THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 469/2025

In the matter between:

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE — **APPELLANT**

and

CORNUCOPIA TRUST — **RESPONDENT**

Neutral citation: *The Commissioner for the South African Revenue Service v Cornucopia Trust (*469/2025) [2026] ZASCA 116 (7 September 2026)

Coram: MOCUMIE, NICHOLLS and MATOJANE JJA and STEYN and ZILWA AJJA

Heard: 22 May 2026

Delivered: 7 September 2026

Summary: Tax Law - Income Tax Act 58 of 1962 (the Act) – whether the raising fee paid by Cornucopia constituted ‘interest’, in the form of a ‘similar finance charge’, as defined in s 24J(1)*(a)* of the Act.

ORDER

On appeal from: The Tax Court of South Africa, Western Cape (Myburgh AJ):

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

JUDGMENT

Nicholls JA (Mocumie JA and Steyn and Zilwa AJJA concurring):

[1] The Commissioner for the South African Revenue Service (SARS) appeals against a decision by the Tax Court of South Africa, Western Cape (the tax court) in favour of the taxpayer, Cornucopia Trust. The central issue is the deductibility of amounts incurred by the Cornucopia Trust as raising fees, claimed as a deduction under the Income Tax Act 58 of 1962 (the Act), in the 2019 and 2020 tax periods. The outcome depends on whether the raising fees are deductible under s 24J(2) of the Act by virtue of constituting similar finance charges to interest as envisaged by the definition of 'interest' in s 24J(1). The tax court (per Myburgh AJ) interpreted 24J to encompass raising fees as interest or similar charges thus holding that they were deductible. The appeal is before this Court with the leave of the tax court.

[2] The Cornucopia Trust originally relied on the deductibility of raising fees in terms of s 11*(a)* of the Act[1] on the basis that they were revenue in nature. For the purposes of this appeal, it no longer persists with s 11*(a)* as a ground for deductibility. Therefore, the issue that remains is whether the raising fees charged in this case

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[1] Section 11*(a)* of the Act provides:
'General deductions allowed in determination of taxable income
…
(a) expenditure and losses actually incurred in the production of the income, provided such expenditure and losses are not of a capital nature;'

constitute similar finance charges to interest as contemplated in terms of s 24J(2) of the Act.

Background

[3] The Cornucopia Trust (Cornucopia) is a South African registered trust established in 2008, which conducts the business of property investment and property leasing in the Bloemfontein area. Although there are three trustees, Mr George Nicholas Georgiou (Mr Georgiou) is the managing trustee and the driving force behind Cornucopia. Mr Georgiou's father set up the George Nicholas Trust in 1993/1994, which housed several commercial properties in Bloemfontein, most of which were smaller properties with a variety of funders. Two properties owned by the George Nicholas Trust were considered to be of superior quality because of the quality of the tenants who had long leases, which were triple net leases.[2] The two buildings identified were the building leased to Absa Bank Limited for their offices (the Absa precinct) and the building leased to Life Healthcare Limited for the Rosepark Life Healthcare Hospital (the Life Health precinct).

[4] Mr Georgiou decided to ring-fence the two properties in a different entity, Cornucopia, the respondent in this appeal. These properties were sold by the George Nicholas Trust to Cornucopia at market value. Various Sanlam entities provided the full financing for the acquisition of these properties by Cornucopia. In 2012, both the Life Health precinct and the Absa precinct were transferred to Cornucopia.

[5] Facility agreements were concluded for each of the two properties on 22 December 2011. In respect of the Absa precinct, a three-year agreement was concluded between Cornucopia as borrower, and Sanlam Life Insurance, Sanlam Credit Division and Sanlam Capital Markets (SCM), as lenders, in the amount of R115 million. The interest rate was floating with a fixed margin. The Sanlam entities will be referred to, collectively, as Sanlam, unless reference is made specifically to SCM, the significance of which will become apparent.

[2] According to Mr Georgiou this is where the tenant is responsible for all expenses relating to the building.

[6] In 2015, in anticipation of the termination of the Absa facility after the three-year period, a refinancing agreement was concluded, which increased the total facility to R170 million. In 2018, two further refinancing agreements were concluded with Sanlam. The first was the Mezzanine Refinance Facility for R16 million. The second was for the facility amount of R170 million and was used to settle the capital on the 2015 refinancing agreement.

[7] In respect of the Life Health precinct, an 11-year loan facility of R295 million was concluded between the Trust and Sanlam at a fixed interest rate of 10.62 percent per annum. In November 2019, an addendum was concluded for an additional amount of R150 million. The money was used to acquire a property to be used as a dialysis centre; as working capital to effect works on the various buildings. The bulk of the money, approximately R92 million, was to repay loans owing to the George Nicholas Trust.

[8] All the financing and refinancing agreements attracted raising fees. It was recorded in a 'fee letter' dated 22 December 2011 that for both the Absa Facility and the Life Facility, and in consideration for arranging the facilities, SCM would be paid a fee equal to the aggregate of two percent of the respective facilities. Fifty percent of the raising fees would be paid by Cornucopia to SCM in cash on the date of signature. The remaining 50 percent would be paid on 31 March 2012 or the date on which the mortgage bond was registered, whichever came first.

[9] When Cornucopia concluded the refinancing agreement with Sanlam in respect of the Absa Precinct, clause 11 of the refinancing agreement, dated 11 June 2015, recorded that '[Cornucopia] shall pay to the Finance Parties a raising fee on the terms and conditions set out of the Fee Letter'. No fee letter was provided, but Mr Georgiou testified that it was 'probably 2%, generally the fees with Sanlam were set at 2%.'

