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Tax Judgments and Company Law Evidence of Corporate Governance Concerns

Tracy Gutuza

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TAX JUDGMENTS AND COMPANY LAW: EVIDENCE OF CORPORATE GOVERNANCE CONCERNS

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The article considers the role of tax disputes as a signal of a company's approach to corporate governance by considering two tax disputes between the South African Revenue Service and the Steinhoff group. It seeks to illustrate the role of tax disputes as a signal of corporate governance concerns through an analysis of the two cases, namely CSARS v Capstone 556 (Pty) Ltd *and* CSARS v Kluh Investments (Pty) Ltd. *The tests used in determining tax liability can be difficult to navigate where the respective roles of the board of directors, the directors and the shareholders are not clear, with de facto and de jure ownership and control shifting between the various parties. This may create uncertainty about who is actually in control of the company and who is legally in control of the company. An in-depth analysis of these two cases shows that tax disputes can alert stakeholders and serve as a warning that something is amiss in the governance of the company.*

Tax disputes – corporate governance

I INTRODUCTION AND BACKGROUND

The tax laws of any country must apply to companies, and the relevant tax investigation procedures and tax dispute procedures must take into account the rules and laws dealing with a company's governance. Tax investigations, tax dispute procedures, and the rules relating to the governance of companies may become relevant when companies or affiliate companies structure commercial transactions in such a way as to reduce or defer the taxation of the company or the affiliate companies. These types of commercial transactions may also reflect a company's approach to corporate governance.

Disputes between companies and the revenue authority may also arise when it is difficult to determine the intention of a company and whether the intention of a shareholder, director, board of directors or some other third party can be attributed to the intention of the company. The uncertainty about whose intention should be ascribed to the company may signal a corporate governance breakdown, or a potential corporate governance breakdown. This article seeks to explore this signal by considering the court decisions on tax disputes between the South African Revenue Service ('SARS') and companies in the Steinhoff group. The tax disputes

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involve two companies in the Steinhoff group, namely Capstone 556 (Pty) Ltd ('Capstone') and Kluh Investments (Pty) Ltd ('Kluh').

The Steinhoff group's legal woes almost certainly qualify as one of the biggest corporate governance breakdowns in recent South African history.[1] Much has been written about the group's corporate governance concerns, and the failures of its internal oversight policies and the group's board of directors and auditors.[2] An aspect of the Steinhoff debacle that is not frequently discussed is the tax disputes between the group (and its affiliates) and SARS that played out before the Steinhoff bubble burst. Whether these earlier tax disputes were a portent of the future Steinhoff disputes cannot be stated with any certainty, but these cases do seem, in hindsight, to raise questions about governance and decision-making in the group and its affiliated companies. When tax disputes arise because of the uncertainty about who actually makes decisions on behalf of the company and whose intention should be attributed to company governance issues, this should serve as a warning to the stakeholders of a company that something is amiss in the company's governance.

II CORPORATE GOVERNANCE AND TAX LAW

While company law regards the board of directors and individual directors as the key role players in the governance of a company,[3] the tax liability of a company is not wholly dependent on the role that is played by the board and the directors. In general terms, the directors usually deal with the management of the company while the business and affairs of the company are managed by, or are under the direction of, the board.[4] There are cases where the role of directors and the board of a company have been critical in determining the tax liability of a company.[5] There are also instances where the role of other stakeholders, such as management, shareholders, and other companies in the group, have played as significant a role.[6]

[1] See for example J B Styan *Steinhoff: Inside SA's Biggest Corporate Crash* (2018); K E van der Linde 'The Steinhoff corporate scandal and the protection of investors who purchased shares on the secondary market' (2022) 25 *PER/PELJ* 1; P Naudé (ed) 'Business perspectives on the Steinhoff saga' USB Management Review Special Report, June 2018, available at *https://www.stellenboschbusiness.ac.za/management-review/sites/default/files/media/documents/2024-03/BusinessPerspectivesontheSteinhoffSaga.pdf*, accessed on 11 November 2024.

[2] All sources ibid.

[3] See s 66 of the Companies Act 71 of 2008.

[4] See the discussion and commentary on s 66 of the Companies Act in Piet Delport (ed) *Henochsberg on the Companies Act 71 of 2008 and Commentary* (2024).

[5] See for example *Commissioner for Inland Revenue v Pick 'n Pay Wholesalers (Pty) Ltd* 49 SATC 132, 1987 (3) SA 453 (A); *Elandsheuwel Farming (Edms) Bpk v Sekretaris van Binnelandse Inkomste* 39 SATC 163, 1978 (1) SA 101 (A).

[6] See for example *Laerste BV v Commissioners* [2009] UKFTT 209 (TC); Tracy Gutuza 'Has recent United Kingdom case law affected the interplay between

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The role of different stakeholders in determining a company's tax liability arises because tax legislation, as interpreted by the courts, seeks to determine either where a company is actually or effectively managed,[7] or the intention of the taxpayer company.[8] The location of actual or effective management may not always be definitively determined by the location of the board or the directors.[9] Similarly, the intention of a company, or the decision-making power of a company relating to the purchasing or selling of assets (such as the core assets of the company), may not necessarily be located in the board or the directors or in the management of the company.[10]

In seeking to determine a company's intention, the courts have considered the role of various company stakeholders in making decisions on behalf of the company. Thus, at times, the intention has been found in the shareholders of a company[11] or in a particular director of a company.[12] The role of shareholders, managers and other stakeholders in a company seems to be increasingly important in determining the intention of a company in tax disputes. While this cannot be faulted as a matter of principle, the growing importance of the role of these stakeholders can also cast light on the company's corporate governance. If the intention of a manager, shareholder or individual director (as opposed to the board of directors) is attributed to the company, is this an indication that something is amiss in the corporate governance structures of that company? In this context, the tax disputes between SARS and the Steinhoff-affiliated companies may be interpreted as a precursor to, and even as evidence of, the corporate governance failures that eventually emerged.

"place of effective management" and "controlled foreign companies"?' (2012) 26 *SA Merc LJ* 424.

[7] 'Place of effective management' is one of the tests used to determine whether a company is tax resident in South Africa. See the definition of 'residence' in s 1 of the Income Tax Act 58 of 1962.

[8] The intention of the taxpayer is particularly important in determining whether amounts received by or accrued to a taxpayer falls in the categories of 'capital' or 'revenue'. See the definition of 'gross income' in s 1 of the Income Tax Act as interpreted in cases such as *Pick 'n Pay* supra note 5.

