A Tax Deduction for Home Office Expenditure: The Interpretation of and Proposed Removal of the Exclusive-Use Requirement in Section 23(b) of the *Income Tax Act*

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Abstract

Hybrid and remote working opportunities have become more prevalent, leading to an increase in attempts to claim income tax deductions for home office expenditure. SARS disallowed over R1.8 billion of the R2.9 billion home office tax claims in the 2021/2022 tax year. Unfortunately, efforts to lobby government to relax the requirements of section 23(b) of the *Income Tax Act* 58 of 1962 have not been met with legislative response. Section 23(b)'s exclusive-use requirement is particularly troublesome. Given the lack of legislative response, this article considers whether the exclusive-use requirement may be interpreted in a manner that would assist more taxpayers to claim a home office deduction. This article argues that the exclusive-use requirement does not require taxpayers to set aside an entire room to be able to claim home office expenditure. Unfortunately for taxpayers, it also finds that "exclusively" is not reasonably capable of bearing a meaning other than "solely" and that absent the application of the *de minimis non curat lex* rule, any private use of the home office space is fatal to the deduction of home office expenditure. The limited application of the *de minimis non curat lex* rule to dismiss insignificant private use offers no solution to taxpayers who live in modest homes and who necessarily work in mixed-use spaces. It also considers SAIT's proposal to tie the exclusive-use requirement to working hours through an interpretative argument and argues that it is unlikely to succeed. This article ultimately concludes that it appears as though taxpayers will find little relief from the exclusive-use requirement through interpretive arguments and must increase their efforts to lobby for legislative amendments instead. However, caution is required because SAICA's proposal that the exclusive-use requirement be removed through legislative amendment could trigger unintended consequences.

Keywords

Home office deduction; section 23(b); exclusively used; *de minimis non curat lex*.

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1 Introduction

When and where taxpayers work has changed across many economic sectors and job levels.[1] The Covid-19 pandemic was the catalyst for the great work-from-home experiment. However, the expansion of the digital and gig economy is also contributing to an increase in the number of taxpayers whose homes have become mixed-use spaces.[2] Unfortunately, a tax deduction for home office expenditure is hard to come by. In the 2021/2022 tax year 76 000 taxpayers attempted to claim home office expenditure totalling R2.9 billion, of which the South African Revenue Service (SARS) disallowed over R1.8 billion.[3] That figure equates to roughly 62% of the total value of all home office deductions taxpayers sought to claim.

Section 23(b) of the *Income Tax Act* 58 of 1962 (hereafter 1962 *ITA*)[4] prohibits the deduction of domestic or private expenditure incurred in connection with any premises not occupied for trade purposes except in respect of such part that is occupied for the purposes of trade, provided that the requirements in proviso (a) and (b) are met. Proviso (a) to section 23(b) provides that such part is deemed to be occupied for trade purposes only if it is specifically equipped for the taxpayer's trade[5] and is regularly and exclusively used for such purposes. SARS interprets the exclusive-use requirement as follows:

> …the part used for trade may not be used for *any* purpose other than the taxpayer's trade. A deduction is not permitted if the taxpayer or any other person conducts any activities that are not part of the taxpayer's trade (for example, activities of a private nature) in the part used for trade. For this reason, even though a part of a room constitutes a part of a premises, it is submitted that taxpayers will have great difficulty satisfying the burden of proof that the part was used exclusively for purposes of trade, if the part does not constitute a separate room in the premises. For example, if the part of the room is within a room that would normally be used for private activities, practically it will be significantly more difficult for a taxpayer to provide evidence proving exclusive use, that is, no non-trade use during or outside of work hours, throughout the relevant period. There may be exceptional cases, for example, a separate room in which two taxpayers have separate,

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1 SAICA National Tax Committee 2021 https://saicawebprstorage.blob.core.windows.net/uploads/resources/SAICA_2021_Annexure_C_submission.pdf 11.

2 SAICA National Tax Committee 2021 https://saicawebprstorage.blob.core.windows.net/uploads/resources/SAICA_2021_Annexure_C_submission.pdf 11.

3 SARS 2022 https://static.pmg.org.za/220304SARSPresentation.pdf slide 15.

4 All section references are to the *Income Tax Act* 58 of 1962 (1962 *ITA*) unless stated otherwise.

5 Note that the s 1(1) definition of "trade" includes employment.

> not shared, space specifically equipped for their trade, in which the burden of proof, depending on the facts, could be met.[6]

The exclusive-use requirement is a tough hurdle to clear.[7] Frustrated tax policy commentators maintain that the current restrictive regime makes it nearly impossible for salaried employees to claim home office deductions.[8] Moreover, many taxpayers do not live in large suburban homes with stand-alone home offices and work in mixed-use spaces instead.[9]

Since remote and hybrid working arrangements are expected to last beyond the Covid-19 pandemic, calls have been issued by some to relax the exclusive-use requirement through legislative amendment to enable a more equitable tax regime.[10] Others have suggested that SARS adopt a more lenient interpretation of the exclusive-use requirement that would promote equity and simplicity of use.[11] In 2021 the Minister of Finance indicated that National Treasury would undertake a multi-year project to review the tax provisions that impact on travel and work-from-home arrangements.[12] These provisions are to be investigated in terms of their "efficacy, equity in application, simplicity of use, certainty for taxpayers and compatibility with environmental objectives."[13] As of this article's publication date, there have been no further developments in this area.

While taxpayers wait on National Treasury to publish discussion papers in respect of proposed legislative amendments that may never materialise, this article seeks to determine whether section 23(b), as it stands, is open to being interpreted in a manner that would entitle more taxpayers to claim

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6 SARS 2022 https://www.sars.gov.za/wp-content/uploads/Legal/Notes/LAPD-IntR-IN-2012-28-Home-Office-Expenses-Deductions.pdf 7-8. Interpretation notes provide guidance on how the CSARS interprets and applies legislation (SARS date unknown https://www.sars.gov.za/legal-counsel/interpretation-rulings/interpretation-notes). Note that our courts must interpret the meaning of statutory provisions in accordance with constitutionally compliant precepts and therefore objectively and independently of interpretation notes issued by SARS (*Marshall v CSARS* 2019 6 SA 246 (CC) paras 3-10).

7 Visser 2022 https://www.moonstone.co.za/failure-to-update-tax-law-is-bad-news-for-employees-trying-to-claim-home-office-expenses/.

8 Visser 2022 https://www.moonstone.co.za/failure-to-update-tax-law-is-bad-news-for-employees-trying-to-claim-home-office-expenses/.

9 SAICA National Tax Committee 2021 https://saicawebprstorage.blob.core.windows.net/uploads/resources/SAICA_2021_Annexure_C_submission.pdf 11; Visser 2022 https://www.moonstone.co.za/failure-to-update-tax-law-is-bad-news-for-employees-trying-to-claim-home-office-expenses/.

10 SAICA National Tax Committee 2021 https://saicawebprstorage.blob.core.windows.net/uploads/resources/SAICA_2021_Annexure_C_submission.pdf 11.

11 SAIT 2021 https://cdn.ymaws.com/www.thesait.org.za/resource/resmgr/2021_technical/sars_submissions_/draft_interpretation_note_28.pdf 3.1.

