THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 84/2020

In the matter between:

MASSMART HOLDINGS LIMITED **APPELLANT**

and

THE COMMISSIONER FOR THE

SOUTH AFRICAN REVENUE SERVICE **RESPONDENT**

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

Coram: PONNAN, MBHA and ZONDI JJA and MABINDLA-BOQWANA and POYO-DLWATI AJJA

Heard: 8 March 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10:00 am on 26 March 2021.

Summary: Capital Gains Tax (CGT) – taxpayer implementing a share incentive scheme for its key management personnel - scheme conducted through a trust -

whether taxpayer suffering capital losses for CGT purposes by virtue of its dealings with, and in relation to, the trust.

ORDER

On appeal from: Tax Court of South Africa, Gauteng (Adams J, sitting as court of first instance):

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

JUDGMENT

Ponnan JA (Mbha and Zondi JJA and Mabindla-Boqwana and Poyo-Dlwati AJJA concurring)

[1] This is an appeal by Massmart Holdings Limited (Massmart), the holding company of the Massmart Group of Companies, against a judgment of Adams J (sitting with assessors) in the Tax Court of South Africa, Gauteng.

[2] In 2000, Massmart resolved to adopt and implement a share incentive scheme for its key management personnel. The scheme was to be conducted through the Massmart Holdings Limited Employee Share Trust (the Trust). On 12 June 2000 the Trust Deed for the Trust (the trust deed) was adopted by Massmart. The first trustees of the Trust were Mr Mark Franklin, an accountant, and Mr Stephen Lewis, an attorney at Edward Nathan and Friedland Inc.

[3] On 23 January 2003, Mr Roger McKee, the then scheme administrator, wrote to Mr Lewis:

'Members of the accounting team . . . met today with Deloitte & Touche and with Mark Franklin representing the trustees of the trust . . .

The following matters arose out of the meeting in respect of which we need your legal advice:

1. Clause 33 of the trust stipulates that "the trust shall not be entitled to make any profit on the resale of shares acquired by it . . . the trust hereby ceding to the company . . . its right to any profit". The questions arising out of this are:

. . .

ii) Does the cession embodied in 33 imply that no such profits (or losses) ever actually arise in the trust and therefore do not fall to be dealt with in the trust's financial statements, and that instead they arise, at the time of the transactions, in the relevant group company?

iii) In the case of a profit on such a resale of shares capital gains tax will arise. Can this be dealt with in the company which accounts for the capital gain or must it be dealt with in the trust, notwithstanding the accounting treatment of the profit? . . .

iv) In the case of a loss on a resale of shares, should such capital loss, for tax purposes, be carried forward in the trust or in the relevant group company?'

[4] The response from Mr Lewis on 5 February 2003 was:

'2. Ad 1(ii) and (iii)

No, for the reasons set out hereunder:

. . .

2.4. We are of the prima facie opinion that paragraph 33 does not alleviate the Trust of such a CGT obligation. The Trust is making the gain or accruing the benefit and only then seeking to pass it on to the holding company. In other words, paragraph 33 does not antecedently divest the Trust of the right to the gain or income. In any event, paragraph [33] may create problems under para 11(1)(a) of the Eighth Schedule to the Income Tax, 1962 as the Trust may be seen to be disposing of an asset (i.e. its right to profits).

2.5. In order for the Trust to avoid having to pay CGT on such a capital gain, it would have to be argued that [Massmart] is a beneficiary of the Trust. [Massmart] (and not the Trust) would then be liable for CGT on the capital gain vested in it (paragraph 80 of the Eight Schedule).

. . .

3. Ad (iv)

A capital loss can only be set-off against a capital gain. Since the capital gain arises in the Trust the loss must also remain in the Trust. Again, the situation in which the Trust makes a loss on a resale of shares is not expressly dealt with in paragraph 33. Whether paragraph 33 is interpreted to include, by necessary implication, that a loss on a resale of shares accrues to [Massmart] in the same way that a profit is intended to, or whether paragraph 33 is to be interpreted as not covering the situation of a loss on a resale of shares, does not make a difference. The loss on the resale of shares will, in both instances, result in the capital loss arising in the Trust rather than [Massmart].'