[9] See *Laerste* supra note 6. See also South African Revenue Services Interpretation Note No 6 (Issue 2) 'Resident — Place of Effective Management (Companies)' November 2015 and the cases mentioned there.

[10] See *Elandsheuwel* supra note 5; see also D French, R Stretch & D Clegg 'Income tax in South Africa' (2024 update) para 5.2.4; A P de Koker & R C Williams *Silke on South African Income Tax* (March 2023 update) para 3.8.

[11] All sources ibid.

[12] All sources ibid.

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III STEINHOFF'S TAX DISPUTES

A few years before Steinhoff's corporate governance failure was exposed, individuals and companies associated with the group were involved in tax disputes with SARS. The first dispute was based on the possible infringement of the provisions of the Constitution,[13] with the other two substantive tax disputes ultimately being decided by the Supreme Court of Appeal.[14] The tax disputes involved two companies: Capstone and Kluh.

The first dispute, which concerned the constitutionality of the 'pay now, argue later' principle, is mentioned for the sake of completeness as it did not deal with corporate governance issues. In terms of this principle, a taxpayer who disputes a tax assessment must first pay the disputed assessed amount to SARS before proceeding with the relevant dispute process.[15] This dispute, which came before the Western Cape High Court, had its origins in Capstone and Kluh seeking to interdict SARS from taking judgments against them, attaching their bank accounts, and taking steps against any of their public officers.[16] The interdictory relief was sought because SARS had refused to suspend the payment of the disputed taxes that it had assessed to be due while the assessments were being disputed. Capstone and Kluh sought to argue that the 'pay now, argue later' principle was incompatible with s 34 of the Constitution and was thus unconstitutional.[17]

The constitutionality of the 'pay now, argue later' principle had already come before the Constitutional Court in 2002 in *Metcash Trading Ltd v CSARS*.[18] In *Metcash*, the taxpayer had also argued that the 'pay now, argue later' principle as set out in the Value Added Tax Act[19] was incompatible with the s 34 of the Constitution. The Constitutional Court held that the principle was not incompatible with s 34 of the Constitution because decisions of SARS are subject to judicial intervention.[20]

Capstone and Kluh, in attempting to distinguish their dispute from *Metcash*, argued that the 'pay now, argue later' principle' as set out in the Income Tax Act differed from the provisions in *Metcash*, which had

[13] *Capstone 556 (Pty) Ltd v CSAR*; *Kluh Investments (Pty) Ltd v CSAR* 2011 (6) SA 65 (WCC).

[14] *CSARS v Capstone 556 (Pty) Ltd* 78 SATC 231 (SCA) ('*Capstone* (SCA)'); *CSARS* v *Kluh Investments (Pty) Ltd* 78 SATC 177 ('*Kluh* (SCA)').

[15] See s 164 of the Tax Administration Act 28 of 2011, read together with *Metcash Trading Ltd v CSARS* 63 SATC 13, 2002 (4) SA 317 (CC).

[16] *Capstone*; *Kluh* supra note 13 para 1.

[17] Section 34 of the Constitution provides: 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

[18] Supra note 15.

[19] Act 89 of 1991.

[20] *Metcash* supra note 15 paras 46, 68–73.

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dealt with the Value Added Tax Act.[21] The taxpayers were, however, not successful in their arguments.

This dispute was the precursor to the two subsequent substantive tax disputes that are the focus of this article. Interestingly, the 'pay now, argue later' judgment did not indicate that the taxpayers, Capstone and Kluh, were linked to the Steinhoff group. The link to the Steinhoff group only emerged during the two subsequent tax disputes discussed below.

IV *CSARS v CAPSTONE 556 (PTY) LTD*

The dispute involving Capstone went before the Tax Court in 2013.[22] As the Tax Court proceedings do not allow the public to be present and the taxpayer is anonymised in the reported decision, the Steinhoff connection first came to light when the dispute was appealed to the High Court.[23]

The Capstone saga began in 2001, when Profurn Ltd ('Profurn'), a JSE-listed company in the retail furniture industry, had financial difficulties and owed money to both FirstRand Bank Ltd ('FirstRand') and Steinhoff International Holdings Ltd ('Steinhoff'). Profurn's financial difficulties created risks for both FirstRand and Steinhoff, as well as for the financial stability of the South African retail furniture industry as a whole. To alleviate the risk, FirstRand and Mr Daun, a director and shareholder of Steinhoff and an indirect shareholder of Profurn, reached an agreement to appoint Mr David Sussman as part of Profurn's management team. The financial rescue of Profurn proceeded with a merger between Profurn and JDG, another company operating in the retail furniture industry, and by JDG purchasing Profurn's shares. Capstone, the taxpayer in the dispute, was a special purpose vehicle company ('SPV') incorporated in April 2002 specifically to hold shares in JDG following the merger between Profurn and JDG.

All of Capstone's ordinary shares were held by Business Ventures Investments No 687 (Pty) Ltd ('BVI'). Mr Markus Jooste (Steinhoff's chief executive officer and a major shareholder in Steinhoff) and his associates held the financial interest in BVI. Although Mr Jooste participated in the restructuring of Profurn and acquired JDG shares through Capstone, the understanding was that Mr Daun would retain 'sole control' over the JDG shares owned by Capstone. Mr Daun owned the balance of the JDG shares through another entity, Daun et Cie, and it was understood that the JDG shares owned by Capstone and Daun et Cie would be dealt with as one package. Mr Jooste, according to the facts, understood

[21] See *Capstone; Kluh* supra note 13 para 9.

[22] *ITC 1867* 75 SATC 273 (Western Cape Tax Court) ('*Capstone* (Tax Court)').

[23] *Capstone 556 (Pty) Ltd v CSARS* 77 SATC 1 (Western Cape High Court) ('*Capstone* (High Court)').

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and accepted that Mr Daun would be the 'captain of the boat' and that Mr Jooste would be the 'passenger'.[24]

To ensure that Mr Daun would be in control of the assets of Capstone, namely the JDG shares, Mr Daun, together with Mr Schouten, Dr Lategan (representing the interest of FirstRand) and Mr Steve Müller (representing the interest of Gensec), were appointed as the directors of Capstone. In addition, the shares in BVI (the owner of the financial interest in Capstone) were held by Daun et Cie as a nominee for companies controlled by Mr Jooste and his associates. Mr Daun was also the only director of BVI. In summary, Capstone's shareholder was a BVI company, one of its directors was Mr Daun, and its only asset was a shareholding in JDG.