12 National Treasury 2021 https://www.treasury.gov.za/documents/National%20Budget/2021/review/FullBR.pdf 52.

13 National Treasury 2021 https://www.treasury.gov.za/documents/National%20Budget/2021/review/FullBR.pdf 52.

a home office tax deduction. In part 3.1 this article discusses the meaning of "part" of a premises in the context of the exclusive-use requirement. Part 3.2 seeks to answer the question as to whether "any" private use is fatal to the home office deduction. Part 3.3 briefly considers the South African Institute of Taxation's (SAIT's) proposal that the exclusive-use requirement be tied to working hours through an interpretative argument. Lastly, part 3.4 offers some thoughts on the South African Institute of Chartered Accountants' (SAICA's) submission, which advocates the removal of the exclusive-use requirement through legislative amendment.

2 Method

This is a doctrinal study. Legal doctrine is a mainly hermeneutical discipline in which legal scholars interpret texts and argue about the choice between different constructions thereof.[14] Van Hoecke,[15] for example, describes the goal as the interpretation of a text and argumentation as the means of sustaining an interpretation. Legal doctrine also has a normative element because legal scholars necessarily assume normative positions when arguing for a preferred construction of the text.[16] The choice of a preferred construction represents a choice between different and often competing values and interests, where the scholar assigns more weight to some than to others.[17]

"Statutory interpretation is a process of the mind, not the application of a yardstick."[18] This study applies the method of interpretative reasoning that was summarised by Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 2 All SA 262 (SCA) (hereafter *Endumeni*)[19], as follows:

> Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or

14 Van Hoecke "Legal Doctrine" 4.
15 Van Hoecke "Legal Doctrine" 4-5.
16 Van Hoecke "Legal Doctrine" 10.
17 Van Hoecke "Legal Doctrine" 10.
18 Mullins 2003 *J Legis* 5, 37.
19 Research shows that by 2019 *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 2 All SA 262 (SCA) (hereafter *Endumeni)* had been cited with approval by the Constitutional Court in 16 cases and by the Supreme Court of Appeal in 50 cases (Wallis 2019 *PELJ* fn 24). See, for example, *Airports Company South Africa v Big Five Duty Free (Pty) Ltd* 2019 2 BCLR 165 (CC) para 29. The method of statutory interpretation set out in *Endumeni* applies to fiscal statutes as to other statutes (*CSARS v United Manganese of Kalahari (Pty) Ltd* 2020 4 SA 428 (SCA) para 8 (hereafter *United Manganese*).

> unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation.[20]

In paragraph 18 of *Endumeni*, interpretation is described as an "objective" process which means that the interpreter should not seek to ascertain the unwritten "intention of the legislature", that is not apparent when the words in the statute are read in context.[21] Thus: "[w]hen dealing with a statute, context does not involve guesswork as to the intention of the legislature, but a reasoned assessment of the broad purpose underlying its enactment."[22] A provision's "context" includes the rest of the statute of which it forms part as well as the "circumstances attendant upon its coming into existence".[23]

Section 39(2) of the *Constitution of the Republic of South Africa*, 1996 (hereafter the *Constitution*),[24] is not directly referenced in *Endumeni*.[25] References to a provision's "context" can, however, be understood to include the normative framework provided by the *Constitution*.[26] Nevertheless, Bishop and Brickhill[27] call for the explicit inclusion of the normative values underlying the South African legal system in the list of interpretational factors mentioned by Wallis in paragraph 18 of *Endumeni*.

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20 *Endumeni* para 18.

21 Wallis 2019 *PELJ* 15.

22 Wallis 2019 *PELJ* 17. Wallis JA strongly rejects the use of the expression "ascertaining the intention of the legislature" to describe the process of statutory interpretation (*Endumeni* paras 20-24).

23 *Endumeni* para 18. Perumalsamy questions whether "context" extends to a provision's legislative history and argues that its inclusion is incompatible with the rejection of the concept of "ascertaining the intention of the legislature" in *Endumeni* (Perumalsamy 2019 *PELJ* 18). The Supreme Court of Appeal (SCA) has, however, recently held that legislative history is a relevant source of context (*United Manganese* para 17). Also see Wallis 2010 *SALJ* 679-686, where he argues that internal context is provided by reading the statute as a whole, external context is provided by the factual matrix in which the provision finds its setting, and all relevant material must be considered to determine the meaning of words in the context in which they are used.

24 Which states that: "[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights." See Moosa 2018 *Revenue LJ* 1-25 for a discussion on the impact of s 39(2) of the *Constitution* on the interpretation of tax legislation. S 39(2) implies that the meaning given to a provision must (where possible) advance at least one identifiable value in the Bill of Rights and that the text must be reasonably capable of bearing that meaning (*Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 7 BCLR 687 (CC) para 72). See Le Roux 2006 *SA Public Law* 382-401 for a discussion of the textual threshold.

25 Le Roux 2019 *PELJ* fn 11.

26 Moosa 2018 *Revenue LJ* 8.

27 Bishop and Brickhill 2012 *SALJ* 715.

In his commentary on *Endumeni,* Wallis[28] references section 39(2) of the *Constitution* and clarifies that the influence of the spirit, purport and objects of the Bill of Rights is essential to the "context" in which a provision is interpreted. This matter was expressed with even greater clarity by Wallis JA in paragraph 17 of the *United Manganese* case where he said that section 39(2) of the *Constitution* is highly relevant to the interpretation of statutes.

3 Interpreting section 23(b)

Section 23(b) provides that no deductions shall be granted in respect of:

> domestic or private expenses, including the rent or cost of repairs of or expenses in connection with any premises not occupied for the purposes of trade or of any dwelling-house or domestic premises except in respect of such part as may be occupied for the purposes of trade: Provided that—
>
> (a) any such part shall not be deemed to have been occupied for the purposes of trade, unless such part is specifically equipped for the purposes of the taxpayer's trade and regularly and exclusively used for such purposes; and
>
> (b) no deduction shall in any event be granted where the taxpayer's trade constitutes any employment or office unless—
>
> (i) his income from such employment or office is derived mainly from commission or other variable payments which are based on the taxpayer's work performance and his duties are mainly performed otherwise than in an office which is provided to him by his employer; or
>
> (ii) his duties are mainly performed in such part;

3.1 The meaning of "part" of a premises in the context of the exclusive-use requirement

In a now withdrawn interpretation note, SARS[29] suggested that home office expenditure could be claimed only if a taxpayer equipped and maintained a separate home office in a designated room. The same claim is still made in the information section on SARS' website: "[i]f you are an employee who works from home and have *set aside a room* to be occupied for the purpose of 'trade', you may be allowed to deduct certain expenses incurred in maintaining a home office" (emphasis added).[30] SAICA[31]

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28 Wallis 2019 *PELJ* 14.

29 See SARS 2011 https://www.sars.gov.za/wp-content/uploads/Legal/Archive/Notes/LAPD-IntR-IN-Arc-2022-01-IN-28-Issue2-Home-Office-Expenses-Deductions-Archived-4-March-2022.pdf.

30 SARS date unknown https://www.sars.gov.za/types-of-tax/personal-income-tax/filingseason/home-office-expenses/.

31 SAICA National Tax Committee 2021 https://saicawebprstorage.blob.core.windows.net/uploads/resources/SAICA_2021_Annexure_C_submission.pdf 12.

claims that an interpretation that the words "such part" mean a specific room incorrectly reflects the law.

In the most recent issue of Interpretation Note 28, SARS[32] concedes that: "a part of a room constitutes part of a premises" and therefore acknowledges that the word "part" does not mean "room". However, SARS[33] also points out that taxpayers will struggle to discharge their burden of proof[34] in respect of the exclusive-use requirement in proviso (a) to section 23(b) if the "part" occupied for trade purposes does not constitute a separate room.