[5] On 1 October 2003 an addendum to the trust deed was adopted. The addendum sought to inter alia delete clause 33 and replace it with the following:

'33. RIGHT TO DIVIDENDS AND ACCRUAL OF NET PROFITS

33.1. The trust shall not –

33.1.1. earn any income as a result of dividends declared from time to time by the company, the trust irrevocably having renounced its rights (insofar as it would otherwise have been entitled to receive dividends in respect of shares registered in its name) to receive any such dividends; and

33.1.2. earn any net profits (being the aggregate of profits less the aggregate of losses) on the resale of shares acquired by it from beneficiaries or otherwise, the company being the vested beneficiary in respect of such net profits.'

The trust deed was restated and amended in November 2010. Clause 33 was restated as clause 35.

[6] The issue that accordingly arose for determination before the Tax Court is whether, during its 2007 to 2013 years of assessment, Massmart suffered capital losses for capital gains tax (CGT) purposes, by virtue of its dealings with, and in

relation to, the Trust. Massmart's claimed capital losses for that period amounted to some R954 million. The respondent, the Commissioner for the South African Revenue Service (SARS), disallowed the capital losses claimed by Massmart. Massmart's appeal to the Tax Court was dismissed and the assessments raised by SARS confirmed. The further appeal is with the leave of that court.

[7] CGT was introduced in South Africa with effect from 1 October 2001. As it was put in *Lion Match Company (Pty) Ltd v Commissioner for the South African Revenue* Service:

'[CGT] is loosely defined as a tax payable on a capital gain and is triggered by the disposal of an asset on or after that date. The CGT provisions are contained in the Eighth Schedule to the Income Tax Act 58 of 1962 (ITA). Section 26A of the ITA serves as a link between the main body of the Act and the Eighth Schedule. The Eighth Schedule determines the taxable capital gain or assessed capital loss and s 26A provides that the taxable capital gain must be included in the taxable income of a taxpayer for the year of assessment. According to para 3 of the Eight Schedule to the ITA, a taxpayer's capital gain for a year of assessment in respect of the disposal of an asset is equal to the amount by which the proceeds received or accrued in respect of that disposal exceeds the base cost of the asset.'[1]

[8] Massmart initially claimed the loss as its capital loss, on the basis that it was a vested beneficiary of the Trust. In the objection to the assessment raised by SARS, Massmart asserted:

'4.2 It should be appreciated that [Massmart] has been a vested beneficiary of the trust from day one. One should consider all of the provisions of the trust deed to determine whether [Massmart] has been a vested beneficiary or not. By virtue of being a vested beneficiary from day one, the relevant losses so sustained are claimable by [Massmart] by virtue of it being a vested

[1] *Lion Match Company (Pty) Ltd v Commissioner for the South African Revenue Service* [2018] ZASCA 36 para 1.

beneficiary. In other words, the ability to claim the relevant losses do not arise because losses were sustained in the trust, but the losses are claimable by virtue of the fact that [Massmart] was a vested beneficiary from day one and the losses associated with those vested rights.'

[9] However, by the time that Massmart had come to file its rule 32 statement with the Tax Court, it no longer persisted in the contention that it was a vested beneficiary of the Trust. It explained '[t]his Rule 32 statement contains new grounds of appeal that embody an approach that differs from the approach previously relied on by the appellant'. It stated:

'12. During the years of assessment in question, the restated and amended [trust deed] required the Trust, on the instruction of [Massmart], to grant call options [the options] to certain employees [the offerees] to acquire shares at the strike price[2] as at a later date.

13. The [trust deed] required [Massmart] to bear the losses made by the Trust, as a result of the Trust granting the options, when such options were eventually exercised by the offerees. The appellant did de facto bear such losses.

14. When the offerees exercised the options, the Trust sold the shares to the offerees at the strike price.

15. In order to be able to deliver the shares thus sold to the offerees, the Trust generally had to purchase shares in the market. The acquisition and disposal of shares typically resulted in a loss for the Trust, which loss was borne by the appellant, both de facto, as provided for in the Deed, and as detailed in notes to the annual financial statements of the Trust.

16. As a result of the above, [Massmart] actually incurred expenditure equal to the share sale losses incurred by the Trust resulting from [Massmart's] instruction to the trust, in terms of the Deed, inter alia to issue the options to the offerees. This expenditure was directly related to [Massmart's] action in instructing the Trust to grant the options to the offerees and to satisfy those options on the exercise thereof by the offerees.