[10] In respect of the further two refinancing agreements concluded with Sanlam in 2018, it was recorded in the Mezzanine Refinancing Agreement that Cornucopia would pay two percent of the total commitment recorded in the terms and conditions and as set out in the fee letter. The relevant fee letter recorded that Cornucopia would pay a

raising fee, which would be payable on demand from SCM and on receipt of a VAT invoice. It further recorded that Cornucopia acknowledged and agreed that the raising fee is an 'advance condition' to be fulfilled prior to the utilisation of the Mezzanine Refinancing Facility. The fee letter in respect of the Absa Refinancing Facility Agreement, is worded in similar terms.

[11] The addendum to the Life Facility Agreement made provision for a raising fee letter in which Cornucopia agreed to pay R3 million which would become payable on the date of signature and against receipt of an invoice. Once again, it was recorded that this was an advance condition to be fulfilled prior to the utilisation of the new Life Facility.

[12] In sum, each facility agreement referred to a raising fee payable as a precondition for drawing down on the facility. The raising fee was regulated under the terms of a fee letter. The fee was two percent of the capital and was payable to SCM upfront as the facility agent, irrespective of whether SCM or a different Sanlam entity was the lender.

[13] The evidence of Mr Georgiou is that he had dealt with financial institutions over the years and the raising fee they charged was generally two percent of the total loan amount. He was taking out loans for relatively short periods and suggested that the interest rate and the raising fees were determined according to how Sanlam structured their financing facility and how they assessed their cost of funding. The raising fee may decrease if the loan were for a shorter period.

[14] During the 2019 tax year, Cornucopia paid SCM's tax invoice and claimed the input VAT. Mr Georgiou stated that although it was a once-off fee, it was spread over the period of the loan for tax purposes. In its income tax returns for 2019 and 2020, Cornucopia claimed portions of the raising fees as deductions of interest under the 'yield to maturity principle' encapsulated in s 24J of the Act. What this means is that each deduction was spread over the duration of the loan facility to which it pertained.

[15] SARS disallowed the deductions of the raising fees on the basis that they did not constitute similar finance charges as contemplated in the definitions of s 24J and

were not deductible under s 11*(a)* of the Act. Cornucopia appealed SARS' disallowance of the raising fees disputing the finding that they were not interest or similar finance charges as contemplated. The tax court upheld Cornucopia's appeal and held that raising fees were interest or similar charges as envisaged in s 24J

[16] Section 24J is a stand-alone deduction provision in relation to interest as defined in that section. It allows tax payers to deduct interest expenditure incurred irrespective of whether it qualifies as a deduction under s 11*(a)*.

[17] Section 24J(2) of the Act provides:

'Where any person is the issuer in relation to an instrument during any year of assessment, such person shall for the purposes of this Act be deemed to have incurred an *amount of interest* during such year of assessment, which is equal to –

(a) the sum of all accrual amounts in relation to all accrual periods falling, whether in whole or in part, within such year of assessment in respect of such instrument; or

(b) an amount determined in accordance with an alternative method in relation to such year of assessment in respect of such instrument,

which must be deducted from the income of that person derived from carrying on any trade, if that amount is incurred in the production of the income.' (Emphasis added)

[18] Tax legislation is dynamic and changes regularly. This year alone there have been three amendments to the Act. Both the definition of interest and the allowance of interest as a general deduction have changed over time. Of significance to these proceedings is the Tax Laws Amendment Act 15 of 2016 (the 2016 amendment), which came into operation on 19 January 2017 and brought about an amendment to the definition of interest in relation to s 24J. Up until this amendment, interest was defined in s 24J(1) as follows:

'"interest" includes the-

gross amount of any *interest or related finance charges*, discount or premium payable or receivable in terms of or in respect of a financial arrangement. . .' (Emphasis added.)

[19] After the 2016 amendment, the definition of interest, for the purposes of s 24J,

is defined as:

'"interest" includes the–

(a) gross amount of *any interest or similar finance charges*, discount or premium, payable or received in terms of or in respect of a financial arrangement…

irrespective of whether such amount is–

(i) calculated with reference to a fixed rate of interest or a variable rate of interest; or

(ii) payable or receivable as a lump sum or in unequal instalments during the term of the financial arrangement;' (Emphasis added.)

[20] It is the change in wording from related in the old Act to similar in the amendment, and the meaning to be attributed thereto, that lies at the heart of this appeal. Neither related finance charges nor similar finance charges are defined in the Act. What is encompassed by similar has not been the subject of judicial consideration. However, this Court dealt with related finance charges in *Commissioner, SARS v South African Custodial Services (Pty) Ltd* (*Custodial Services*).[3] There, this Court allowed tax deductions for various service fees, finding that 'because of their close connection to the obtaining of loans and the furtherance of [the business] project, the qualify as "related finance charges" for purposes of the section.'[4] These services included guarantee fees, financial advisory fees, margin fees, commitment fees, legal fees and administration fees. What is apparent is that this Court found that the test in terms of the old definition was one of connectivity and relatedness. Now the test is similarity.