Interpretation notes are, of course, not law, but they are helpful resources that set out SARS' interpretation of provisions.[35] Ordinary taxpayers seeking guidance on the deductibility of home office expenditure may consult these resources provided by SARS and base their decisions on whether to claim home office expenditure on the strength of SARS' interpretations. It is, therefore, important to consider whether there is merit in those interpretations.

As highlighted above, the historical debate about the true meaning of the word "part" of a premises has centred on two possible interpretations. The first is that in the context of section 23(b) "part" of a premises means a "room". The second is that "part" means any portion (alternatively segment or piece) of a premises, irrespective of whether the said portion also constitutes a "room".

The ordinary meaning of "part" is:

> [a] piece or section of something which together with another or others makes up the whole (whether actually separate from the rest or not); an amount, but not all, of a thing or a number of things (material or immaterial); any of the smaller things into which a thing is or may be divided (in reality or notionally); a portion, segment, constituent, fraction.[36]

The ordinary meaning of "room" is:

> (i) [a] compartment within a building enclosed by walls or partitions, floor and ceiling, *esp.* (frequently with distinguishing word) one set aside for a specified purpose ...[37]

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32 SARS 2022 https://www.sars.gov.za/wp-content/uploads/Legal/Notes/LAPD-IntR-IN-2012-28-Home-Office-Expenses-Deductions.pdf 7.

33 SARS 2022 https://www.sars.gov.za/wp-content/uploads/Legal/Notes/LAPD-IntR-IN-2012-28-Home-Office-Expenses-Deductions.pdf 7-8.

34 Section 102(1)(b) of the *Tax Administration Act* 28 of 2011 places the burden of proving that an amount is deductible on the taxpayer.

35 Mazansky 2021 *The Taxpayer* 44.

36 OED Online 2023 https://www.oed.com/dictionary/part_n1?tab=meaning_and_use#32048550.

37 OED Online 2023 https://www.oed.com/dictionary/room_n1?tab=meaning_and_use#177416005.

> (ii) one of the separate sections or part of the inside of a building. Rooms have their own walls, ceilings, floors, and doors, and are usually used for particular activities.[38]

Based on the ordinary meaning of the word "part", a "room" (being an enclosed space with its own walls, ceiling, floor and door) is certainly a "part" of a premises, but so is a portion or segment of a room. While a "room" constitutes "part" of a premises, a "part" of a premises does not necessarily constitute a "room". The question is whether the exclusive-use requirement in section 23(b) requires that the word "part" be given the narrower meaning of "room".

In a decision by a United States (US) tax court,[39] a taxpayer successfully discharged the burden of proof in relation to the exclusive-use requirement even though he used only part of the room in question, as opposed to the entire room, for the purposes of his trade. The taxpayer, an associate professor of sociology, lived in an apartment consisting of a living room, bedroom, bathroom and small kitchen.[40] He used a part of his bedroom as a home office to prepare lectures, grade assessments, and conduct research activities.[41] The part of his bedroom that was used as his home office was furnished with a desk, chair, filing cabinets and bookcases.[42] The other part of his bedroom was furnished with a bed and a dresser.[43] Despite the fact that his working and sleeping areas were located in the same room and that they were not separated by any wall, partition, curtain or other physical demarcation, he testified that they were separate and discrete areas and convinced the US tax court that he met the exclusive-

38 CED 2023 Online https://www.collinsdictionary.com/dictionary/english/room.

39 *Weightman v Commissioner* 42 TCM (CCH) 104 (1981) (hereafter *Weightman*). Note that s 39(2) of the *Constitution* neither compels nor prohibits South African courts from considering foreign case law. Para 18 of the *Endumeni* case directs the interpreter to adopt a contextual approach to statutory interpretation, perhaps "comparative interpretation" is therefore better described as "transnational contextualisation". Comparative interpretation is appropriate when the domestic statute is based on a foreign statute or when their provisions have similar wording (Moosa 2018 *Revenue LJ* fn 170). See fn. 44 for a comparison of the wording of the US and South African statutes.

40 *Weightman* 106.

41 *Weightman* 106.

42 *Weightman* 107.

43 *Weightman* 107.

use requirement in section 280A[44] of the US *Internal Revenue Code* (hereafter the *IRC*).[45]

The Commissioner had argued that the exclusive-use criterion was not satisfied because the taxpayer's home office: "was not an entire room or some portion or area of a room physically separated in some manner from the rest of the bedroom."[46] The question before the US tax court was whether section 280A of the *IRC* requires the home office to be a separate room or, alternatively, a physically separated portion of a room.[47] The US tax court said that the word "room" did not appear in the wording of section 280A of the *IRC*, merely the term "a portion of the dwelling unit", and after referring to its legislative history, concluded that there was nothing in the statute or its history that compelled an interpretation to the effect that "portion of the dwelling unit" means a separate room or a physically separated portion of a room.[48]

The US tax court expressed an appreciation for the fact that Congress intended section 280A of the *IRC* to provide "definitive rules" regarding the deductibility for home office deductions, wishing to "alleviate the administrative burdens, uncertainties, and potential for abuse that existed under the prior case law in regard to offices in the home".[49] The Commissioner argued that a failure to adopt the restrictive interpretation

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44 Section 280A(a) of the *Internal Revenue Code* of 1986 (the *IRC*) contains a general rule prohibiting the deduction of expenses in connection with the use of a dwelling unit which the taxpayer uses as a residence during the taxable year. Section 280A(c) of the *IRC* provides for exceptions to the general rule and reads as follows: "Exceptions for certain business or rental use; limitation on deductions for such use. (1) Certain business use. — Subsection (a) shall not apply to any item to the extent such item is allocable to a portion of the dwelling unit which is exclusively used on a regular basis — (A) as the principal place of business for any trade or business of the taxpayer, (B) as a place of business which is used by patients, clients, or customers in meeting or dealing with the taxpayer in the normal course of his trade or business, or (C) in the case of a separate structure which is not attached to the dwelling unit, in connection with the taxpayer's trade or business." The structure and wording of s 280A of the *IRC* and s 23(b) of the 1962 *ITA* are similar. Both contain a general prohibition in respect of the deductibility of expenses in connection with a dwelling occupied as a residence (domestic premises), followed by an exception that effectively allows the deduction of expenses in respect of a part (portion) of the premises used for trade purposes if the restrictive qualifying criteria are satisfied. In both sections, one of the restrictions is that the relevant "part" or "portion" must be "exclusively used" for the purposes of the taxpayer's trade.

45 *Weightman* 107.

46 *Weightman* 107.

47 *Weightman* 107.

48 *Weightman* 107-108.