[2] The strike price was the five day weighted average price of the Massmart shares on the Johannesburg Stock Exchange to the day preceding the offer date.

17. In this matter [Massmart] acquired a right against the Trust to require the Trust to grant the options to the offerees and, on the exercise of such options, to acquire shares to the extent necessary, at the expense of [Massmart], and to deliver them to the offerees at the strike price specified in the option contracts.

18. The pattern of events set out above was carried out repeatedly during [Massmart's] 2007 to 2012 years of assessment, as a result of which [Massmart] actually incurred de facto commercial losses as follows, during the years of assessment indicated below:

2007	-	R 234 161 613.00
2008	-	R 90 992 505.00
2009	-	R 84 602 796.00
2010	-	R 97 124 960.00
2011	-	R 146 983 736.00
2012	-	R 121 614 885.00.'

[10] The new case sought to be advanced by Massmart in its rule 32 statement was:

'19. For CGT purposes, whenever [Massmart] instructed the Trust to grant the options and to deliver shares to the offerees pursuant to the exercise of such options by the offerees, [Massmart] acquired the right ("the Right") to require the Trust to perform the obligations arising from the instructions issued by [Massmart] and accepted by the Trust.

20. The Rights thus acquired by [Massmart] constituted an "asset", as defined in paragraph 1, in the hands of [Massmart].

21. The base cost of these Rights, namely rights to require the Trust inter alia to acquire and offer shares to the offerees, was the expenditure actually incurred by [Massmart], as contemplated in paragraph 20(1)(a), which expenditure was equal to the losses made by the Trust on the delivery of the relevant shares.

22. When these assets were extinguished as a result of the performance of its obligations by the Trust, this resulted in a "disposal" of the assets as contemplated in paragraph 11(1), which expressly refers to the "extinction of an asset". [Massmart's] Rights against the Trust simply ceased to exist, and thus its assets were extinguished, resulting in the "extinction of an asset", i.e. a "disposal" of the assets as contemplated in paragraph 11(1).

23. There were no "proceeds", as defined in paragraph 1, from the disposal of these assets as nothing was received by or accrued to [Massmart] "in respect of that disposal", as contemplated in paragraph 35(1).

24. As a result, for CGT purposes, [Massmart] suffered a "capital loss", being "the amount by which the base cost of that asset exceeds the proceeds received or accrued in respect of that disposal", as contemplated in paragraph 4(a), each time such an asset was extinguished during the years of assessment in question. This is borne out by the commercial reality that [Massmart] factually incurred expenditure equal to the losses incurred by the Trust without any proceeds being received by or accruing to [Massmart] in respect of the relevant "disposals", as defined, resulting in de facto commercial losses to [Massmart].'

[11] Massmart's case came to be further refined on appeal. In heads of argument filed with this court, it was submitted by counsel for Massmart:

'30. In a nutshell, the appellant's case is as follows:

30.1 When it issued instructions to the trustees of the Trust to offer specific share options to specific employees at specified prices ("the strike prices"), the appellant acquired a *jus in personam ad faciendum*, i.e. a right to claim performance, against the trustees, requiring them to offer the share options as aforesaid. The right was an "asset" for CGT purposes.

30.2 When this right was extinguished or discharged by performance by the trustees, the extinction or discharge thereof constituted a disposal in terms of paragraph 11(1).'

[12] In terms of paragraph 4 of the Eighth Schedule of the Act:

'A person's capital loss for a year of assessment in respect of the disposal of an asset-

(a) during that year, is equal to the amount by which the base cost of that asset exceeds the proceeds received or accrued in respect of that disposal . . .'

[13] An 'asset', according to paragraph 1 of the Eighth Schedule, includes:

'(a) property of whatever nature, whether movable or immovable, corporeal or incorporeal, excluding any currency, but including any coin made mainly from gold or platinum; and

(b) a right or interest of whatever nature to or in such property.'

[14] Massmart called three witnesses: Mr Hayward, its CEO and, at the relevant time, its CFO; Mr Franklin, one of the first trustees of the Trust; and Ms Farquhar, the assistant to the share Trust administrator. Far from supporting Massmart's case, the evidence of the three witnesses rather appears to have bolstered SARS' contention that the notion that the so-called right constituted an asset, is illusory and an ex post facto reconstruction to establish a basis by Massmart for a claim for capital gains.

