010 protocol. This was in relation to the collection of income tax by SARS, assisted by the UK Revenue authority, which accrued during the 1998, 1999 and 2000 years of assessment. The taxpayer's ultimate argument in its resistance to the tax recovery was that on a proper interpretation of the 2010 protocol and the 2002 convention, article 27 of their DTA (similar to article 27 of the DTA) applied to article 25A and precluded mutual assistance in the collection of tax debts which arose before 1 January 2003.

[38] Mr Krok sought to capitalise on the distinguishing features between *Ben Nevis* and the instant appeal. It was argued, inter alia, that this appeal is not concerned with the scope and effect of article 27 but the temporal limitation imposed by article 13(2)(a)(ii) on article 25A as opposed to Article VI of the South African and United Kingdom treaty which does not have any temporal limitation. I am nonetheless persuaded that there is sufficient similarity between the issues

27The commentary reads: '14. Nothing in the [OECD Model] Convention prevents the application of the provisions of the Article to revenue claims that arise before the Convention enters into force, as long as assistance with respect to these claims is provided after the treaty has entered into force and provisions of the Article have become effective. Contracting States may find it useful, however, to clarify the extent to which the provisions of the Article are applicable to such revenue claims, in particular when the provisions concerning the entry into force of their Convention provide that the provisions of that Convention will have effect with respect to taxes arising or levied from a certain time. States wishing to restrict the application of the Article to claims arising after the Convention enters into force are also free to do so in the course of bilateral negotiations.'

28*Ben Nevis (Holdings) Ltd and Metlika Trading Ltd v Commissioners for HM Revenue & Customs* [2013] EWCA Civ 578 paras 32 and 33.

raised in both cases and that the findings of the English court on the nature and effect of article 25A are instructive for present purposes.[29] Regarding the submissions relating to the OECD commentary, the court held that the commentary makes clear that it is open to the parties to apply the provision on assistance in the collection of taxes to revenue claims arising before the Convention enters into force and that the question is whether the parties intended that the Protocol should have that effect. All indications are that this is what was intended here.

[39] As to whether assistance could be rendered in terms of Article 25A in respect of taxes that arose prior to the 2002 Convention, the court held:[30]

'[T]he Protocol in Article IV (introducing the new Article 25A) … makes entirely sensible and workable provision for assistance in the collection of taxes and it is not necessary to resort to Article 27 to supplement it. Its provisions apply only to requests for assistance made after the entry into force of the Protocol. The Convention in its original form was principally concerned … with substantive issues of double taxation. These provisions, when brought into effect and implemented, modified liability to taxation in both the United Kingdom and South Africa. There was therefore a compelling reason why it was necessary to define with precision the scope of their effect by reference to both the categories of taxes and the time of accrual of liability to which they applied. This need was intensified by the fact that the 2002 Convention was merely the latest in a line of treaties between the United Kingdom and South Africa on double taxation and it was necessary to define the precise temporal limitations of the successive regimes which they introduced. Article 27 has a vital role to perform in this context. However, while parties may choose to limit the temporal application of provisions relating to mutual assistance in this way, I can see no corresponding necessity for defining the years of accrual liability to which such provisions for mutual assistance

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29 Article 27(1)(a)(ii) under consideration in *Ben Nevis* bears striking resemblance to article 13(2)(a)(ii). It provides that '[e]ach of the Contracting States shall notify the other, through the diplomatic channel, the completion of the procedures required by its law for the bringing into force of this Convention [which] shall enter into force on the date of receipt of the later of these notifications and shall thereupon have effect … in South Africa … with regard to other taxes, in respect of taxable years beginning on or after the 1st January next following the date upon which this Convention enters into force'.

30 At paras 23 and 24.

may apply. *"Taxes' in Article 25A(2) does not need to be limited by reference to the date of their accrual. Article 25A has no bearing on liability to tax and is merely concerned with proceedings for enforcement. Whereas provisions which modify tax changes need to be linked to the relevant tax period so as to ensure a smooth transition from the existing rules to the new rules, there is no need to make similar provision for administrative provisions such as Article 25A which may, without difficulty, be brought into effect as soon as the Protocol comes into effect ... This reading of the provisions is also consistent with the objective of the Protocol which …is to assist international tax enforcement … This purpose would be obstructed by limiting Article 25A in the manner proposed by the Appellants.'* (My emphasis.)

These views aptly contextualise the DTA and the meaning and purpose of article 25A. For the same reasons adopted by the English court, there is clearly no basis to construe article 25A as being subject to article 13(2)(a)(ii).

[40] There is equally no merit in the retrospectivity point which the appellants properly conceded during argument. The rule against retrospectivity bears no relevance in this case. The effect of article 25A is plainly prospective as it could only be invoked when the relevant countries so agreed and its provisions came into force. Tax claims which arose in the past in respect of which assistance was sought would also be covered. It is a firmly established principle of our law that a statute is not retrospective merely 'because a part of the requisites for its action is drawn from time antecedent to its passing'.[31] The appellants' own argument supports this position because they paradoxically accepted that article 25A, which it was common cause came into force on 1 July 2010,[32] may be applied to Australian tax in respect of income profits or gains in any year of income beginning on or after 1 July 2009.