49 *Weightman* 108.

of "a portion of a dwelling unit" would resurrect past uncertainties and abuse.[50] To which the US tax court responded:

> We think the issue is merely a question of fact. The problems of proof are essentially the same whether the Court is asked to determine the exclusive use of an entire room for business purposes or the exclusive use of a portion of that room for business purposes. The Court must resolve any issues of credibility and make its own factual determination based upon all the evidence in the record. The presence or absence of a wall, partition, curtain, or some other physical barrier separating the two areas is a factor for the Court to weigh. Absent a wall, partition, curtain, or other physical demarcation of the business area, the Court as the trier of fact may well view with a somewhat more critical eye the evidence adduced by the taxpayer to establish that there was in fact some separate, though, unmarked, area that he used exclusively and on a regular basis as his home office. Here the Court, having had the opportunity to observe the demeanour of the taxpayer, finds the taxpayer's testimony credible and is convinced that there was a separate area or portion of his bedroom that was used exclusively as his home office. This case is distinguishable on its facts from a situation where the taxpayer's business use and personal use of a single room are so intermingled that the Court cannot make the necessary finding of fact that a specific portion of the room was used exclusively and regularly for business purposes.[51]

Section 23(b)'s legislative history may be consulted as a source of relevant context to determine the proper construction of the word "part".[52] The history of the exclusive-use requirement is of particular interest because absent its existence, there would probably be no argument about whether the meaning of "part" ought to be restricted to the narrower meaning of "room". In fact, it is precisely because of the exclusive-use requirement and the taxpayer's burden of proof that SARS has, on occasion, equated "part" with "room".[53]

Income tax was first introduced in South Africa through the enactment of the *Income Tax Act* 28 of 1914 (hereafter the 1914 *ITA*), which was based on the *Land and Income Tax Assessment Act* of 1895 (hereafter the *LITAA*) of New South Wales.[54] Therefore, the earliest version of section 23(b) was probably loosely based on section 29(viii) of the *LITAA*.[55] It appears that section 23(b)'s ultimate South African predecessor is section 15(2)(b) of the 1914 *ITA*; it was re-enacted as section 21(2)(c) of the *Income Tax Act* 41 of 1917 (hereafter the 1917 *ITA*), subsequently as section 13(c) of the *Income Tax Act* 40 of 1925 (hereafter the 1925 *ITA*),

50 *Weightman* 108.
51 *Weightman* 108.
52 See the discussion in fn 23.
53 SARS 2011 https://www.sars.gov.za/wp-content/uploads/Legal/Archive/Notes/LAPD-IntR-IN-Arc-2022-01-IN-28-Issue2-Home-Office-Expenses-Deductions-Archived-4-March-2022.pdf; SARS date unknown https://www.sars.gov.za/types-of-tax/personal-income-tax/filingseason/home-office-expenses/.
54 Croome *Tax Law* 6.
55 The wording of the provision is provided in Appendix A.

then as section 12(b) of the *Income Tax Act* 31 of 1941 (hereafter the 1941 *ITA*), and finally as section 23(b) of the 1962 *ITA*.[56]

When the *Van Der Walt* case[57] came before the Transvaal Provincial Division (as it then was) in 1986, section 23(b) read as it does now, except for the fact that provisos (a) and (b) had not yet been introduced.[58] In that case the Commissioner unsuccessfully argued that section 23(g), which at the time prohibited the deduction of any expenditure not wholly and exclusively laid out for trade purposes, prevented a taxpayer from claiming home office expenditure if the home office in question was not exclusively used for trade purposes.[59]

The court held that section 23(g) did not qualify section 23(b) because section 23(b) inherently contemplated the absence of exclusivity.[60] The scheme of section 23 is to enumerate specific expenditures that are disqualified from deduction together with their exemptions.[61] Eloff DJP (Grosskopf J and Kirk-Cohen J concurring) said that section 23(g) is a general prohibition designed to address cases not already captured by the specific prohibitions, and if section 23(g) were taken to qualify section 23(b), section 23(b) would be rendered meaningless.[62] Taxpayers were, therefore, historically able to claim home office expenditure despite not using a specific part of their domestic premises wholly or exclusively for the purposes of their trade.[63] In an ironic turn of events, section 23(g) was amended in 1992, whereafter it prohibited the deduction of expenditure *only to the extent* that such expenditure was not incurred for trade purposes, thereby opening the proverbial door for the apportionment of mixed-use expenditure previously not allowed on the strict wording of section 23(g).[64]

The Commissioner's loss in the *Van Der Walt* case probably led to section 23(b)'s amendment through the insertion of proviso (a) in 1991. The newly introduced requirements in proviso (a) were that the part occupied for trade purposes must be specifically equipped for that purpose and must be

56 See Swart 1995 *THRHR* 653. The exact wording of the earlier versions of s 23(b) is provided in Appendix A.
57 *KBI v Van Der Walt* 1986 4 All SA 421 (T) (hereafter *Van Der Walt*).
58 See *Van Der Walt* 425.
59 *Van der Walt* 426.
60 *Van der Walt* 426.
61 *Van der Walt* 427.
62 *Van der Walt* 427.
63 Swart 1995 *THRHR* 654.
64 Emphasis added. See RSA 1992 https://osall.org.za/docs/2011/02/1992-IT-Bill.pdf cl 20.

regularly and *exclusively* used for that purpose.[65] The 1991 amendment, therefore, effectively extended the "exclusively used for trade purposes" requirement found in section 23(g) (as it read then) to section 23(b).[66] Proviso (a) was reported to have been enacted in response to historical difficulties in establishing, as a matter of fact, that any part of the premises was used for trade purposes.[67]

A further amendment, the insertion of proviso (b)(i)), was made in 1993 because many taxpayers were reported to have invoked section 23(b) in claiming expenditure in respect of home offices which were occasionally used for trade purposes as a matter of personal convenience.[68] Proviso (b)(i) denies the deduction of home office expenditure if the taxpayer's trade constitutes employment or the holding of an office unless the taxpayer's employment income is derived mainly from commission (or other variable payments based on work performance) and the taxpayer's duties are mainly performed otherwise than in an office provided by the taxpayer's employer. The 1993 amendment was also reported to have had the purpose of alleviating the significant administrative burden on the Commissioner of the South African Revenue Service (CSARS) to implement measures to prevent taxpayers from exploiting section 23(b).[69] Swart[70] suggests that both the 1991 and 1993 amendments appear to have been motivated mainly by administrative convenience.

Yet another amendment followed in 1994, extending the home office deduction to employees who received only salaries and no variable payments but worked mainly from a home office.[71] Proviso (b)(ii) now provides that the deduction is allowable only if the employee (whose income is not mainly derived from commission) performs his duties mainly in his home office.

It is submitted that the background to and purpose of the legislative amendments discussed above provide the necessary context to appreciate the significance of the insertion of the exclusive-use requirement and the retention of the word "part" in the text of section 23(b). If one accepts that a part of a room and an entire room are intrinsically equally capable of being used exclusively for trade, it is submitted that the enactment of the exclusive-use requirement provides no basis for giving

65 RSA 1991 https://osall.org.za/docs/2011/02/1991-IT-Bill.pdf cl 23. Note that the SCA has referred to explanatory memoranda to trace the legislative history of a statutory provision; see for example *United Manganese* para 22.
66 Swart 1995 *THRHR* 654.
67 RSA 1991 https://osall.org.za/docs/2011/02/1991-IT-Bill.pdf cl 23.
68 RSA 1993 https://osall.org.za/docs/2011/02/1993-IT-Bill.pdf cl 18.
69 RSA 1993 https://osall.org.za/docs/2011/02/1993-IT-Bill.pdf cl 18.
70 Swart 1995 *THRHR* 656.
71 RSA 1994 https://osall.org.za/docs/2011/02/1994-IT-Bill.pdf cl 15.

the word "part" the more restrictive meaning of "room". It is further submitted that the taxpayer's burden of proving that any part of his premises was exclusively used for trade purposes does not qualify the meaning of the word "part". The proper interpretation of the meaning of the word "part" in section 23(b) is a matter of law, not of fact. Nevertheless, the point made by the US tax court warrants repeating:

> [t]he problems of proof are essentially the same whether the Court is asked to determine the exclusive use of an entire room for business purposes or the exclusive use of a portion of that room for business purposes.[72]

Section 23(b) reinforces a basic tenet of South African income tax law, namely that trade expenditure incurred in the production of income is deductible, while expenditure of a private nature is not.[73] The evident purpose of section 23(b) is to allow the deduction of home office expenditure, albeit in limited circumstances. When interpreting section 23(b) a sensible meaning must be preferred[74] to one "that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation."[75] It is submitted that giving the word "part" the narrower meaning of "room" is an insensible construction that would lead to oppressive consequences by preventing a taxpayer from claiming a tax deduction only because there was no physical barrier separating the area the taxpayer used exclusively for trade purposes from the areas he also used for domestic purposes. The interpreter must be wary of substituting his view of what is reasonable, sensible and businesslike for the words actually used.[76] The word actually used is "part", not "room", and it is submitted that there is nothing in section 23(b)'s text, read in the context of the scheme of the *Income Tax Act*, section 23(b)'s purpose nor its legislative history that indicates that the word "part" should be given the more restrictive meaning of "room".