[15] Ms Sena Farquhar was responsible for the administration of the Trust, which included buying shares on behalf of the Trust, preparing offers for participants, assisting participants who exercised options including selling shares on their behalf and preparing the Trust's financial statements annually. She explained:

'. . . The option was valid for ten years . . . it didn't vest until after two years, and it vested in quarters. So, at the end of five years, it was fully vested. The employee did not have to do anything with it when it vested, but it was valid for ten years. They had to do something within the ten years. They had to trade it within the ten years.

MR EMSLIE: So, can I just confirm . . . they could only exercise a quarter of the share options at the end of the first year, another quarter at the end of the second year.

MS FARQUHAR: Yes.

MR EMSLIE: And so on?

MS FARQUHAR: Yes.

MR EMSLIE: Until year five, then it was fully vested, and then they could exercise it whenever they liked. But did you and Mr Hawksley advise employees when they could exercise their options?

MS FARQUHAR: Yes, we did . . . We sent an e-mail out to all the participants. How it worked is the employees were allowed to trade from the day after Massmart presented their bi-annual

results, and the period was open for trading for three months from that date, and it closed one month before the next . . . reporting period. So, we advised them by e-mail that we were open for trading.

MR EMSLIE: And, again, after the three months was up … (intervention).

MS FARQUHAR: We would then send them a letter telling them that we going into a closed period . . . and that they were not allowed to trade until the results came out, which would be two months after the close of that period. So, we were … (intervention).

MR EMSLIE: And when there was … new open period, would you advise them again?

MS FARQUHAR: Yes, absolutely, [e]very time. Ja.

MR EMSLIE: Now, can you tell the Court something about the exercise of the options by the offerees.

MS FARQUHAR: Okay. So, if a participant wanted to exercise their options, they had to send me an instruction to do so. It was by e-mail, there had to be something in writing. They would tell me what the tranche number was, what the vesting date was, the quantity that they wanted to sell, and they would tell me either I could sell at . . . the market price at the time it went into the market, or the broker could sell it, or they could set a price, that they wanted to hold on to . . .

MR EMSLIE: And did they also have an alternative to simply acquire the shares and keep them?

MS FARQUHAR: Yes, they did. That didn't happen very often. But, yes, basically you just sold enough of the shares in the market to cover their obligations. Which was the strike price and the tax, and the remaining shares that were left over . . . would have been then transferred to their own share account.

MR EMSLIE: Now, can you estimate roughly what percentage of participants exercised the option to sell the shares, as opposed to those who didn't?

MS FARQUHAR: Oh, I would say about 90% of the participants took the money. They didn't keep the shares.'

[16] Mr Franklin confirmed that the Trust granted options to the employees as part of their duties as trustees, on the instruction of Massmart's directors. He was asked

to identify the asset disposed of which gave rise to the capital loss. He could not. His evidence was to the following effect:

'MR FINE: What is the asset that it disposed of, that Massmart, not the Trust, Massmart Holdings disposed of.

MR HAYWARD: M'Lord, if I may, this situation is subtle. The asset and the resulting loss that is incurred on disposal of the asset, is incurred in the Trust. That gives right to a nett loss, which the company, Massmart Holdings, is obligated to carry. And so it is the loss that is transferred and disclosed in the books of the company.

MR FINE: Mr Hayward, do you know what an asset is?

MR HAYWARD: It is – do I know what the asset is, Sir?

MR FINE: Do you know what an asset is?

MR HAYWARD: Yes, I do, M'Lord.

MR FINE: What is the, I'm talking about the loss, I know, and you know that I know what a loss is, I'm talking about what was the asset that was disposed of by Massmart that gave rise to a capital loss.

MR HAYWARD: M'Lord, sorry, I'm not trying to be difficult, the asset disposed of was in the books of the Trust, which was the closing out of the transaction of the beneficiary that gave rise to the loss.

MR FINE: Let's try and make it simple. Or make it easier. Do you know that previously, what was the basis upon which capital losses were claimed previously by Massmart before the appeal?

MR HAYWARD: I have, M'Lord, I have no recollection, I'm not clear on that.

MR FINE: As the CEO, you don't know the basis upon which they claimed substantial amounts.

. . .

MR HAYWARD: I do not know that personally.

MR FINE: So Massmart was claiming the losses in the share trust as an assessed loss in Massmart. You see that?

. . .