[21] Academic opinion on the similarity between interest and raising fees was divided prior to the 2016 amendment. Some scholars were of the view that the meaning of interest includes a wide variety of expenditure and losses.[5] Others were of the opinion that a distinction can be made between interest and raising fees in that raising fees are the cost of obtaining capital, while interest is the cost of the usage of

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[3] *Commissioner, SARS v South African Custodial Services (Pty) Ltd* [2012] 2 All SA 237 (SCA); 2012 (1) SA 522 (SCA).
[4] Ibid para 49.
[5] See G Barkhuizen and L Willemse 'The Impact of the Deletion of Section 11(bA) on the Deductibility of Pre-Production Raising Fees Incurred in the Expansion of an Existing Trade' Journal of Economic and Financial Sciences July 2015 8(2) at 651.

the capital.[6] Income tax experts also held different views regarding the income tax treatment of raising fees. Some viewed raising fees and interest as qualitatively different to one another.[7] In contrast, others held that raising fees are the same as interest and that the income tax treatment of these two items must be the same because both interest and raising fees are part of the cost of borrowing money and the fact that raising fees are directly related to the amount and term of the loan is additional evidence that the income tax treatment of interest and raising fees should agree.[8]

[22] Commenting on the current definition of interest in s 24J(1), De Koker et al emphasise that 'in its ordinary connotation, interest is consideration for the use of money.'[9] But it is not the only cost of credit:[10] instead, the cost of credit includes other types of finance charges, such as commitment fees and arrangement fees. The distinction between the charges associated with borrowing money raises the question of the scope of the definition of interest.

[23] It is not disputed that the 2016 amendment came about as SARS' response to *Custodial Services* in an attempt to restrict what was considered the over-broad meaning given to related finance charges in that case. SARS refers to its interpretation note 142,[11] which states that:

'To clarify the inclusion and meaning of the words "related finance charges" in paragraph (*a*), the definition was amended in 2016 and the word "related" was substituted with the word "similar", resulting in the relevant portion of paragraph (*a*) to be more focused and now reading "interest or similar finance charges"'. (Citations omitted.)

[24] Interpretation note 142 furthermore refers to the reason for this amendment as explained in the Explanatory Memorandum on the Taxation Laws Amendment Bill 17B of 2016:

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[6] R Stretch and J Silke 2000 'Deductibility of Raising Fees in terms of s 11(bA) of the Income Tax Act' *Taxgram* July 2000.
[7] R C Williams 1997 'Can Expenditure on Interest be of a Capital Nature?' The South African Law Journal 114 (Part IV) 641-644; T E Brincker 2011 Taxation Principles of Interest and Other Financing Transactions.
[8] T De Jager 1987 'The deductibility of raising fees' *SA Tax Journal* 2(1) 1-11.
[9] A de Koker and R C Williams Silke on South African Income Tax 2017 service 59 17.63 at 17-112.
[10] Sometimes called 'transaction costs'. See M Stighlingh, A Koekemoer, L van Heerden, S Wilcocks, P van der Zwan Silke: South African Income Tax 2023 2022 at 569-570.
[11] See https://www.sars.gov.za/wp-content/uploads/Legal/Notes/Legal-IntR-IN-142-Meaning-of-similar-finance-charges.pdf.

'The proposed amendment in paragraph (*a*) of the definition of "interest" in subsection (1) replaces the word "related" with the word "similar" to clarify the policy position that this applies to finance charges of the same kind or nature.'

[25] Interpretation note 142 refers to raising fees as the cost of raising capital while interest is the payment for the use of capital. It then concludes that a 'raising fee that is paid to obtain funds cannot be said to be similar to interest that is paid for the use of such borrowed funds. The nature of a raising fee, or otherwise stated what it is for, is very different to the nature of interest.'[12] It concludes that:

'. . . irrespective of what a finance charge is called, finance charges resembling interest (either in kind or nature) without being identical to interest, are regarded as similar finance charges. Therefore, the phrase "similar finance charges" does not include all forms of costs associated with acquiring and executing a loan and should not be interpreted and applied too widely.'

[26] SARS accepts that it cannot rely on the interpretation note for interpretive purposes other than to give context to the unitary approach of text, context and purpose espoused by this Court in *Capitec Bank Holdings v Coral Lagoon Investments 194 (Pty) Ltd and Others (Capitec)*.[13] Although the Constitutional Court has questioned the legal basis for affording interpretation notes of SARS the last word in determining the meaning to be given to a statutory provision,[14] both the Constitutional Court and this Court have had regard to explanatory memoranda in identifying the purpose for which a statute or amendment was introduced.[15]

[27] SARS argues that the finance fees in this matter lack the fundamental characteristics of interest: they were upfront, once-off payments incurred before the loan agreements became effective, conditional upon drawdown, and paid for the arrangement of the loans rather than for the use of the borrowed money. They are not linked to the time value of money. Nor are they compensation linked to the outstanding

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[12] See https://www.sars.gov.za/wp-content/uploads/Legal/Notes/Legal-IntR-IN-142-Meaning-of-similar-finance-charges.pdf.

[13] *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA).

[14] *Marshall NO v SARS* [2018] ZACC 11; 2019 (6) SA 246 (CC); 2018 (7) BCLR 830 (CC); 80 SATC 400.

[15] See *Thistle Trust v Commissioner, South African Revenue Service* [2024] ZACC 19; 2025 (1) SA 70 (CC); 2024 (12) BCLR 1563; paras 64-70; C*ity Power (SOC) Limited v Commissioner for the South African Revenue Service* [2020] ZASCA 150; 2022 (1) SA 121 (SCA); 83 SATC 523 paras 6-7.

capital balance or loan duration. As such the finance fees are separate from the interest. For these reasons, argues SARS, they cannot be considered as similar to interest and do not share the same characteristics of interest.