It is submitted, that on a proper interpretation, even of section 23(b) in its current form, taxpayers need not set aside an entire room to claim a deduction for home office expenditure. The requirement is only that the "part" of the premises that is occupied for trade purposes must be exclusively used for such purposes. The said "part" must be separately identifiable to prevent a situation where a taxpayer's domestic and trade use are so intermingled that it becomes impossible to meet the exclusive-use requirement.

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72 *Weightman* 108.
73 See ss 11(a), 23(a), 23(b) and 23(g).
74 *Endumeni* para 18.
75 *Endumeni* para 26.
76 *Endumeni* para 18.

3.2 Is "any" private use fatal to the home office deduction? Invoking the de minimis non curat lex *rule in the context of the exclusive-use requirement*

The ordinary meaning of "exclusively" is: "[s]o as to exclude all except some particular object, subject, etc.; solely".[77] "Solely" is defined as: "[o]nly, merely, exclusively, entirely, altogether".[78] This part commences with a discussion of the interpretation of the exclusive-use requirement in section 280A of the *IRC* to determine how the same might be interpreted in the context of section 23(b).

The term "exclusively used", as it appears in section 280A of the *IRC*, suggests that even incidental personal use is prohibited, an interpretation that finds support in the legislative history of the provision.[79] However, common sense suggests that trivial personal use should not be fatal to the deduction.[80] In a Senate Report "exclusively" is equated to "solely"; therefore, no personal use is allowed.[81] Goff, however, proposes that:

> the phrase 'exclusive use' is susceptible to two interpretations: (1) a restrictive meaning, which requires use for one purpose and prohibiting all others, and (2) a liberal meaning, which requires only that it be used primarily or substantially for the intended purpose.[82]

He argues that the restrictive interpretation of the exclusive-use requirement put forth in the Senate Report (that is, prohibiting all private use) ought to be discarded in favour of a more liberal approach that accommodates what he calls "practical realities".[83] He favours the liberal interpretation on the grounds that the restrictive interpretation would render the tax deduction inoperative, rather dramatically equating a restrictive interpretation with reading section 280A out of the *IRC* entirely.[84] Offices outside the home are occasionally and unavoidably used for incidental personal purposes in the same way that offices inside the home are. This means that a taxpayer may, for example, take personal phone

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77 OED Online 2023 https://www.oed.com/dictionary/exclusively_adv?tab=meaning_and_use#4967480.

78 OED Online 2023 https://www.oed.com/dictionary/solely_adv?tab=meaning_and_use#22013812.

79 Holtschneider 1985 *U Balt L Rev* 528.

80 Holtschneider 1985 *U Balt L Rev* 528. Note that South African courts may not necessarily reference "common sense" as a criterion of statutory interpretation but express the same idea using different terminology; e.g. in *Endumeni* para 18, Wallis JA refers to a "sensible" interpretation that does not yield unbusinesslike results.

81 Senate 1976 https://www.westlaw.com/Document/I08D77CD063E911D9B7CECED691859821/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0 148.

82 Goff 1978 *Gonz L Rev* 502.

83 Goff 1978 *Gonz L Rev* 502-505.

84 Goff 1978 *Gonz L Rev* 503.

calls in either type of office.[85] Denying deserving taxpayers a home office deduction because of *de minimis* personal use is impractical, imprudent, and contrary to congressional intent.[86]

There is no evidence that the US tax court has equated "exclusively" with "primarily" or "substantially". It has, however, dismissed *de minimis* personal use in limited circumstances. For example, walking through the portion of the dwelling that is occupied for trade purposes to reach another portion of the dwelling (that is, "non-business passage") was held not to violate the exclusive-use requirement.[87] In the *Hughes* case the taxpayer used a walk-in closet in his studio apartment as his home office space, and one had to walk through the closet to access the bathroom. Mr Hughes' incidental personal use of the closet (non-business passage) was held to be *de minimis* and not in violation of the exclusive-use requirement. In the *Lind* case a portion of the taxpayers' garage was used to store equipment and supplies and was held to be used exclusively for trade purposes, even though they and their family members occasionally walked through the garage.

However, carrying out normal household activities in the portion of the dwelling that is purported to be occupied for trade purposes was held to violate the exclusive-use requirement.[88] For example, in the *Rayden* case the taxpayers initially claimed that their breakfast room was used exclusively for trade purposes but later conceded that they and their visiting family members may have occasionally eaten in that area. The court did not regard such use to be *de minimis*. In the *Tilman* case one of the taxpayers, a voice coach and piano accompanist, conducted rehearsals and gave lessons in the living room (labelled as her "studio") and used a second bedroom as her office. The court emphasised that section 280A of the *IRC* allowed no personal use of the portion of the dwelling unit that is purported to be exclusively used for trade purposes and said that the taxpayer had failed to substantiate that the studio and office were so used. The taxpayer's downfall was that her visiting daughter slept on a couch in the office (that is, used it as a bedroom), and her husband read books and used the computer for his own work. The taxpayer and her family also watched television and entertained friends in the studio. Because both rooms were used for both trade and personal purposes, the exclusive-use requirement was not met.

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85 Holtschneider 1985 *U Balt L Rev* 529.

86 Holtschneider 1985 *U Balt L Rev* 529-530.

87 See *Lind v CIR* 50 TCM (CCH) 1096 (hereafter *Lind)*; *Hughes v CIR* 41 TCM (CCH) 1153 (hereafter *Hughes*); *Rayden v CIR* 101 TCM (CCH) 1001 (hereafter *Rayden*).

88 *Rayden*; *Tilman v United States* 644 F Supp 2nd 391 (SDNY 2009).

It is unclear why "non-business passage" is dismissed as *de minimis* but other activities of a personal nature are not. The frequency of personal use is seemingly not the deciding factor because passing through a home office space to access a bathroom surely happens multiple times every day and, therefore, more often than a visiting family member who sleeps on a couch in the home office for a few nights a year. Allowing taxpayers to invoke the *de minimis* rule in the context of the exclusive-use requirement, therefore, creates the problem of defining the parameters of what is truly *de minimis* personal use versus what is not.

In the United Kingdom case *Sienkiewicz v Greif (UK) Ltd*,[89] Lord Phillips said:

> I doubt whether it is ever possible to define, in quantitative terms, what for the purposes of the application of any principle of law is de minimis. This must be a question for the judge on the facts of the particular case.

The inherent subjectivity involved in deciding whether a matter is *de minimis* (trivial)[90] means that the *de minimis* rule does little to promote legal certainty for taxpayers, but it is submitted that the uncertainty is perhaps preferable to the denial of a home office deduction if there is any form of private use, no matter how trivial.