BVI made a shareholders' loan to Capstone to finance Capstone's acquisition of the JDG shares. BVI financed this shareholder loan through a loan from Gensec. The loan agreement between BVI and Gensec provided that on the loan's repayment date, BVI would pay Gensec a portion of any gain in the market value of the JDG shares. In terms of the agreements, Capstone was obliged to pay this portion of the gain to BVI, which in turn would pay the amount to Gensec.[25]

As part of the restructuring and merger arrangement between Profurn and JDG, Capstone issued redeemable preference shares to FirstRand. The arrangement also provided for a condition that Capstone could not

> 'enter into any contract or undertake any obligation whatsoever, other than in respect of the sale and subscription agreement and a voting pool agreement relating to its shares in JD Group Limited, provided however that this shall not prevent the company from acquiring any additional shares in the share capital of the JD Group Limited from time to time … without the express prior written consent of FirstRand.'[26]

This condition, together with the other terms and conditions, meant that Capstone could not sell its JDG shares without FirstRand's consent for a period of three years and a day from 30 May 2003. In addition, Daun et Cie and Capstone indemnified FirstRand for certain tax liabilities of Profurn for a period of five years from early 2000.

From a company-law and corporate governance perspective, the board of Capstone consisted of Mr Daun, Mr Schouten and Dr Lategan (representing the interests of FirstRand), and Mr Muller (representing the interests of Gensec). Thus, Capstone's decision to sell its property, namely the JDG shares, should have been made by the board. The role of Mr Jooste, the beneficial shareholder[27] rather than a director, should have been limited, but he possibly would have played a role in the sale

[24] Ibid para 18; *Capstone* (Tax Court) supra note 22 para 52.
[25] *Capstone* (SCA) supra note 14 para 11.
[26] Ibid para 10.
[27] Through the BVI company. See ibid para 9.

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of JDG shares as Capstone's only asset. However, from the facts, it appears that Mr Daun was the driving force behind Capstone, as a director of Capstone and the sole director of Capstone's shareholder, BVI. It is important to remember that the sole purpose of Capstone was to acquire and hold the JDG shares. As a result, it had no other business or activity, and its directors did not meet,[28] which meant that it did not hold board meetings or make board resolutions. Capstone's only obligations were related to the funding to acquire the JDG shares and the relevant statutory obligations of a South African incorporated company, such as filing tax returns and preparing financial statements.[29]

The lack of board meetings and company resolutions may indicate a concern for corporate governance. However, some SPVs do operate in this way, especially if there is a single shareholder and where shareholders' resolutions are, as a result, not always required.[30] The Companies Act provides that a private company must have at least one director. Further, it provides for circumstances when a private company is not required to convene an annual general meeting of shareholders.[31] These circumstances are meant to apply to and accommodate small and less complex entities, providing in particular for exceptions to certain formalities for companies (a) with only one shareholder exercising all the voting rights on any matter; (b) with only one director; and (c) where every shareholder is also a director.[32] Given that Capstone had only one shareholder, it fell under one of the exempt categories.

The tax dispute arose when Capstone sold the JDG shares and made a profit on the sale of the shares. There were two sales, one in respect of the book-building exercise (to be explained below) and the other to a company, Mayfair Speculators (Pty) Ltd, a company holding the interests of Mr Jooste and his family.[33] The dispute centred around whether, on the facts, the profit Capstone had made on the sale of the shares was 'of a revenue nature' made 'in a scheme of profit-making',[34] or whether the profit was 'of a capital nature', the result of the shares sold as a capital asset.[35] If it were the former, the gain would be included in the 'gross income'

[28] *Capstone* (High Court) supra note 23 para 40; *Capstone* (Tax Court) supra note 22 para 11.

[29] Ibid.

[30] Section 66(2)*(a)* of the Companies Act.

[31] Section 34(2) read with ss 84(1)*(c)*, 61, 66(2)*(a)* and 57(2)–(4) of the Companies Act.

[32] Ibid.

[33] *Capstone* (SCA) supra note 14 para 14.

[34] See the definition of 'gross income' in s 1 of the Income Tax Act. See also *Commissioner for Inland Revenue v Pick 'n Pay Employee Share Trust* 1992 (4) SA 39 (A), 54 SATC 271 at 288.

[35] See para 3 of the 8th Schedule to the Income Tax Act.

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calculation of the taxpayer,[36] However, if it were the latter, the difference between the original purchase price of the shares and the sale price of the shares would be included as a capital gain in calculating the taxpayer's liability.[37] Given that the amount of tax to be paid in the former case would have been more than the tax paid in the latter case, understanding the parties' respective arguments is important.

The Income Tax Act does not say whether a profit made on the sale of property should be treated as either capital or revenue, and the test is found in the case law. The court in the leading case of *Natal Estates Ltd v Secretary for Inland Revenue* ('*Natal Estates Ltd*')[38] held that the distinction between revenue and capital is whether the taxpayer intended to embark on a 'scheme of profit-making'.[39] If the taxpayer's intention at the time of acquiring and disposing of the property is for the purposes of investment, then the gain made is of a capital nature.[40] By contrast, if the taxpayer embarks on a profit-making scheme, then the gain is of a revenue nature.[41] Cognisance must also be taken of the possibility that the taxpayer's intention can change between the time of the acquisition and the time of the disposal.[42] The difficulty in determining whether an amount is capital or revenue can be seen in the numerous tax disputes on this issue that have come before the courts.[43]

In addition to the challenge of determining the intention of the taxpayer and whether the intention of the taxpayer has changed from the time of acquisition to the time of disposal, a further challenge in the determination of the intention of a company arises because of the number of stakeholders in a company's decision-making process. In terms of company law, while the directors and the board manage the company and make decisions on the purchase and sale of the company's property,[44] there are times when

[36] The definition of 'gross income' in s 1 of the Income Tax Act provides that 'gross income' includes 'the total amount in cash or otherwise received by or accrued to a taxpayer, that is not of a capital nature'.

[37] If an amount is of a capital nature, then the tax payable on that amount is determined in accordance with s 26A read with the 8th Schedule to the Income Tax Act.

[38] 37 SATC 193, 1975 (4) SA 177 (A).

[39] Ibid at 198. See also *Commissioner for Inland Revenue v Pick 'n Pay Employee Share Purchase Trust* supra note 34; *Commissioner for Inland Revenue v Nussbaum* 1996 (4) SA 1156 (A).

[40] *Natal Estates Ltd* ibid.

[41] Ibid.

[42] See for example *John Bell and Co (Pty) Ltd v Secretary for Inland Revenue* 1976 (4) SA 415 (A); *Commissioner of Taxes v Booysen's Estates Ltd* 1918 AD 576; *Commissioner for Inland Revenue v Stott* 3 SATC 253, 1928 AD 252; *Matla Coal Ltd v Commissioner for Inland Revenue* 1987 (1) SA 108 (A).