31*R v St Mary, Whitechapel (Inhabitants)* 116 E.R. 811 ((1848) 12 QB 127) at 814. See also *R v Grainger* 1958 (2) SA 443 (A) at 446; *Adampol (Pty) Ltd v Administrator, Transvaal* 1989 (3) SA 800 (A) at 812A-F, 817I-818A; *Swanepoel v Johannesburg City Council* 1994 (3) SA 789 (A) at 793.

32 In terms of Diplomatic Note No 10/184 from the Australian Department of Foreign Affairs and Trade dated 23 July 2010 and Diplomatic Note Aus/16/2010 from the Department of International Relations and Cooperation of the Republic of South Africa dated 28 July 2010.

[41] Therefore, when article 25A entered into force on 1 July 2010 in terms of article 13(2)(d), it applied to a revenue claim, ie an amount owed in respect of taxes of every kind and description to which article 13(2)(a)(ii) has no application. Mr Krok's jurisdictional challenge to the preservation order accordingly fails.

[42] I now turn to Jucool's claim that the preservation order should nevertheless be discharged because SARS pursued these proceedings in total disregard of its ownership of the beneficial interest in the assets in question, despite having notice thereof. It seems that this issue can safely be decided simply by determining whether or not ownership in the assets passed from Mr Krok to Jucool. I will assume without deciding, in the appellants' favour, that the agreements were binding and valid under the law of the British Virgin Islands. But there is an insuperable difficulty with which Jucool must contend. The assets are situated in South Africa and not in the British Virgin Islands. Their fate must accordingly be decided in terms of the relevant South Africa law.[33] In particular, as we are concerned with the question whether the ownership of assets situated in South Africa passed from Mr Krok to Jucool, the law of South Africa (the *forum rei sitae*) governs. This is also in accordance with English common law, which is the law applicable in the British Virgin Islands.[34]

[43] The Deeds Registries Act 47 of 1937 governs the transfer of real rights in immovable property. Section 16 thereof provides that 'ownership of land may be conveyed from one person to another only by means of a deed of transfer executed or attested by the registrar, and other real rights in land may be conveyed from one person to another only by means of a deed of cession attested by a notary public

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33*Estate Kemp v McDonald's Trustee* 1915 AD 491 at 498-499; *Gallo Africa Ltd v Sting Music (Pty) Ltd* 2010 (6) SA 329 (SCA) para 11.

34*Marcard Stein & Co v Port Marine Contractors (Pty) Ltd* 1995 (3) SA 663 (A) at 667; *Hardwick Game Farm v Suffolk Agricultural and Poultry Producers Association Ltd (William Lillico & Son Ltd and another, Third Party; Henry Kendall & Sons and another, Fourth Parties)* [1966] 1 All ER 309 (CA) at 338I.

and

registered by the registrar'. And s 63 of the same Act imposes a strict restriction on such registration. It provides that '[n]o deed, or condition in a deed, purporting to create or embodying any personal right, and no condition which does not restrict the exercise of any right of ownership in respect of immovable property, shall be capable of registration: Provided that a deed containing such a condition … may be registered if, in the opinion of the registrar, such condition is complementary or otherwise ancillary to a registrable condition or right contained or conferred in such deed.'

[44] As to movable property, whether corporeal or incorporeal, it is trite that ownership thereof cannot pass by virtue of a contract of sale alone: there must in addition, be at least proper delivery of the contract goods to the purchaser.[35] In sum, the transfer of rights in movable property, which is governed by the *lex situs*, requires delivery.

[45] None of these legal requirements appear to have been met in respect of the assets in issue. And this also applies to the lesser rights in the incorporeal movables such as the right to income derived from the shares which would have required transfer by way of cession. Jucool merely contented itself with its reliance on the provisions of the British Virgin Islands law and the opinion of its English expert thereon (who did hint at some recognition of the importance of South African law in this regard). It has not shown that the court below erred in finding that it failed to prove its beneficial ownership in the assets and confirming the preservation order. The appeal must therefore fail.

35*Marcard Stein & Co*, fn 34, at 667B*; Lendalease Finance (Pty) Ltd v Corporacion De Mercadeo Agricola* 1976 (4) SA 464 (A) at 489H-490A.

[46] In the result, the following order is made:

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

M M L MAYA

Judge of Appeal

APPEARANCES

FIRST APPELLANT:	P Ginsburg SC (with G Goldman) Instructed by: Cliffe Dekker Hofmeyr Inc., Sandton Webbers, Bloemfontein
SECOND APPELLANT:	A E Franklin SC (with S W Burger) Instructed by: Bowman Gilfillan Inc., Sandton McIntyre & Van der Post, Bloemfontein
RESPONDENT:	N G D Maritz SC (with H G A Snyman SC) Instructed by: Mahlangu Attorney, Pretoria Lovius-Block, Bloemfontein