We now return to Goff's proposition[91] that the phrase "used exclusively" is capable of meaning "used primarily" or "used substantially", and specifically whether such a so-called "liberal" interpretation is possible in the context of section 23(b). "Exclusively" means: "[s]o as to exclude all except some particular object, subject, etc.; solely"[92] while "primarily" means: " [t]o a great or the greatest degree; for the most part, mainly".[93] In addition, "substantially" means: "[fully], amply; to a great extent or degree, considerably, significantly, much".[94] The ordinary meaning of the word "exclusively" is, therefore, vastly different from that of "primarily" and "substantially". If the home office space must be used:

i. "exclusively" for trade purposes, all private use is prohibited;

ii. "primarily" for trade purposes, private use is permitted with the caveat that trade use must be the greater of the two. In this context, "primarily" could potentially be equated to "mainly", which has been

89 *Sienkiewicz v Greif (UK) Ltd* 2011 UKSC 10 para 108.
90 Gooden and Thaldar 2022 *PELJ* 10.
91 Goff 1978 *Gonz L Rev* 502.
92 OED Online 2023 https://www.oed.com/dictionary/exclusively_adv?tab=meaning_and_use#4967480.
93 OED Online 2023 https://www.oed.com/dictionary/primarily_adv?tab=meaning_and_use#28334893.
94 OED Online 2023 https://www.oed.com/dictionary/substantially_adv?tab=meaning_and_use#20113890.

held to be a quantitative measure of more than 50%.[95] Therefore, trade use must be greater than 50% of total use;

iii. "substantially" for trade purposes, private use is permitted with the caveat that the trade use must be significant or considerable. There must be a great degree of trade use, but it need not necessarily be the main form of use. For example, if trade use is 40% of total use, that is arguably still significant or considerable trade use.

The word "exclusively" is used in proviso (a), and the word "mainly" is used twice in proviso (b) to section 23(b). The presumption that statute law is not invalid or purposeless expresses the idea that statutes are meant to be of effect.[96] Closely related to this presumption is the rule that language is not used unnecessarily, which in turn means that as a point of departure different words are meant to bear different meanings because they are meant to express different ideas.[97] As explained above, the word "exclusively" expresses a higher standard of trade use than the words "primarily" (mainly) or "substantially". SARS,[98] probably inspired by foreign case law regarding home office deductions, has cited the *de minimis non curat lex* rule as support for the claim that:

> inconsequential private use, such as, for example, answering a private telephone call in the home office whilst working, or walking through the home office after work to an outside patio, will not render the use to be not exclusively for purposes of trade.

Given that there are no qualifications or exemptions to the exclusive-use requirement in the text, is the potential use of the *de minimis* rule justified? As a principle of legal policy the maxim *de minimis non curat lex* (the *de minimis* rule) provides that the law does not concern itself with trifles.[99] The *de minimis* rule originates in English law and has been accepted in South African law.[100] In *R v Dane*[101] it was held that the *de minimis* rule could be applied to criminal cases when the charges are extremely trivial so as, in the words of Holmes J, not to "make a mountain out of a mole-hill". In *S v*

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95 See *SBI v Lourens Erasmus (Eiendoms) Bpk* 1966 4 SA 434 (A) 445, where the word "mainly" was held to mean more than 50% in the context of s 51(f) of the 1941 *ITA*. Also see SARS 2022 https://www.sars.gov.za/wp-content/uploads/Legal/Notes/LAPD-IntR-IN-2012-28-Home-Office-Expenses-Deductions.pdf 10, where SARS asserts that "mainly" also means more than fifty per cent in the context of proviso (b) to s 23(b).

96 Du Plessis *Re-Interpretation of Statutes* 187. This presumption is consonant with para 18 of *Endumeni,* that directs the interpreter to have regard to the purpose of a provision.

97 Du Plessis *Re-Interpretation of Statutes* 213.

98 SARS 2022 https://www.sars.gov.za/wp-content/uploads/Legal/Notes/LAPD-IntR-IN-2012-28-Home-Office-Expenses-Deductions.pdf 9.

99 Claassen *Claassen's Dictionary of Legal Words and Phrases* (online).

100 Labuschagne 1973 *Acta Juridica* 295*.*

101 *R v Dane* 1957 2 SA 472 (N) 77.

Kgogong[102] Trollip JA said that the application of the *de minimis* rule in the context of the theft of an article of little to no value means that the accused should not be prosecuted in the first place, but if prosecuted, the accused should be acquitted "for in the contemplation of the law, because of the *de minimis* rule, the offence must be regarded as not having been committed."

In respect of statutory offences the purpose of the legislation must be considered, and the *de minimis* rule cannot be invoked if its application is contrary to the intention of the legislature, irrespective of the seriousness of the contravention.[103] Where the legislature has determined a statutory limit, it has already determined what is negligible, and the *de minimis* rule does not apply, thereby promoting legal certainty, respect for the wording of statutory provisions and the preservation of the separation of powers.[104] In the *Endumeni* case[105] Wallis JA strongly objects to the use of the expression "intention of the legislature" as was done in *Klue*. However, it is submitted that the use of the expression, in the context of the application of the *de minimis* rule to statutory provisions, serves to remind the interpreter that he is engaged in the business of interpreting provisions written by others and in that process he ought not to impose his own views of what would have been sensible for them to say.[106]

We are not presently dealing with criminal law or a statutory offence as such, however:

> [t]he general principle of legal policy that the law does not concern itself with trifles applies to statutory construction as to other legal contexts … The principle is essential to the working of any legal system by helping to discourage unnecessary litigation, to reduce time and cost and to preserve the dignity of the law … In a case where there is a departure from a rule and the departure is truly *de minimis*, the rule is still considered to have been complied with.[107]

If one accepts that word "exclusively" in the context of s 23(b) bears its ordinary meaning of "solely", whilst being appreciative of the fact that there are no statutory exemptions to the exclusive-use requirement, no private use of the part the taxpayer occupies for trade purposes is allowed. As a principle of legal policy, however, private use may be disregarded if it is so insignificant as not to matter. Consequently, it is submitted that to invoke the *de minimis* rule is not to deny that "exclusively" means "solely", but rather to acknowledge that where a taxpayer has not fully complied with the exclusive-use requirement, but his private use is trivial, the taxpayer

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102 *S v Kgogong* 1980 3 SA 600 (AD) 603-604.
103 *DPP (EC) v Klue* 2003 1 SACR 389 (E) para 13 (hereafter *Klue*).
104 *Klue* para 13.
105 *Endumeni* paras 20-24.
106 See *Endumeni* para 24.
107 Bennion, Bailey and Norbury *Bennion, Bailey and Norbury on Statutory Interpretation* §9.4.

must be considered as having complied with it. It is submitted that applying the *de minimis* rule is, therefore, different from claiming that "exclusively" means "primarily" or "substantially". The *de minimis* rule is invoked only after the meaning of "exclusively" has already been decided and not to determine the meaning thereof.

The purpose of section 23(b) is to allow the deduction of home office expenditure in the prescribed circumstances. The provisos to section 23(b) prescribe those circumstances, and their purpose is to prevent taxpayers from disguising non-deductible private expenditure as deductible trade expenditure. Denying home office deductions on account of private use that is truly insignificant is not required for section 23(b) to be effective, that is, for its purpose to be achieved and, therefore, there appears to be little reason to reject the application of the *de minimis* rule.