[28] Cornucopia accepts that the purpose of the amendment to the Act was to restrict the broad definition given to related finance charges in *Custodial Services*. But it contends that while there is clearly some narrowing intended, the intention was not to excise raising fees from the definition. It argues that raising fees are an economic reality of modern finance, a well-known commercial concept that is an inevitable requirement when acquiring a loan; the raising fee is the key that unlocks the funds. Without payment of a raising fee, the argument continues, there would be no access to, and no receipt of, the loan funds. Thus, the raising fee is inextricably linked with obtaining the loan and constitutes a payment for the credit advanced. It must, therefore, be a finance charge, which is similar to interest as both constitute the cost of credit. On this basis, contends Cornucopia, the raising fees, on the facts of this case, fall squarely within the amended definition of 'a similar finance charge'. It emphasises that similar denotes a relevant resemblance rather than being identical.

[29] Cornucopia's stance found favour with the tax court, which conducted a thorough interpretative analysis in its endeavour to ascertain 'the most compelling and coherent' meaning to be attributed to the relevant sections. It found that s 24J(1) does not refer to the common law definition of interest, but instead provides for an expanded definition of interest. Citing *Attorney-General, Transvaal v Additional Magistrate, Johannesburg,*[16] it held the use of the word 'includes' after the definition is 'no doubt generally a word of expansion'. The use of 'or' between interest and finance charges refers to something other than interest. In addition, stated the tax court, similar and its various iterations connotes a resemblance of some sort, which can be remotely similar or may refer to a closer resemblance. But it does not mean that the finance charges have to be identical.

[30] SARS' distinctions (timing, once-off payment, arranging as opposed to use of funds, no link to time value of money) were systematically rejected by the tax court

[16] *Attorney-General, Transvaal v Additional Magistrate, Johannesburg* 1924 AD 421.

which found that these did not constitute relevant dissimilarities. The tax court held that context is not everything and one must guard against a meaning that strains the language of the provision or wields an unbusinesslike result. If there is an irresoluble ambiguity the *contra fiscum* rule[17] should apply and a court should find in favour of the taxpayer.

[31] The tax court concluded that whilst there was a residual linguistic tension within the text, the most compelling and coherent account, without the necessity to apply the *contra fiscum* rule, and which did not yield an unbusinesslike and unwieldy result, was that raising fees were similar to interest.

Discussion

[32] Various issues are common cause. It is not disputed that Cornucopia is an 'issuer' in terms of the Act, which is defined as any person who has incurred any interest or has any obligation to repay such amounts in terms of such interest. It is not disputed that the raising fees are the cost of credit and are finance charges as contemplated under the Act. It is also agreed that the loan is a loan for consumption. The sole issue in dispute is whether a raising fee is a finance charge similar to interest as contemplated in the definition in the 2016 Amendment. Before deciding whether raising fees are similar to interest, one must determine what constitutes interest and what constitutes finance charges. Only then can it be determined whether the raising fees in this matter are finance charges similar to interest.

[33] As De Koker et al point out, the definition of interest refers to the common law concept of interest. Lord Wright in *Westminster Bank Ltd v Riches*[18] described interest as follows:

'… the essence of interest is that it is a payment which becomes due because the creditor has not had his money at the due date. It may be regarded either as representing the profit he might have made if he had had the use of the money, or conversely the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the

[17] The *contra fiscum* rule means that where there is doubt as to the meaning of a statutory provision which imposes a burden, this must be resolved by construing the provision in favour of the subject (taxpayer), provided it is reasonably capable of that construction.

[18] *Westminster Bank Ltd v Riches* [1947] 1 All ER 469 at 189.

deprivation.'[19]

[34] In *Commissioner for Inland Revenue v Lever Bros* (*Lever Bros*)[20] Watermeyer CJ described interest as follows:

'In the case of a loan of money, the lender gives the money to the borrower, who in return incurs an obligation to repay the same amount of money at some future time and*, if the loan is one which bears interests*, he also incurs an obligation to pay that interests. . . As a rule, the lender either gives credit to the borrower or transfers to him certain rights of obtaining credit which had previously belonged to the lender, and *this supply of credit is the service which the lender performs for the borrower, in return for which the borrower pays him interest. . .* Although, colloquially, one speaks of a debt carrying interest, or interest on a debt, as though interest were a sort of growth sprouting from the debt, the language used means no more than that *the borrower pays interest, if that is the agreement between the borrower and lender, as consideration for the benefits allowed to him by the lender.'* (Emphasis added.)

[35] This Court, in *Commissioner for Inland Revenue v Genn & Co (Pty) Ltd* (*Genn*)[21] found that raising fees were deductible together with interest as they formed one consideration. The company had to pay for the use of the money for the period of each loan, and it was not possible to justify a difference in treatment between interest on the loans and the raising fees or commissions on the loans. There, the taxpayer, Genn, had funded its business through short term loans arranged by a third party and to whom it paid raising fees, separately from interest. The raising fee was directly proportionate to the duration of the loan. Schreiner JA stated:

'It should I think be observed at the outset that, whatever might be the position on other facts, it is not possible in the present case to justify a difference in treatment between the interest on the loans and the commissions; the circumstances mentioned above show that in each case *the commission together with the interest formed in effect one consideration which the company had to pay for the use of the money for the period of the loan*. Although, therefore, the Commissioner allowed the deduction of the interest, as distinguished from the commission, the principles to be followed are on the present facts equally applicable to both.' (Emphasis added.)