MR FINE: So it was claiming the capital losses in the trust as a vested beneficiary. You see that?

MR HAYWARD: I read that.

MR HAYWARD: I do, M'Lord.

MR FINE: Yes. And the basis for the claim in this appeal is different, do you agree?

MR FINE: . . . just on a purely logical common sense basis that all that would happen is the directors would give an instruction to the trustees to grant options and the trustees would carry out that instruction, correct?

MR HAYWARD: That is correct, M'Lord.

MR FINE: Ja, there are no rights and assets involved in that instruction, correct?

MR HAYWARD: Not at that time but the relationship is governed with rights and obligations through the trustees.

MR FINE: Good. What asset is involved there?

MR HAYWARD: Nothing. No, at the time there was no asset involved, that is correct.

MR FINE: There's an instruction and if you go to page – if you go back to paragraph – if you go to page 25 of the original trust deed . . . you will see that the duties of the trustees, the trustees in addition to any other duty imposed on this deed, whether express or implied, shall make offers or grant options to offerees as directed in terms of clause 13 but always subject to the provisions of the Act. So that's the obligation, once they get an instruction and authorisation, they carry out the duty. That's all it is, correct?

MR HAYWARD: Yes, M'Lord.'

[17] But, even were it to be accepted that the right contended for is an asset as defined, there may well be a further insuperable difficulty in the way of Massmart. It is unclear when precisely, as contemplated by paragraph 4 of the Eighth Schedule of the Act, a 'disposal' of the asset occurred. At best for Massmart, it would seem that the disposal would have occurred when the trustees had agreed to grant the options as instructed from time to time. But, as Ms Farquhar testified, employees had to first accept the grant of the option and if accepted, exercise the option. Both Mr Franklin and Mr Hayward confirmed that the mere granting or acceptance of the option would not result in any financial obligation for either the Trust or Massmart.

There was therefore no unconditional obligation to pay, nor had any expenditure actually been incurred at that point in time. And, at the time that the options were granted, it was uncertain if any loss would indeed arise.

[18] What is more, Mr Franklin accepted that the funds that Massmart had advanced to the Trust were recorded as loans. He testified, however, that there was never any intention that the loans would be repaid. But, he could not explain why the loans were recorded as unpaid loans in the financial statements of the Trust and the balances were carried forward to each succeeding year. On that score, his evidence was:

'MR FINE: Evidence will be led to show that amounts advanced to the trust were recorded in what was for accounting purposes styled as a loan account as between the trust and the appellant in the books of the appellant.

Are you able to comment on that?

MR FRANKLIN: I agree with that.

MR FINE: But what I'm questioning you is, is there a difference between for accounting purposes or was it in reality a loan as a matter of substance or is it just for accounting purposes?

MR FRANKLIN: It was for accounting purposes because there was never any intention that it should be repaid. A loan normally is required to be repaid. So this was for accounting purposes.

MR FINE: So was the loan a sham? Was it a simulation?

MR FRANKLIN: It could have been described reflecting on it as an advance for the purposes of the activities of the trust.

MR FINE: But it is still a loan. It's a loan for the purchase of shares, correct?

MR FRANKLIN: Well, the shares had already been purchased by Massmart and it was a means of recording that transaction in the books of the trust.

MR FINE: Let's just break it up. An amount was paid by Massmart to the trust.

MR FRANKLIN: No.

. . .

MR FRANKLIN: Well, it could have been described otherwise, but it was not a loan in the sense that a loan means that the trust was required to repay it, because the trust had no funds. So it would never have been able to repay it. So in that respect the term loan is probably misleading.

MR FINE: So are the financial statements of the trust misleading, Mr Franklin?

MR FRANKLIN: I think all the parties involved were quite comfortable with the description. It could have been that on reflection it could have been described separately, but Massmart and the trustees were happy and the auditors were happy and it was described as a loan, but in fact it was an advance and there is a technical potential difference between a loan and an advance.

MR FINE: Would you care to answer the question, please? Are the financial statements of the trust misleading, yes or no?

MR FRANKLIN: On reflection I think they are misleading.

MR FINE: Deliberately so?

MR FRANKLIN: No, definitely not deliberately so, because all the parties approved them.

MR FINE: Yes but now to the uninitiated, these financial statements would possibly be shown to SARS for the purposes of income tax purposes, income tax returns, correct?