"What is relatively small within the context of the matter in question will not be dismissed as *de minimis* if it nevertheless has some real substance."[108] Other than non-business passage, the analysis of US case law provides no other examples of where private use has been dismissed as *de minimis*.[109] South African courts might be equally conservative should they be afforded the opportunity to apply the *de minimis* rule in this context.

In conclusion, the exclusive-use requirement in section 23(b) prohibits the part of the premises that is occupied for trade purposes from being used for private purposes. No exemptions to the exclusive-use requirement have been carved out in the text. The *de minimis* rule could potentially be applied to disregard private use that has no real substance (that is, is truly insignificant) with the effect that the exclusive-use requirement is still considered to have been complied with. Foreign courts have, for example, in the instances discussed above, disregarded non-business passage through the part occupied for trade purposes as *de minimis*. Nevertheless, the scope for applying the *de minimis* rule seems rather limited. In cases where normal household activities were carried out in the home office space, foreign courts have refused to dismiss such activities as *de minimis* private use.

The application of the *de minimis* rule, therefore, offers no solution for taxpayers who live in homes with modest dimensions and who must, out of necessity, share their working spaces with other family members or whose working spaces are multi-functional in the sense they are also used for private household activities. It appears that if a solution is to be found to the problems faced by such taxpayers, it must be through legislative

108 Bennion, Bailey and Norbury *Bennion, Bailey and Norbury on Statutory Interpretation* §9.4.

109 Refer to the earlier discussion of the *Hughes* and *Lind* cases above.

amendment, not through interpretation. As things stand, absent the application of the *de minimis* rule, any private use of the part of the home office space is fatal to the home office deduction.

3.3 Can the exclusive-use requirement be tied to working hours by means of an interpretative argument?

In a submission to SARS the SAIT[110] commented on draft Interpretation Note 28 (issue 3), suggesting that SARS' interpretation of the exclusive-use requirement in section 23(b) ought to be sensitive to the fact that only a select few, mostly high-income earners, would have dedicated home office spaces available to them. SAIT[111] contends that most taxpayers fall short of the exclusive-use requirement because they must share working spaces with other family members on account of space constraints, with the result that only an elite group of taxpayers can benefit from a tax deduction under section 23(b).

SARS' interpretation of the exclusive-use requirement gives the impression that the state is seemingly trying to discourage taxpayers from utilising the home office deduction.[112] SAIT[113] implored SARS to consider adopting an interpretation of the exclusive-use requirement that would: "provide for equity in application and simplicity of use as expressed in the 2021 budget review". SAIT[114] accordingly proposed that SARS interpret the exclusive-use requirement as applying during office hours, that is, when the taxpayer is actually working in the home office space, thereby allowing limited after-hour private use of the space.

It is difficult to find support for SAIT's proposed interpretation in the wording of section 23(b). The text makes no distinction between different periods of use and there are no qualifications of the exclusive-use requirement of any kind. Section 23(b)'s legislative history[115] also offers no evidence in support of SAIT's proposed construction. It is submitted that attempting to read the proposed working-hour qualification of the exclusive-use requirement into the text is not a case of choosing the most equitable interpretation between various plausible options with due regard to text, context and purpose. It is to alter or add to the text to achieve a particular

110 SAIT 2021 https://cdn.ymaws.com/www.thesait.org.za/resource/resmgr/2021_technical/sars_submissions_/draft_interpretation_note_28.pdf 3.1.

111 SAIT 2021 https://cdn.ymaws.com/www.thesait.org.za/resource/resmgr/2021_technical/sars_submissions_/draft_interpretation_note_28.pdf 3.1.

112 SAIT 2021 https://cdn.ymaws.com/www.thesait.org.za/resource/resmgr/2021_technical/sars_submissions_/draft_interpretation_note_28.pdf 3.1.

113 SAIT 2021 https://cdn.ymaws.com/www.thesait.org.za/resource/resmgr/2021_technical/sars_submissions_/draft_interpretation_note_28.pdf 3.1.

114 SAIT 2021 https://cdn.ymaws.com/www.thesait.org.za/resource/resmgr/2021_technical/sars_submissions_/draft_interpretation_note_28.pdf 3.1.1.

115 Refer to the discussion of s 23(b)'s legislative history in part 3.1 above.

outcome. Words can be read into the text but only when necessary to give effect to the provision[116] and to remedy constitutional defects if a provision is incompatible with the *Constitution*.[117] Interpreters must not cross the divide between interpreting legislation and drafting it.[118]

Considering the changes that the *Constitution* has wrought in the field of statutory interpretation, Du Plessis[119] has suggested that the maxim *iudices est ius dicere sed non dare* be rephrased as: "it is the province of an interpreter of a statute to give the best possible effect to the statutory text as it stands and not to (try and) re-enact (or even rephrase) it". Even if one were to accept that the exclusive-use requirement, absent qualifications or exemptions, is a misguided policy choice in today's much-changed working environment, it is submitted that the proposed interpretative argument is unlikely to (and should not) succeed because it disregards the role of the interpreter. The interpreter is tasked with discerning the meaning of words used by others, not one of imposing his own views of what it would have been sensible for others to say.[120] It is therefore submitted that the proposed qualification of the exclusive-use requirement is a policy change best effected through legislative amendment, not through interpretation.

If efforts to lobby the National Treasury to relax the statutory requirements for deductibility are unsuccessful, it may be possible to force change by directly challenging the constitutionality of section 23(b) in a court of law. None of SAIT's arguments about "equity in application" are directly linked to the constitutional value of equality, but that is not to say one could not argue the point.[121] It is, however, beyond the scope of this article to consider the substantive arguments relevant to a direct constitutional challenge.

3.4 Some thoughts on the proposed removal of the exclusive-use requirement through legislative amendment

In its Annexure C submission, SAICA[122] suggested that National Treasury consider the possibility of replacing the words "exclusively used" with

116 *Medox Ltd v CSARS* 2015 6 SA 310 (SCA) para 16.
117 Moosa 2018 *Revenue LJ* 9.
118 *Endumeni* para 18.
119 Du Plessis *Re-Interpretation of Statutes* 256.
120 *Endumeni* para 24.
121 See for example Swart 1995 *THRHR* 633-661 for a discussion of the discriminatory effect of s 23(b). Swart argues that the provisos to s 23(b) are arbitrary, unfair and based on irrational considerations opening them up to a constitutional challenge as they limit taxpayers' right to equality in a manner which is not reasonable and justifiable in an open and democratic society based on human dignity, freedom and equality.
122 SAICA National Tax Committee 2021 https://saicawebprstorage.blob.core.windows.net/uploads/resources/SAICA_2021_Annexure_C_submission.pdf 12.

"mainly used". In this context, "mainly used" is intended to be interpreted as more than 50% of the time.[123] Although not its main purpose, the exclusive-use requirement addresses the time-of-use allocation problem that would exist in its absence.[124] Consequently, "[w]herever there is no exclusivity of business use of a portion of a taxpayer's home, a space-time formula must come into play or else injustice will occur."[125] Injustice will occur because taxpayers would have the opportunity to convert non-deductible private expenditures into deductible trade expenditure. It is, therefore, unlikely that the exclusive-use requirement would be removed without the introduction of a time-of-use allocation. Currently it is SARS' practice to allow qualifying home office expenditure to be apportioned in accordance with a space-only formula (as opposed to a time-and-space formula),[126] and it is submitted that this practice is justifiable precisely because of the exclusive-use requirement.