[43] Ibid.

[44] See for example *Commissioner for Inland Revenue v Richmond Estates (Pty) Ltd* 1956 (1) SA 602 (A) at 606.

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the intention of the company can be ascribed to other stakeholders, such as the management committee[45] or even the shareholders of the company.[46] Even though there may be a board and board resolutions, the intention can also be ascribed to one director. The test is to determine who is in effective control of the company, with the 'controller' giving evidence as to the intention of the company.

The central issue in *Capstone* was to determine who was in effective control of Capstone, and then to determine the intention of the 'controller' at the time of purchase of the JDG shares and whether that intention had changed at the time of disposal of the JDG shares. The court did not consider the change-of-intention aspect as the parties did not raise this in argument. Accordingly, I will not consider this aspect in my discussion.

As to who effectively controlled Capstone, there were three possibilities: the board of directors as a whole, or one specific director, Mr Daun, or the beneficial holder of the Capstone shares, Mr Jooste. First, it must be remembered that Capstone was an SPV company that was incorporated specifically to acquire the JDG shares and hold them on behalf of certain individuals. Capstone's activity was therefore limited. In fact, it did not engage in any activity other than holding the JDG shares. It did not conduct a trade or even hold board meetings. This meant that the board of directors could immediately be eliminated as being in effective control of Capstone. This left a choice between Mr Daun and Mr Jooste. The 'time of acquisition of the shares' by Capstone was a further twist in the factual matrix. The first possibility of 'the time of acquisition' was June 2002, when the memorandum of agreement was entered into with a binding commitment by Mr Daun to acquire the JDG shares, and the decision was made to set up an SPV to purchase the shares as nominee. The second possibility of 'the time of acquisition' was December 2003, when Capstone became the legal owner of the shares. The delay between the decision to purchase, the completion of the memorandum of understanding ('MOU') and the subsequent passing of legal ownership occurred because certain regulatory legal approvals had to be acquired.

If the date of acquisition was the commitment to acquire the JDG shares, then it is more probable that Mr Daun's intention could be ascribed to Capstone, as he had made a commitment to purchase the JDG shares. Mr Daun stated in his evidence that the original intention had been to purchase the JDG shares as an investment and to provide capital to finance the rescue of Profurn by using equity investments and back-to-back loans.[47] This would be akin to a type of realization company,

[45] See for example *Secretary for Inland Revenue* v *Trust Bank of Africa Ltd* 1975 (2) SA 652 (A) at 668–9.

[46] See *Richmond Estates (Pty) Ltd* supra note 44; *Elandsheuwel* supra note 5.

[47] Capstone (SCA) supra note 14 para 44.

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where an SPV company acquires property with the intention to sell the property, with the sale to the SPV company being the only way to realize a capital asset to its best advantage.[48] The structure would then have been set up as an investment, with Mr Daun's intention to hold the shares until the transaction 'bedded down'. This intention would then normally be used to determine whether or not Mr Daun had purchased the shares with the intention of holding them as a capital asset. The reason for the eventual sale thereof would then not be relevant as the question of a change of intention would not have to be considered. Interestingly, however, both the Tax Court and the High Court prioritised the evidence relating to Mr Daun's decision to sell the shares.[49] Mr Daun stated that he had decided to sell the JDG shares because of a risk assessment of his South African exposure. Once he had decided to sell his block of the JDG shares, the other shareholders also had to sell their proportionate share as the shares were treated as a 'block'.[50] Given the case law, which tends to focus on the intention at the time of purchase, it is not clear why the intention at the time of sale was canvassed, other than perhaps to indicate that even if it had been argued that there was a change in intention, on the facts and the evidence, there was no such change in intention.[51]

Alternatively, Capstone's intention could also be ascribed to Mr Jooste, who was, in effect, the beneficial shareholder of Capstone. Capstone became the legal owner of the shares on 5 December 2003, and on that date, Mr Jooste would have become the beneficial owner of JDG shares held by Capstone. Before Mr Jooste had formally acquired the shares, he had a discussion with a Citigroup representative, and at this point, the possibility of a book-building exercise was raised. Subsequently, in early 2004, Mr Jooste enquired whether Daun et Cie and Capstone could undertake a book-building exercise[52] and thus sell the shares.

[48] See for example *CIR v Stott* supra note 42 at 257; *Natal Estates* supra note 38 at 216; *Berea West Estates (Pty) Ltd v SIR* 1976 (2) SA 614 (A), 38 SATC 43; *Elandsheuwel* supra note 5; *CSARS v Founders Hill (Pty) Ltd* (2011) 73 SATC 183 (SCA).

[49] *Capstone* (Tax Court) supra note 22 paras 62–74; *Capstone* (High Court) supra note 23 paras 31–42.

[50] *Capstone* (Tax Court) ibid para 67.

[51] *Capstone* (SCA) supra note 14 para 41, where the Commissioner did not rely on the change of intention and argued that, from the outset, the shares were acquired as trading stock.

[52] *Capstone* (SCA) ibid para 14 stated: 'A book building exercise is a means of determining a price and acquiring institutional investors through either the issue and acquisition of new shares, or the sale of an existing block of shares in circumstances where the disposal of such a large block of shares in the market would detrimentally affect the price of the shares on a stock exchange. The institution undertaking the book building approaches institutional investors to ascertain how many shares they might buy and at what price. Once the price is

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Given that Mr Jooste had discussed the possibility of the sale of the JDG shares in a book-building exercise just before Capstone's legal acquisition of the JDG shares, it could have been argued that, at the time of the acquiring legal ownership, the shares were acquired with the intention of selling them on — possibly in a scheme of profit-making. Interestingly, the courts placed emphasis on the acquisition at the time of entering into the MOU, namely June 2002, and not at the time of formal acquisition, namely December 2003.[53]

The Supreme Court of Appeal ultimately placed the directing mind of Capstone in Mr Daun, stating that he was in control and could decide when to sell the shares.[54] At the time of the sale of the shares, Mr Daun was one of the taxpayer's directors. Notably, the Supreme Court of Appeal did not go into detail about whether Mr Daun was influenced by the beneficial owner, Mr Jooste, and Mr Jooste's role in selling the shares. The role of shareholders has been considered in other similar situations. For example, in the case of *Laerste*,[55] the court considered the shareholder's role in influencing the company's intention and found that the company's intention could be found in the shareholder, not in the director or the board of directors.[56] The Supreme Court of Appeal also identified the date of the MOU as the date of acquisition. In other words, the date at which the intention had to be determined was when the agreement to acquire the shares was concluded, as opposed to the date when the legal acquisition of the shares occurred. It is unclear why the court chose the agreement date as the date of acquisition to determine the intention. By accepting this fact, and therefore that a change of intention was not to be considered, the only person that could have been considered in relation to the taxpayer's intention was Mr Daun. However, the problem with choosing the date of the MOU as the date of intention is that the court was then, in effect, creating a fiction. It was not merely piercing the corporate veil but was ignoring the legal status of the taxpayer by treating Mr Daun as the acquiring party. Mr Daun's intention could not be ascribed to Capstone at the date of the MOU as Capstone had not yet been included in the transactions. In fact, Capstone was only incorporated on 2 April 2003. With respect, it was only when Capstone was formed and then identified as the entity that would be purchasing the shares and became part of the financial structuring of the deal that Mr Daun's intention could be ascribed to Capstone. The other alternative is that the Supreme

determined the shares are disposed of other than through the exchange on which they are, or are to be, listed.'