[36] In *Cactus Investment (Pty) Ltd v Commissioner for Inland Revenue* (*Cactus*

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[19] A de Koker and R C Williams *Silke on South African Income Tax* 2017 service 59 17.63 at 17-112.
[20] *Commissioner for Inland Revenue v Lever Bros and Another* 1946 AD 441 at 451.
[21] *Commissioner for Inland Revenue v Genn & Co (Pty) Ltd* 1955 (3) SA 293 (A) at 298 F-G.

Investment)[22] this Court stated that bearing in mind that one was dealing with 'loans for consumption which brought about that each borrower became the owner of the money received, the interest cannot be compensation to Cactus for the use of Cactus' money.'[23] *Cactus Investment* found that the right to the agreed interest accrues immediately to the lender upon advancing the loan, although the right to claim payment is delayed by a time clause. This is consistent with the approach in *Lever Bros* that interest is a consideration for the supply of money. Nothing more is required of the lender other than to await periodic payment.

[37] More recently, our courts have stressed substance over form when characterising what constitutes interest. This functional characterisation includes what the charge is used for, rather than the label given to a charge in a contract. This is evident in *National Credit Regulator v National Consumer Tribunal and Others and Similar Matters* (*NCR v NCT*)[24] in the context of the National Credit Act[25] where this Court had to determine which fees and charges were permissible under s 102(1) of the Act. The section contains a list of fees and charges that a credit provider may include in the principal debt deferred under a credit agreement. These include an initiation fee, but also service fees, interest, cost of credit insurance, administration charges and collection costs and are 'costs directly related to the granting of credit. . .'[26] This Court found that s 102(1) was a closed list of permissible charges because there was no catch-all phrase like other similar charges.[27] A court has to properly characterise the disputed amount which does not escape characterisation as interest, merely because it is not labelled as such.

[38] Thus, while interest reflects the time value of money plus the *quid pro quo* for the lender's forbearance in awaiting repayment at a later date, these are not the only characteristics of interest. Interest is the functional cost of credit - what it costs the lender to provide the credit, together with a margin. Interest is not only the time value

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[22] *Cactus Investment (Pty) Ltd v Commissioner for Inland Revenue* 1999 (1) SA 315 (SCA).
[23] Ibid at 321 C-D.
[24] *National Credit Regulator v National Consumer Tribunal and Others and Similar Matters* [2025] ZASCA 132; 2026 (2) SA 455 (SCA) (*NCR v NCT*).
[25] National Credit Act 34 of 2005; see also *SACTWU Investments Group (Pty) Ltd v Sekunjalo Independent Media (Pty) Ltd and Another* [2026] ZASCA 39; 2026 JDR 1311 (SCA).
[26] *NCR v NCT* para 47.
[27] Ibid paras 50 and 51.

of the loan but also compensation for the risk involved. This is borne out by higher interest rates for higher risk loans. In this scenario interest is the agreed consideration to the lender for the extension of credit.

[39] The next question is this: what constitutes finance charges? It is noteworthy that the definition refers to interest or similar finance charges. The use of 'or' is disjunctive and is 'used to link alternatives.'[28] This presupposes that the finance charges are something other than interest, even under the limitation that they are finance charges that have a kinship link to interest. The Cambridge Dictionary defines 'finance charges as the total cost including interest that you must pay for borrowing money in the form of a loan or with a credit card'.[29] De Koker et al states that a finance charge is 'a fee charged for a service or a provision of a facility, namely making credit available. . .'[30] What the above definitions have in common is that raising fees, like interest, are a consideration for a service which is the provision of credit.

[40] The final consideration is what meaning should be attributed to similar in light of the above. Related means 'connected' and is clearly a far broader term than similar. Definitions of similar range from 'having characteristics in common: strictly comparable'[31] to 'looking or being almost the same but not exactly the same'[32]. The concise Oxford Dictionary defines similar as of the same kind in appearance, character, or quantity, without being identical. The point of departure between SARS and Cornucopia is that SARS views similar as meaning of the same nature with the same characteristics. Cornucopia relies on *R v Revelas*[33] and *South African Railways and Harbour v Springs Town Council*[34] to argue that similar does not mean identical. 'A thing is similar… if, without being identical with it, there is resemblance in some relevant respect'.[35] In coming to its conclusion, this Court must decide where on the scale the requisite similarity or relative relevance should raising fees be placed, having

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[28] Oxford Online Dictionary (https://www.oxfordlearnersdictionaries.com/definition/english/the-oxford-english-dictionary).
[29] Cambridge Dictionary (https://dictionary.cambridge.org).
[30] A De Koker and R C Williams *Silke on South African Income Tax* 2016 service 57 at 7.38 on 7-90-16.
[31] Merriam-Webster Dictionary (https://www.merriam-webster.com).
[32] Cambridge Dictionary (https://dictionary.cambridge.org).
[33] *R v Revelas* 1959 (1) SA 75 (A).
[34] *South African Railways and Harbour v Springs Town Council* 1949 (2) SA 34 (T).
[35] Ibid at 48.

regard to the triad of language, context and purpose.

[41] I accept that there are a wide range of charges related to interest that do not bear the same characteristics as interest. They may be related to interest in terms of the connectivity test, but they do not reach the higher threshold that the similarity test requires. Undoubtedly this provision was enacted in response to *Custodial Services* and its purpose was to narrow the connectivity test. But in so doing there must be some finance charges that pass the similarity test and fall into the category of finance charges similar to interest otherwise the words ‘or similar finance charges’ are rendered superfluous. According to SARS the section avoids a situation where something other than interest is dressed up as such. But it cannot be the case that only interest and disguised interest qualify for the s 24J deduction.