MR FINE: And we have under that in clear and unequivocal terms loans from Massmart Holdings Limited Group and company. Do you see that?

MR FRANKLIN: I do.

MR FINE: And the assets and liability position of the trust is determined with reference to that as a liability, correct?

MR FRANKLIN: Correct.

MR FINE: Yes. Then move to page 321 please and we see at page 321 under the heading note 6:

"Loans from Massmart Holding Limited Group companies." Do you see that?

MR FRANKLIN: I do.

MR FINE: Nothing about it not being a loan, correct?

MR FRANKLIN: Correct.

MR FINE: And it talks about loans payable. Do you see that?

MR FRANKLIN: I do.

MR FINE: Doesn't say that it was never the intention of the loans would not be repaid, correct?

MR FRANKLIN: Correct.

MR FINE: In fact all it says: "These loans are unsecured, interest free and have no repayment date." Correct?

MR FRANKLIN: Yes, the fact that it says no fixed repayment dates suggests that…

MR FINE: Yes?

MR FRANKLIN: It may never be repaid.

MR FINE: Or it is repayable on demand, correct?

MR FRANKLIN: Yes.

MR FINE: Or repayable on demand.

MR FRANKLIN: But all the parties knew that that was impossible because there were no assets of the trust in order to be able to do that.

MR FINE: And if the trust sold the shares that it had? If the trust sold the shares that it had? Could pay or pay some, correct?'

[19] Mr Franklin later added:

'MR FINE: "No taxation has been provided as no income accrues in terms of clause 33 of the trust deed. To the extent that capital gains arises in respect of profits on resale of the shares, this liability is assumed by Massmart in accordance with clause 36 of the trust deed." Do you see that?

Mr Franklin: I do.

MR FINE: So where there was capital gains in the trust because of buying and selling of shares that was a liability that had been taken over by Massmart is that correct?

MR FRANKLIN: That is the way it is described.

MR FINE: Yes.

MR FRANKLIN: But the intention was that it would always be borne by Massmart because the administration of the trust was for the benefit of Massmart as it had to be done through the trust because the Companies Act and the listing requirements did not allow the loans to be made out of Massmart.

MR FINE: Right. It is just … (intervention)

MR FRANKLIN: So it is merely an administrative support arrangement.

MR FINE: Yes, so the point is the shares were bought by the arrangement.

MR FINE: Yes, so the point is the shares were bought by the trust, correct?

MR FRANKLIN: They were bought in the name of the trust but they were bought by Massmart in the name of the trust.

MR FINE: Okay let's go back to the financial statements, Mister go back to 317 please, just this one example. An asset of the trust is shares in Massmart Holdings, correct?

MR FRANKLIN: Correct.

MR FINE: Yes, Those shares were sold by the trust to the employees on exercise of option, correct?

MR FRANKLIN: Correct.

MR FINE: In respect of those shares there would either be a capital gain or a capital loss. Correct?

MR FRANKLIN: Correct.

MR FINE: That liability would rest with the trust, correct?

MR FRANKLIN: No.

MR FINE: Why not?

MR FRANKLIN: Because the trust had no resources to be able to fund that. They were doing this as agents for Massmart Holdings. The understanding throughout was that all of, everything done in the trust was as a service, if you will, an administrative support service, to Massmart Holdings.

MR FINE: The facility that they didn't have the funds to pay did not mean that they weren't liable to pay, is that correct? They had an arrangement with Massmart Holdings that it would pay the capital gains because of the arrangement in terms of the trust deed, is that correct?

MR FRANKLIN: That is correct.'

[20] The unpaid loans plainly constituted an asset in the hands of Massmart. There could thus be no loss to speak of. Instead, what Massmart purported to do was to account for the Trust's losses in its books. This despite the fact that at the outset they had received legal advice from Mr Lewis that they could not, by arrangement between them and the Trust, change the incidence of capital gains or losses.

[21] It follows that the appeal must fail and it is accordingly dismissed with costs, including those of two counsel.

V M Ponnan
Judge of Appeal

APPEARANCES

For appellant:	TS Emslie SC Instructed by: Webber Wentzel, Sandton Honey Attorneys, Bloemfontein
For respondent:	DM Fine SC (with him F Southwood SC) Instructed by: Mathopo Moshimane Mulangaphuma t/a DM5 Incorporated, Sandton McIntyre van der Post Attorneys, Bloemfontein