[53] Ibid paras 7 and 13.

[54] Ibid para 38.

[55] *Laerste* supra note 6.

[56] See Gutuza op cit note 6.

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Court of Appeal viewed Capstone as Mr Daun's alter ego. But this would have meant that the complex scheme of corporate arrangements was merely a sham.

Both the High Court and the Supreme Court of Appeal seem to have become mired in the details of the complex corporate structures and lost sight of the legal issue, which was to determine Capstone's intention from the objective factors. The courts did not clearly set out the test to determine objectively whether or not Capstone was involved in a scheme of profit-making when it was selling the shares. Making such an objective determination would normally include considering who made the decisions for the company with reference to issues of company law, tax law, ownership, and any other operational matters. Capstone's status as a separate legal entity would also have needed consideration, as well as when it was formed and nominated to acquire the JDG shares, and when Mr Daun was appointed as its director. The court's decision raises the question whether a director's intention can be ascribed to a company before the company is formed and before the director is appointed to the company. Can the prior actions of a person who is not yet a director constitute the intention of the company? What does this mean for corporate governance and the appointment of directors who are involved in earlier transactions? There is some element of this in the case of *Elandsheuwel*, where the intention of the new directors and shareholders was attributed to a company after the company's shareholding had changed.[57] However, it can be argued that *Elandsheuwel* is distinguishable because there was a change in the directors and shareholders of an already established company.

In my view, SARS's argument — that Capstone, at the time of legal acquisition, not the date of the MOU, had a mixed intention — was more legally sound. This is evidenced by how its beneficial shareholder, Mr Jooste, had held discussions for the sale of the shares just before the acquisition and that its director, Mr Daun, acquired the asset as an investment at the time of the formal legal acquisition. But, given the differing intentions as evidenced by the objective evidence, the Tax Court ultimately sought to find the dominant intention of the taxpayer.[58] Thus, even if Mr Jooste wanted to sell the shares to make a profit in a scheme of profit-making sense, the question was whether he was the directing mind of the company. It is this that potentially weakened SARS's case. The Tax Court held that Mr Jooste was the main decision-maker. The High Court and the Supreme Court of Appeal disagreed. Had the High Court and the Supreme Court of Appeal followed the objective

[57] *Elandsheuwel* supra note 5.
[58] *Capstone* (Tax Court) supra note 22 paras 77–8.

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evidence, the judgments could still have found in favour of the taxpayer without getting caught up in the complexity of the corporate structure.

In determining Capstone's intention, the courts emphasised the various transactions, the timelines of the various transactions, and the role of the two protagonists, Mr Jooste and Mr Daun, in this timeline. The courts placed limited emphasis on determining who the company's decision-makers were when the shares were purchased. The emphasis on the transactional aspects, as opposed to the limited emphasis on Capstone's intention, meant that the company-law and governance issues played a minor role in the matter, if they were considered at all. Of course, it could be argued that the company-law issues do not resolve the tax question or issue in the case. Nevertheless, it does seem remiss not to consider the intentions of the party against the requirements of corporate governance or even the concepts of legal ownership, but rather to place such emphasis on an MOU instead. The complexity of the transactions, the uncertainty of the decision-making process, and the influence of stakeholders such as beneficial shareholders could all potentially have been signs of a disturbance in the governance issues at play in the Steinhoff group and the potential use (or abuse?) of the company form. The case does highlight the use of the company form for purposes other than the objective or purpose of a company. However, it also highlights how the Steinhoff group used a convoluted company structure to finance the purchase of the shares, and how it manipulated the appointment of directors and the selection of shareholders in setting up this type of structure.

V *KLUH INVESTMENTS (PTY) LTD v CSARS*

As was the case in *Capstone*, the courts in *Kluh* also emphasised the corporate structure that the relevant parties had set up, and this again resulted in the legal issues and analysis being obscured. Once again, the tax disputes highlight issues relating to corporate governance.

The Kluh saga started in May 2001, when Mr Van der Merwe, a director of Steinhoff Southern Cape (Pty) Ltd, concluded an agreement that Steinhoff Southern Cape (Pty) Ltd, or its nominee, would purchase the assets and business of Thesens Properties (Pty) Ltd, as a going concern, for a total purchase price of R45 million.[59] The assets included land and the forestry plantations on the land.

The purchase agreement did not go ahead as Steinhoff's policy prevented the acquisition of fixed property in South Africa. The policy reflected the concern that a decrease in the value of fixed property would negatively affect its consolidated balance sheet and the share price of the listed holding company. Since Mr Van der Merwe wanted Steinhoff to

[59] *Kluh* (SCA) supra note 14 para 1.

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have access to the plantations, he set out to find a third party to acquire the fixed property with the idea that Steinhoff could benefit from the plantations without directly owning them.[60]

Following conversations between Mr Van der Merwe and Mr G A Evans of Fihag Finanz und Handels AG ('Fihag'), Thesens[61] and Steinhoff cancelled their agreements, and Kluh, a wholly owned special purpose subsidiary of Fihag, acquired the plantations as a going concern. Fihag was an investment holding company registered in Switzerland with an investment interest in the pine furniture industry in Europe, but it had not had any previous operations in South Africa. Before June 2001, Kluh was a subsidiary of the Steinhoff group, conducting a saw-milling business. In 2001, Kluh sold its existing business as a going concern, and Fihag became its holding company.

The effective date of Kluh's acquisition of the plantations was 29 June 2001, with Kluh paying the R29.5 million purchase price and taking possession of the plantations.[62] The purchase price was apportioned between the plantations ('the growing timber'),[63] the land, and other assets. Kluh retained the land and the plantations but sold the other assets, which included an erf, the plywood business and certain trademarks, to a third party.