[42] On being asked to indicate which similar finance charges would qualify as being sufficiently similar, SARS was emphatic that it was not obliged to define these in the abstract, but merely to show, on the facts of this particular case, that the finance charges were not similar. However, when pressed, SARS provided two examples of what would fall into the category of similar to interest, and a description of their purpose. These are: substitute margins (which are an alternative to interest being a profit spread applied by the lender if the interest rate becomes disrupted or unavailable); and default interest charges (which are finance fees recognised gradually over the period of the loan). Default interest is clearly interest, merely at a higher rate on account of the default. Substitute margins and derived terms are generally used by SARS in the context of shares. The two examples provided are not a clear illustration of recognisable finance charges that would be similar to interest without actually falling within the definition of interest.

[43] The purpose of amending related to similar was not to confine deductibility to the most obscure forms of finance charges. Instead, it was to circumvent the wide approach adopted by this Court in *Custodial Services*. It was not to eliminate every fee other than interest but to ensure that fees such as legal fees, financial advisory fees

and other fees relating to the loan, but not strictly necessary for the loan, were excised from falling within the s 24J deduction.

[44] If the credit would not be granted absent the raising fee, then, together with interest, it constitutes the necessary consideration for the loan. As such it has the same function as interest in the provision of credit and creates a direct link between the raising fee and the use of capital. If interest is compensation for the time value of the money as well as the risk taken by the lender in providing the loan, then the raising fee is similar in character. The raising fees in this particular case share the same characteristics as interest in that they are payments to mitigate the risk of non-repayment of the loan, in addition to compensation for the deprivation of the use of the money. In these circumstances where the raising fee is directly proportionate to the amount of the loan it is not merely consideration for work done in providing, arranging, or setting up the loan, but the indivisible cost of the raising of credit, payable by the borrower to the lender as compensation for using its money, which bears the same characteristics as interest.

[45] In other words, where raising fees are quoted as a percentage of the loan that is entered into for a relatively short period, as in this matter, they are inextricably linked. The loan could have been structured in such a way that the interest rate was higher and the raising fee lower, or even eliminated altogether.[36] On the facts of this case one cannot merely state that the interest was incurred for the use of the capital while the raising fees were the costs of acquiring the capital. The sum of the raising fee was directly linked to the interest rate charged and, according to the uncontested evidence of Mr Georgiou, also linked to the period of the facility.

[46] In this scenario the raising fee is determined according to the time value of money in that the lender requires initial early compensation for the use of the capital. That raising fees are paid on a once-off basis does not detract from the fact that the

[36] C Haines 'Tax Deductibility of Interest and Finance Charges' Master of Commerce (Specialising in Taxation) research report, University of the Witwatersrand, 2017 at 21-22.

raising fees compensate the lender for the time value of money. The fact that the raising fee was paid upfront is not a distinguishing character. Support for this is found in the definition of interest in s 24J which does not only include those amounts payable in instalments but specifically refers to interest being payable 'as a lump sum or in unequal instalments during the term of the financial arrangement.'

[47] The practical effect of this is that raising fees that are charged merely for the efforts associated with obtaining the loan, would be related fees. But raising fees that are strictly linked to the procurement of the loan, both in amount and objective, and compensate the lender for the risk and cost involved in being deprived of its money, would fall within the rubric of similar. Raising fees that are inextricably linked to the procurement of the loan, as set out above, have the same functional characteristics as interest.[37] They are to be distinguished from the ancillary charges such as legal fees, financial advisory fees and other charges, not strictly necessary, but merely incidental to the loan and compensation not for the use of the funds as such, but for the labour associated with arranging the funds. Unlike interest and inextricably linked raising fees, these ancillary expenses (which might even be called raising fees in some instances) are not a necessary part of the loan so as to permit the taking of the risk and bearing the potential loss or profit to the lender.

[48] I have read the judgment of my colleague Matojane JA (the second judgment) which holds an alternative view and adds a valuable contribution to the vexed question as to what finance charges are similar to interest. This judgment purports to find support in what is referred to as internal indications in the Act, namely para 20(2)*(a)* of the Eighth Schedule and the definition of 'hybrid interest' in s 8FA.

[49] The Eighth Schedule deals with the determination of capital gains tax and

[37] See F E Jordaan 'An analysis of income from staking crypto assets paid to a non-resident in terms of the South African Income Tax Act No. 58 of 1962, and a tax treaty established on the OECD Model Tax Convention', minor research dissertation for Master of Laws (LLM) Specialising in International Taxation, University of Cape Town, 2025 at 24, with reference to D Davis, L Olivier and G Urquhart (founding eds) *Juta's Income Tax*: 'Given that "similar finance charges" is not defined, it will take the normal meaning, which is any kind of charge levied, irrespective of name, with the intention, and having the effect, of raising the effective interest burden on the transaction as a whole.'

para 20(2)*(a)* excludes borrowing costs, 'including interest as contemplated in s 24J, raising fees, bond registration or bond cancellation costs' from the expenditure incurred by a person in respect of an asset. The separate exclusion of interest and raising fees from the base cost in the Eighth Schedule does not, in my view, point to a dissimilarity between the two but instead underscores the similarity of raising fees to interest.

[50] Sections 8F and 8FA re-characterise any amount of interest accrued in relation to a 'hybrid debt instrument' and hybrid interest as a dividend *in specie*. In terms of s 8FA, interest on a debt is classified as hybrid interest if it is not fixed to a specific rate and is not based on the time value of money. Where a debt instrument displays equity characteristics, interest is deemed to be a dividend *in specie* and taxed as such. As a result, the deduction of interest is disallowed. Hybrid interest is excluded from a creditor's gross income under s 24J.These provisions relate to resident and non-resident companies. They were introduced into the Act to address equity instruments disguised as debt instruments, so as to benefit from an interest deduction. The present case is not such an instance. Moreover, as illustrated above with reference to the uncontested evidence of Mr Georgiou, the raising fees in this particular case are linked to the period of the facility and were negotiated with reference to the time value for money.