Even though the removal of the exclusive-use requirement could theoretically result in improved "equity in application" because more taxpayers could theoretically qualify to claim a deduction under section 23(b), the amendment may come at the cost of increased complexity and substantiation requirements. Therefore, even though the proposed amendment is intended to broaden access to the section 23(b) deduction, increased complexity and substantiation requirements might result in even fewer taxpayers successfully claiming a home office deduction. That is not to say that the proposed amendment is without merit and that attempts should not be made to broaden access to the tax deduction for home office expenditure; only that thought should be given to the practical realities of the proposal to determine whether it will achieve its desired objective. Tax policy decisions always involve trade-offs, and which policy objectives will be prioritised when National Treasury concludes its multi-year project to review the tax provisions that impact on work-from-home arrangements remains to be seen.

4 Conclusion

The exclusive-use requirement in section 23(b) is an obstacle for many taxpayers who seek to claim a tax deduction for home office expenditure. To date, tax policy commentators have been unsuccessful in their attempts to lobby government to relax the requirements of section 23(b) through legislative amendment. Absent legislative amendments, taxpayers have

123 SAICA National Tax Committee 2021 https://saicawebprstorage.blob.core.windows.net/uploads/resources/SAICA_2021_Annexure_C_submission.pdf 12.

124 Lang 1981 *Utah L Rev* 288.

125 Berns 1975 *Hofstra L Rev* 66.

126 See SARS 2022 https://www.sars.gov.za/wp-content/uploads/Legal/Notes/LAPD-IntR-IN-2012-28-Home-Office-Expenses-Deductions.pdf 14.

little choice but to attempt to rely on interpretative arguments in contesting assessments. Section 23(b) prohibits the deduction of private or domestic expenditure incurred in connection with any premises not occupied for trade purposes, except in respect of such a part as may be occupied for trade purposes. To qualify for deduction, however, the said part must be exclusively used for trade purposes in addition to other requirements. However, SARS has been inconsistent in its interpretation of the meaning of such a "part". SARS sometimes equates "part" to "room" and at other times acknowledges that "part" does not mean "room", but then it also belabours the point that taxpayers will struggle to discharge their burden of proving that the "part" was exclusively used for trade purposes if the said "part" does not constitute a "room". One might be excused for wondering if SARS is actively trying to discourage taxpayers from claiming tax deductions for home office expenditures. This article presents evidence that US taxpayers have been able to prove exclusive trade use even in those instances where their home offices were not separate rooms or physically separated portions of rooms. An entire room and a part of a room are intrinsically equally capable of being used exclusively for trade purposes, and in both cases the burden of proof is essentially the same. Upon considering the ordinary meaning of the word "part", section 23(b)'s legislative history and its purpose, this article argues that the exclusive-use requirement in section 23(b) does not compel the meaning of "part" to be restricted to the narrower meaning of "room".

Although some authors writing in the context of *IRC* have suggested that the word "exclusively" can bear a meaning akin to "primarily" or "substantially", this article argues that such a so-called liberal interpretation of the word is not available in the context of section 23(b). Indeed, no evidence has been found that the US tax courts have ever accepted and applied such a liberal interpretation in the context of the *IRC*. "Exclusively" means "solely", and therefore, private use is fatal to the home office tax deduction. The US tax courts have dismissed *de minimis* private use in very limited circumstances. The *de minimis* rule also forms part of South African law, and there appears to be little reason why South African courts should refuse to apply it in the context of the exclusive-use requirement in section 23(b). In cases where a court finds private use to be truly *de minimis*, the taxpayer will be considered to have complied with the exclusive-use requirement. Unfortunately for taxpayers, US case law offers non-business passage as the only example of private use that has been dismissed as *de minimis*, and South African courts might be equally conservative in their application of the rule. The potential application of the *de minimis* rule also introduces new uncertainties because what constitutes *de minimis* private use is seemingly incapable of precise definition and depends on the facts of the case.

This article has also briefly considered the possibility of tying the exclusive-use requirement to working hours by means of an interpretative argument. Section 23(b) does not distinguish between different periods of use, and the exclusive-use requirement has not been qualified in any way. It is submitted that reading the proposed working-hour qualification is to cross the divide between interpreting the statute and re-drafting it.

Lastly, this article argues that removing the exclusive-use requirement entirely would not necessarily have the desired effect of broadening access to the home office tax deduction because such an amendment may come at the cost of increased complexity and substantiation requirements. What is clear is that interpretative arguments alone are not the solution to the problems posed by the exclusive-use requirement. The policy changes that taxpayers and tax policy commentators have called for are best effected through legislative amendments. One can only hope that National Treasury will heed their call for a more equitable regime that is sensitive to the realities of the modern work environment.

Appendix A

Section 29(viii) of the *LITAA*

> No deduction shall, in any case, be made in respect of any of the following matters: — … Nor, as regards income derived from any profession, trade, employment, or vocation, in respect of any of the following matters, viz: — … (vii) The rent of value of or cost of repairs or alterations of any premises not occupied for the purposes of the profession, trade employment or vocation, or of any dwelling-house, or domestic premises, except such part thereof as may be occupied for said purposes …

Section 15(2)(b) of the 1914 *ITA*

> No deduction shall, as regards to income derived from any trade, be made in respect of any of the following matters: — … (b) the rent or value or cost of repairs or alterations of any premises not occupied for the purposes of the trade, or of any dwelling house or domestic premises, except such part thereof as may be occupied for those purposes …

Section 21(2)(c) of the 1917 *ITA*

> No deduction shall, as regards income derived from any trade, be made in respect of any of the following matters: — … (c) the rent or cost of repairs of any premises not occupied for the purposes of the trade, or of any dwelling house or domestic premises, except such part thereof as may be occupied for those purposes …

Section 13(c) of the 1925 *ITA*

> No deduction shall, as regards income derived from any trade, be made in respect of any of the following matters: — … (c) the rent or cost of repairs of any premises not occupied for the purposes of trade, or of any dwelling house or domestic premises, except such part thereof as may be occupied for the purposes of trade …

Section 12(b) of the 1941 *ITA*

> No deduction shall in any case be made in respect of the following matters: — … (b) domestic or private expenses including the rent of or cost of repairs of or expenses in connection with any premises not occupied for the purposes of trade, or of any dwelling house or domestic premises except in respect of such part as may be occupied for the purposes of trade …

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List of Abbreviations

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CIR	Commissioner of Internal Revenue
CSARS	Commissioner of the South African Revenue Service
DPP	Director of Public Prosecutions
Gonz L Rev	Gonzaga Law Review
Hofstra L Rev	Hofstra Law Review
IRC	Internal Revenue Code (US)
ITA	Income Tax Act
J Legis	Journal of Legislation
KBI	Kommissaris van Binnelandse Inkomste
LITAA	Land and Income Tax Assessment Act (New South Wales)
OED	Oxford English Dictionary
PELJ	Potchefstroom Electronic Law Journal
Revenue LJ	Revenue Law Journal
RSA	Republic of South Africa
SAICA	South African Institute of Chartered Accountants
SAIT	South African Institute of Taxation
SALJ	South African Law Journal
SARS	South African Revenue Service

SBI	Sekretaris van Binnelandse Inkomste
SCA	Supreme Court of Appeal
SCOF	Standing Committee on Finance
SeCOF	Select Committee on Finance
TC	Tax Court (US)
TCM	Tax Court Memorandum Decisions (US)
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg / Journal of Contemporary Roman-Dutch Law
U Balt L Rev	University of Baltimore Law Review
US	United States
Utah L Rev	Utah Law Review