Since Mr Van der Merwe wanted Steinhoff to have access to the plantations, the agreements between the parties provided that Steinhoff would conduct the forestry and plantation operations on the land for its own profit and loss, with Kluh, as the landowner, granting Steinhoff the beneficial use of the land. The relationship between Kluh and Steinhoff could be characterised as usufructuary, with Steinhoff having a usufruct over the plantations and Kluh retaining the bare dominium.[64]

To facilitate its use of and access to the plantations, Steinhoff purchased the machinery and equipment (including the sawmill) from Thesens. In addition, Steinhoff employed the plantation workers, entered into contracts with service providers, and assumed responsibility for all expenditure and risks concerning the land. Steinhoff accordingly insured the plantations against the risk of fire. All operational income and

[60] *Kluh Investments (Pty) LTD v Commissioner for South African Revenue Service* 77 SATC 23 (Western Cape High Court) para 12 ('*Kluh* (High Court)').

[61] Thesens was also a party to the transactions.

[62] While the effective date of possession was 29 June 2001, the written agreements between Kluh and Thesens were executed on 3 October 2001.

[63] The plantations were 'mature plantations in rotation', annually yielding a steady and sufficient number of mature trees for commercial felling, with younger trees taking their place year by year. The plantations thus comprised a range of trees ranging from the very young to the fully mature, with a cycle of about 30 years.

[64] *Kluh* (SCA) supra note 14 paras 12 and 16.

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expenditure in relation to the plantations were earned and incurred by Steinhoff and reflected in its accounts.[65]

By contrast, Kluh's financial records and financial statements did not reflect operational income and expenditure. Furthermore, Kluh did not own any equipment, had no employees, and did not earn any income or incur expenses for any of the plantations' operations.[66] It was anticipated that this arrangement between Steinhoff and Kluh would be in place for a considerable period, given the long-term nature of investment in plantations, in which trees take some 29 years to mature.[67]

While the arrangement between Kluh and Steinhoff could be terminated on reasonable notice, the contract provided that, on termination, the plantations were to comprise trees of the same volume and quality as at commencement. This meant that Steinhoff, in conducting the plantation operations, had to keep the plantations in rotation and do the necessary pruning, thinning and maintenance to ensure that, upon termination, it could restore the plantations to the state in which they had been in June 2001.[68]

After Kluh acquired ownership of the assets and Steinhoff began operating the plantations, Mr Van der Merwe persuaded the main board of Steinhoff's holding company to change its policy on land ownership in South Africa. On 21 February 2003, a mere two years after the original arrangement, Steinhoff and Kluh concluded a written agreement that Steinhoff would purchase the 'plantation business' from Kluh, with the 'plantation business' defined as being:

> 'the business of commercial forestry operations, which included the plantations sale assets, machinery and equipment and plantation contracts carried on by [Kluh] at the plantation and the plantation immovable property as defined, as a going concern'.[69]

Following a dispute between the parties, a 'settlement agreement' was concluded on 29 July 2004, with an effective date of 1 June 2004 and the 'plantation' defined in the settlement agreement as:

> 'the standing timber on the Immovable property and, for the purposes of expressing value thereof as part of the Purchase Price, includes the plantation business (ie the business of commercial forestry operations) including the Plantation sale assets, machinery and equipment and Plantation contracts, all as a going concern'.[70]

[65] Ibid para 11.
[66] Ibid paras 11 and 12.
[67] *ITC 1869* 75 SATC 329 (Western Cape Tax Court) para 19 ('*Kluh* (Tax Court)').
[68] *Kluh* (SCA) supra note 14 para 11.
[69] Ibid para 3.
[70] Ibid para 4.

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The final purchase price was R159.7 million, with R144.7 million allocated to the plantations (as defined) and R15 million to immovable property. The purchase price of the business was to be the sum of the value of the land and 'the standing timber, plantation stocks and other assets as valued by an independent nationally recognised value[r]'.[71] No reason was given for the increase in the purchase price or the value of the property from R29.5 million in 2001 to R159.7 million in 2004, or from an amount of R11 596 121 apportioned to the plantations in 2001 to an amount of R144.7 million in 2004.[72]

While the original agreement between Steinhoff and Kluh further provided that the business was being sold as a going concern and that the sale would thus be zero-rated in terms of s 11(1)*(e)* of the Value Added Tax Act, following disputes between the parties, the settlement agreement concluded in 2004 provided that the subject of the sale was the 'Kota business' and the plantations were defined as:

> 'the Standing Timber on the Immovable Property and, for the purposes of expressing the value thereof as part of the Purchase Price, includes the plantation business (*ie* the business of commercial forestry operations) including the Plantation sale assets, machinery and equipment and Plantation contracts, all as a going concern.'[73]

As a result, VAT was payable upon the sale.[74] All benefits and risks with respect to the business were passed from Kluh to Steinhoff on the effective date, with Kluh warranting that it was the true and lawful owner of the business and all its assets. Given that Steinhoff operated the plantation business and in terms of the usufruct arrangement, it is not clear what risk was passed from Kluh to Steinhoff. It is also not clear from the facts if the usufruct arrangement was terminated and when this termination was effective, which means that there may have been a period where the usufruct and the plantation business reverted to Kluh as the owner, with all rights in the land reverting to it. This reversion is supported by the bonus management fee of R12 million paid by Kluh to Steinhoff for the manner in which Kluh had performed its obligations in relation to the stewardship of Kluh's property.[75]

Before looking at the issue before the court, namely, whether or not Kluh was carrying out farming operations or — put simply — was a farmer, the company structure and management of Kluh warrant some attention. Kluh's sole shareholder was Fihag, the Swiss company, meaning that Kluh was, in effect, a wholly owned subsidiary of Fihag,

[71] *Kluh* (Tax Court) supra note 67. See also *Kluh* (SCA) ibid para 3.
[72] *Kluh* (SCA) ibid paras 2 and 4.
[73] *Kluh* (High Court) supra note 60 para 24.
[74] Ibid para 26.
[75] Ibid para 27.