[51] Accordingly, I remain of the view that raising fees in this case constitute similar finance charges within the meaning of s 24J.

Order

[52] The following order is made:

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

C E HEATON NICHOLLS

JUDGE OF APPEAL

Matojane JA (Dissenting):

[53] I have had the benefit of reading the judgment prepared by my colleague Nicholls JA. I regret that I am unable to agree with it. In my respectful view, the appeal should succeed. This is a dissenting judgment. I gratefully adopt the account of the facts, of the terms of the facility and fee agreements, and of the legislative history set out in the first judgment, and I do not repeat them save where necessary. I differ on the single question on which the appeal turns, whether a raising fee of the kind incurred by Cornucopia constitutes a finance charge similar to interest within the meaning of the definition of 'interest' in s 24J(1) of the Act. In my view it does not.

[54] The question is one of interpretation, to be answered by the unitary consideration of text, context and purpose explained in *Capitec*.[38] The word to be construed is 'similar', which qualifies 'finance charges'; and the comparator fixed by the definition is interest. Two matters are common cause. The raising fee is a finance charge. And similar does not mean 'identical': *National Brands Ltd v Cape Cookies CC and Another*.[39] The enquiry is therefore whether a raising fee resembles interest in a respect relevant to the purpose of s 24J. To answer it, one must identify the essential character of interest and then ask whether the raising fee shares that character. It is at this point that I part company with the first judgment, which in my view fixes upon a resemblance too general to bear the weight placed on it.

The nature of interest

[55] The character of interest is settled. In *Lever Bros*,[40] Watermeyer CJ described interest as the consideration paid by the borrower for the benefit allowed by the lender, namely the supply of credit or money. In *Cactus Investment*,[41] this Court refined that description for a loan for consumption: interest is not compensation for the use of the lender's money, since the borrower becomes owner of the money advanced, but is the negotiated return that accrues to the lender upon the advance for having made the money available. Whether interest is understood as the price of the supply of credit or as the return for its provision, its defining incidents are constant. It is a return payable to

[38] Op cit fn 13.
[39] *National Brands Ltd v Cape Cookies CC and Another* 2024 (2) SA 296 (SCA); [2023] ZASCA 93; [2023] 3 All SA 363 (SCA); 2023 BIP 7 (SCA).
[40] Op cit fn 20.
[41] Op cit fn 22.

the lender; and it is measured by reference to the amount advanced and to the period for which the advance remains outstanding. That interest may be paid otherwise than as a periodic percentage does not displace those incidents. They are what distinguish interest from the many other costs a borrower may incur in obtaining finance.

The raising fee is not similar to interest.

[56] The raising fee in this matter was a single charge, fixed at two per cent of the capital, payable in advance to SCM as facility agent. It was a precondition to any drawdown, it was payable in full whether or not Cornucopia utilised the whole facility, it bore no relation to the term of the loan, and, on the terms of the fee letters, it remained payable in full irrespective of any subsequent early settlement. It was not a return to the lender referable to the outstanding capital over time. It was payable to SCM even in respect of facilities in which SCM advanced none of the money. It was, in the words of the fee letters, the consideration for SCM 'arranging' the facility. In substance it was the cost of obtaining the capital, not the price of its retention over time.

[57] That distinction, between the cost of procuring capital and the cost of its use or retention, is not a formal one; De Koker et al. draw it expressly.[42] A finance charge is a fee charged for a service or the provision of a facility, such as making credit available, it is distinct from interest, which is the payment for the use of the borrowed money, in the same way that rent is the payment for the use of a thing. A raising fee, the learned authors explain, is calculated at the commencement of the arrangement, is added to the cost of acquisition, and remains payable in full even if the debtor accelerates repayment. That description fits the present fees exactly. A charge with those attributes does not, to my mind, resemble interest in any respect relevant to s 24J, it resembles the price of a service rendered once, at the outset, in return for access to the loan.

[58] The first judgment meets the point that these fees were paid once, and in advance, by reference to the words of the definition that admit an amount 'payable or receivable as a lump sum or in unequal instalments during the term of the financial arrangement', as indicated in s 24J(1)*(a)*(ii) of the Act. With respect, that provision does not answer the question. It addresses the manner in which an amount falling within the

[42] Op cit fn 30.

definition may be payable; it does not convert into a similar finance charge an amount that is dissimilar in nature. Even where interest is paid in a single sum, there remains a plain distinction between interest and a fee paid for the service of raising the loan. The subparagraph disposes of the objection that a lump sum cannot constitute interest. It does not touch the anterior question, which is whether the lump sum in issue resembles interest at all.

The internal indications in the Act

[59] Two features of the Act itself indicate that a raising fee is not embraced within the notion of interest in s 24J. The first is para 20(2) of the Eighth Schedule, which provides that the expenditure incurred by a person in respect of an asset does not include –

'(a) borrowing costs, including any interest as contemplated in section 24J, raising fees, bond registration costs or bond cancellation costs.'

[60] There the legislature has enumerated interest as contemplated in s 24J of the Act and 'raising fees' as separate and coordinate species of borrowing cost. Had a raising fee been regarded as a charge similar to, and so comprehended within, interest as contemplated in s 24J, its separate enumeration alongside such interest would be difficult to explain. The provision is a textual indication that, under the Act, a raising fee is treated as something other than interest.