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an SPV specifically used to acquire Thesens' property. The composition of the board of directors of Kluh is not clear from the facts, apart from the fact that there was an arrangement between Steinhoff and Fihag that Steinhoff recommended a South African attorney, Mr J Pretorius, to be appointed as the local director of Kluh.[76]

The relationship between Kluh and Steinhoff could be seen in Kluh's draft financial statements that were sent by Steinhoff to Kluh's director, Mr Pretorius, in November 2002, before the agreement was reached to sell the land to Steinhoff. The agreement of sale between Kluh and Steinhoff was dated 1 February 2003. The financial statements were adopted by Kluh's board on 15 March 2004, before the settlement agreement of 29 June 2004. The statements ultimately adopted (so it was stated) differed from the draft statements by creating an appearance that the specific alterations were directed at removing statements and entries that would suggest that Kluh had been conducting a plantation business.[77] The High Court raised the issue of whether the financial statements were changed to reflect the parties' views.[78] However, the Supreme Court of Appeal stated that an inference could not be drawn from the changed financial statements.

A relevant question for corporate governance is whether the alterations that were made were perhaps an indication that all was not well with the company's governance. While one can understand that the Supreme Court of Appeal was reluctant to draw this inference on the evidence before it, in hindsight, the combination of the adjusted financial statements, the exponential change in the prices of the land and the plantations, and the cosy relationship between the parties should have raised the alarm.

The tax dispute arose due to the sale of the plantations by Kluh to Steinhoff and focused on whether SARS was correct in including the sale proceeds in Kluh's gross income for the 2004 tax year of assessment. SARS's basis for the inclusion was the application of s 26(1) of the Income Tax Act, read with para 14(1) of the First Schedule. Section 26(1) of the Act provides:

> 'The taxable income of any person carrying on pastoral, agricultural or other farming operations shall, insofar as it is derived from such operations, be determined in accordance with provisions of this Act, but subject to the provisions of the First Schedule.'

[76] Ibid para 12.

[77] *Kluh* (SCA) supra note 14 para 9.

[78] *Kluh* (High Court) supra note 60 para 51, where the court commented on recharacterisation when Kluh had taken advice. The court referred to a possible 'jaundiced view' if the credibility of the witnesses were to be called into dispute in relation to changes made in the settlement agreement. In para 52, the court indicated that the same observation could be made with respect to the draft financial statements prepared in 2002, compared with the final statements adopted by the board in 2004.

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The First Schedule sets out the computation of the 'taxable income derived from pastoral, agricultural or other farming operations'. For Kluh's proceeds to fall within the ambit of s 26(1), Kluh had to be 'carrying on … farming operations', and the relevant taxable income had to be derived from the farming operations. Furthermore, while the taxable income derived from such 'farming operations' is determined in accordance with the provisions of the Income Tax Act, it is also subject to the provisions of the First Schedule. The relationship between the Income Tax Act and the relevant schedule to the Income Tax Act is that the relevant schedule usually sets out the computation aspect of relevant provisions of the Income Tax Act. Hence, the First Schedule deals with the '[C]omputation of Taxable Income from Pastoral, Agricultural or other Farming Operations'. Paragraph 14 provides:

> '(1) Any amount received by or accrued to a farmer in respect of the disposal of a plantation shall, whether such plantation is disposed of separately or with the land on which it is growing, be deemed not to be a receipt or accrual of a capital nature and shall form part of such farmer's gross income.
>
> (2) Where any plantation is disposed of by a farmer with the land on which it is growing the amount to be included in such farmer's gross income in terms sub-paragraph (1) shall:
>
> (*a*) if the amount representing the consideration payable in respect of the disposal of the plantation is agreed to between the parties to the transaction, be the amount so agreed to; or
>
> (*b*) failing such agreement, be such portion of the consideration payable in respect of the disposal of the plantation as in the opinion of the Commissioner represents the consideration payable for the plantations.'

Paragraph 16 of the First Schedule defines a 'plantation' as

> 'any artificially established tree as ordinarily understood (not being a tree of the nature described in paragraph 12(1)*(g)*) or any forest of such trees and includes any natural extension of such trees.'

As the plantations that Kluh had sold fell within the definition of para 16 of the First Schedule, the issue before the court was whether Kluh was a 'farmer' as set out in para 14 and 'a person carrying … on farming operations' in terms of s 26(1). If Kluh fell within the parameters of these provisions, the proceeds from the sale of the plantations had to be included in its 'gross income'.

Given that the tax bill would be higher if s 26(1) did apply, Kluh argued that s 26(1) did not apply and that the net proceeds should be taxed as a capital gain.[79] In particular, Kluh argued that it had not disposed of an income-earning activity or a business as a going concern but rather

[79] *Kluh* (Tax Court) supra note 67 para 4.

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that it had disposed of the land and the plantations on the land. In terms of this argument, Kluh was not a 'farmer' and did not derive income from farming. According to Kluh, it had acquired the plantations as an investment, and Steinhoff had carried on the farming operations in terms of the contract that had been entered into between Kluh and Steinhoff.[80] Kluh further argued that even if Steinhoff had acted on behalf of Kluh, this would not result in Kluh being 'a farmer'.[81] A question that was not considered was whether, on termination of the agreement between Kluh and Steinhoff, Kluh had taken over the plantation business and had become the owner of the plantation business for a short while. The question becomes relevant because the contract provided that 'all benefit and risk in respect of the business was passed from Kluh to Steinhoff on the effective date', with Kluh warranting that it was the true and lawful owner of the business and all its assets.[82]

The Tax Court described the legal issue as whether Kluh was carrying on farming operations and had the right to the yield of the plantations. While the Tax Court recognised that Kluh did not carry on the farming activities directly, it found that there was 'a continuous and close link between Kluh and the farming operations'.[83] Accordingly, Kluh was carrying on farming operations through Steinhoff at all times. The Tax Court therefore held, on the evidence before it, that Kluh had not discharged the onus that fell on it to prove that it was not a farmer and did not have the right to the yield from the farming activities.[84]

In light of the Tax Court's finding that while Kluh did not carry on farming activities directly, it had done so through the 'continuous and close link between Kluh and the farming operations of Steinhoff', the key issue in the High Court was whether there was a sufficiently close or direct connection to Kluh, as the owner, of the income that was generated and the farming activities that were conducted on the property.[85] The High Court therefore described the issue as whether Kluh was carrying on farming operations, and whether the income in dispute was derived from those farming operations.[86] When one compares this to the Tax Court, the first part of the issue was described in the same way, but the second part was framed differently. The High Court emphasised whether Kluh's income was derived from farming operations, while the Tax Court

[80] Ibid para 7; *Kluh* (High Court) supra note 60 para 41.
[81] *Kluh* (Tax Court) supra note 67 para 32.
[82] Ibid para 41 read with *Kluh* (High Court) supra note 60 para 22.
[83] *Kluh* (Tax Court) ibid para 45.
[84] Ibid.
[85] *Kluh* (High Court) supra note 60 para 60.
[86] Ibid.