[61] The second is s 8FA of the Act. That section defines 'hybrid interest' to include interest where the amount of that interest is not determined with reference to a specified rate or to the time value of money. It deems such an amount to be a dividend *in specie*, which is not deductible. Parliament has thus taken an amount that is called interest, but which lacks the temporal character of interest and has placed it outside the deduction. It would be incongruous, having deliberately excluded from the reach of s 24J an amount denominated to be interest precisely because it is untethered from the time value of money, to admit as similar to interest a raising fee that is likewise untethered from time and from the outstanding balance. The reasoning of the tax court, which read hybrid interest into s 24J to conclude that interest need not be referable to the time value of money, cannot in my respectful view be sustained, it treats a separately defined and separately excluded concept as though it enlarged the very definition from which it is

withheld.

The purpose of the 2016 amendment

[62] The purpose of the amendment reinforces this conclusion. Under the previous definition, which spoke of 'related finance charges', this Court in *Custodial Services* held that a wide range of charges connected with the obtaining of loans – guarantee, advisory, margin, commitment, administration and legal fees among them – qualified for deduction, the test being one of connection. The 2016 Amendment substituted similar for 'related'. The explanatory memorandum records that the object was to confine the paragraph to finance charges 'of the same kind or nature' as interest. The evident purpose of the amendment was to narrow the reach of the definition, as the tax court itself recognised in *Taxpayer A v Commissioner, South African Revenue Service*[43] when it observed that the amendment 'may be geared towards narrowing' the concept.

[63] A construction that brings raising fees within 'similar finance charges' does not give effect to that narrowing; it undoes it. A raising fee is the very paradigm of a charge related to the obtaining of a loan. If it survives the substitution of similar for related, it becomes difficult to say what the amendment intended to exclude, and the deliberate alteration of the language is deprived of practical effect. The main judgment answers that unless raising fees qualify, the words 'or similar finance charges' retain little content. I do not think the alternatives are so stark. Charges calculated by reference to the outstanding capital and the passage of time, though not themselves interest in the strict sense, may answer the description. Substitute or alternative interest charges and default interest are examples. The exclusion of raising fees does not empty the phrase of content; it leaves within the phrase, as the amendment intended, the temporal and compensatory character of interest.

The payee of the fee

[64] A further consideration confirms the conclusion. The raising fee was payable to SCM in its capacity as facility agent, and in certain of the facilities SCM advanced none of the money lent. A payment made to a third party for the service of arranging a facility, and payable whether or not that party lends anything, cannot without more be a charge

[43] *Taxpayer A v Commissioner for the South African Revenue* Services [2022] ZATC 7; 85 SATC 246 para 32.

similar to interest, which is by its nature the return of a lender for the provision of credit. That the arranger was a member of the Sanlam group does not change the character of the payment. Any third party could have rendered the service of sourcing and securing the loan for a fee, and the fee would have been no less a charge for that service.

Genn does not decide this question

[65] In the tax court and before this Court, reliance was placed, on *Genn*.[44] That decision does not determine the present question. It was decided under the general deduction provisions and long before s 24J was enacted. The issue was whether raising fees and interest should be treated alike for deductibility, not the meaning of 'similar finance charges'. Moreover, the reasoning of Schreiner JA, that the commission and the interest together formed 'one consideration which the company had to pay for the use of the money for the period of the loan', rested on the premise that interest is the price for the use of the money – a premise that, as the respondent fairly accepted, is no longer consistent with the approach in *Cactus Investment*. *Genn* establishes deductibility on the particular facts there considered, of commissions paid in connection with raising loans. It is not authority for the proposition that a raising fee is itself 'interest,' still less that it is a 'similar finance charge' within s 24J(1). This Court's conclusion rested on the particular features of the commissions, which, together with the interest, formed in effect the consideration paid for the use of the money for the period of the loan.

Conclusion and order

[66] For these reasons I would hold that the raising fees, though finance charges, are not finance charges similar to interest within the meaning of s 24J(1), that they are accordingly not deductible under s 24J(2). The tax court erred in concluding otherwise. Because the appeal succeeds on that ground, it is unnecessary to decide finally whether the fees are deductible under s 11*(a)* of the Act. I record, however, that the fees were incurred to acquire, and to refinance the acquisition of, the two immovable properties from which the respondent derives its rental income. In *New State Areas Ltd v Commissioner for Inland Revenue*,[45] this Court distinguished between expenditure incurred in acquiring or extending the income-producing structure and expenditure incurred in carrying on the income-earning operations. In *Commissioner for Inland*

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[44] Op cit fn 21.
[45] *New State Areas Ltd v Commissioner for Inland Revenue* 1946 AD 610.

Revenue v George Forest Timber Co Ltd,[46] this Court likewise recognised the distinction between expenditure incurred in establishing or enlarging the income-producing structure and expenditure incurred in its operation. On the established test, there is a substantial basis for treating the fees as capital in nature. I express no final view on their deductibility under s 11*(a)*, however, since that issue does not arise for determination on this appeal.

[67] I would make the following order:

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

2 The order of the tax court is set aside and replaced with the following: 'The appeal is dismissed and the additional assessments raised for the 2019 and 2020 years of assessment are confirmed.'

KE MATOJANE

JUDGE OF APPEAL

[46] *Commissioner for Inland Revenue v George Forest Timber Co Ltd* 1924 AD 516.

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