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had emphasised whether Kluh had the right to the yield of the plantations — that is, whether Kluh had the right to the income.[87]

In considering whether Kluh was carrying on farming operations, the High Court considered, inter alia, how farming operations on plantations are conducted and that the proceeds from the annual sale of the timber harvested would fall into the 'gross income' of the farmer. The High Court also considered whether Steinhoff was Kluh's agent but dismissed this agency construction because of the lack of evidence that had been placed before it.[88] On its interpretation of the evidence, Steinhoff was carrying on its farming operations for its own profit and loss, was contractually obliged to maintain the plantations to a particular standard, had returned the plantations on the termination of the arrangement with the same volume of timber as at June 2001, and did not share any of the profits from the farming operations it had conducted with Kluh. The High Court thus found that Kluh was not carrying on farming operations and that its income was not derived from those farming operations.

In turn, the Supreme Court of Appeal stated that the threshold enquiry was whether Kluh was 'carrying on farming operations' as contemplated by s 26(1) of the Act and not whether there was a 'sufficiently close connection between the income and farming operations'.[89] On its interpretation of the facts, the Supreme Court of Appeal concluded that 'from the very beginning, Kluh wanted nothing to do with any farming operations'.[90] With respect to the possibility that Steinhoff had in some way acted on Kluh's behalf, the Supreme Court of Appeal stated that this in itself would not make Kluh a farmer. Kluh did not have the right to the yield of the plantations, did not have the use of the land and the plantations, and did not derive any income from the land and the plantations.[91] The Supreme Court of Appeal therefore narrowed down the effective application of s 26(1) to the question whether the person to whom s 26(1) applies is 'carrying on … farming operations'. Only once the person is carrying on farming operations can the link between the farming operations and the income be considered. To determine whether a person is carrying on farming operations, the Supreme Court of Appeal stated that

[87] Ibid para 54, where the court referred to *Commissioner for Inland Revenue v D & N Promotions (Pty) Ltd* 1995 (2) SA 296 (A). In that case, the question was whether certain items of income derived from farming operations, and whether the taxpayer to whom the income had accrued was a person carrying on farming operations.

[88] *Kluh* (High Court) supra note 60 para 70.

[89] *Kluh* (SCA) supra note 14 para 7.

[90] Ibid para 12.

[91] Ibid para 16.

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> '[t]here is no definition of "farming operations" in the Act and whether or not a person's economic activity constitutes farming operations is essentially a question of fact'.[92]

On the facts, the court stated that it was clear that Kluh 'wanted nothing to do with farming operations'[93] and that its 'involvement was to acquire ownership of the land and the plantations'.[94]

As was the case in *Capstone*, the courts spent much of their judgments sifting through the details of the contractual arrangements involved in the original purchase, the financing of the purchase, and the arrangement between Kluh and Steinhoff. The original agreement between Steinhoff and Thesens was concluded in May 2021. After this agreement was cancelled, the agreement between Thesens and Kluh to purchase the plantations was executed in October 2001, in terms of the contract of 29 June 2001. At the same time, so it seems, Kluh and Steinhoff entered into an agreement that Steinhoff would run the plantations. A short time later, on 21 February 2003, Kluh sold the plantations and the immovable property to Steinhoff. Limited information was disclosed about the decision-making and business operations of Kluh and, likewise, about the relationship between Fihag and Steinhoff. Except for the Tax Court, which heard the oral evidence, the courts provided a limited discussion of the relationship between Steinhoff and Kluh.[95] There is also limited discussion on the 'carrying on of farming operations'.[96] In this context, questions arise, such as why would Fihag initially assist Steinhoff and then sell two years later? What were the profits arising from the disposal?

It seems clear from the contractual arrangements that Steinhoff was the entity that dealt with the farming operations, an arrangement effective from 29 June 2001. In terms of this contractual agreement, Steinhoff was granted the use of Kluh's land under a usufruct. In terms of the bare dominium arrangement, Kluh was not entitled to the proceeds from the working of the property, and all the proceeds from the working of the property would be Steinhoff's. In terms of the tax arrangement, barring the question of the application of s 26(1), Kluh's tax liability would be a capital gain from the proceeds of the sale of the land, while Steinhoff would be able to deduct all expenses from the proceeds of the working of the land. In this way, the capital and revenue elements of the property were separated, with the tax consequences differing for the respective parties. It is unclear whether the tax relating to the bare dominium sale was part of the planning. It may have been one of the factors that Fihag would

[92] Ibid para 10.
[93] Ibid para 12.
[94] Ibid.
[95] *Kluh* (High Court) supra note 60; *Kluh* (SCA) supra note 14.
[96] Both sources ibid.

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have considered in its decision to be part of the arrangement — namely that, as the investor, its tax liability would be limited to a capital gain. Regarding s 26(1), the main issue was whether Kluh was, in fact, 'carrying on … farming operations'. The question then would have to be: what is the test used to make that determination, and does Kluh meet that test? The High Court found that the nature of Kluh's former operations was not a relevant factor,[97] but from a company-law perspective, it is interesting that Kluh started out as one of the companies in the Steinhoff group, had a background of operating a sawmill, and was to be used as the 'bare dominium' holder.[98] Furthermore, the appointment of a Steinhoff-recommended director in the form of Mr Pretorius[99] is also indicative of the relationship between Steinhoff and Kluh. While these arrangements and relationships may not have been important or relevant for determining the tax liability, there should have been some concerns about the corporate governance of the various companies and how these companies intersected with one another. The courts' emphasis on the contractual arrangements resulted in a limited discussion of the role of the stakeholders in the decision-making of the various corporate entities.

VI CONCLUSION

Both *Capstone* and *Kluh* show how different companies and affiliate group companies may be used to achieve particular legal obligations. In *Capstone*, Mr Daun and, later, Mr Jooste seemed to control the activities of the various companies. The role of the board, the directors and the shareholders is not always clear, and de facto and de jure ownership and control seemed to shift between the various parties. This type of uncertainty may be indicative of uncertain corporate governance. It becomes hard to discern who is actually in control of the company and who is legally in control of the company. Similarly, in *Kluh*, the arrangement was clearly meant to separate use and ownership by employing a usufructuary and bare-dominium structure. However, the setting up of the affiliate companies by using an existing company, the concerns raised about the financial statements, and the radical changes in the purchase price all seem to indicate that all was not well within the corporate governance of these companies. An in-depth consideration of these two cases, taking into account the facts and the relevant law, should have alerted the various corporate stakeholders and served as a warning that something was amiss in the governance of the various companies, particularly of Steinhoff.

[97] *Kluh* (High Court) ibid para 17.
[98] Ibid.
[99] Ibid para 12.

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