THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No: 581/2002

REPORTABLE

In the matter between

COMMISSIONER FOR THE SA REVENUE SERVICE **Appellant**

and

CATHERINE MARCIA WYNER **Respondent**

Before: Howie P, Navsa, Nugent, Cloete JJA, Southwood AJA

Heard: 6 November 2003

Delivered: 25 November 2003

Summary: Profit on sale of immovable property – whether of capital or revenue nature – intention of purchaser at time of acquisition to make profit on resale.

JUDGMENT

SOUTHWOOD AJA

[1] The Commissioner for the South African Revenue Service ('the Commissioner') appeals against the whole of the judgment and order of the Full Court of the Cape of Good Hope Provincial Division ('the Full Court') upholding the respondent's appeal against the judgment and order of the Cape Income Tax Special Court ('the Special Court'). The Special Court confirmed the assessment issued in respect of the respondent for the 1996 year of assessment which included in the respondent's gross income the profit received by the respondent from the sale of erf 484, Clifton, ('the property'). The Commissioner appeals with the leave of the Full Court, leave having been granted in terms of s 20 (4) (b) of the Supreme Court Act 59 of 1959 – see *Commissioner of Inland Revenue v Tuck* 1989 (4) SA 888 (T).

[2] On 29 August 1994 the respondent purchased the property for R802 000 with the intention of selling the property within a year at a profit. Just over a year later, on 4 September 1995, the respondent sold the property for R2 850 000. After deduction of certain expenses the respondent made a profit of R1 530 947 on which the Receiver of Revenue, Cape Town, sought to levy tax in an amount of R701 132, 96.

[3] The respondent objected to the inclusion in the assessment of the profit of R1 530 947 on the ground that the profit was received on the realisation of a capital asset. The objection was disallowed. The respondent then appealed to the Special Court. The Special Court (per Traverso J, the members concurring) found that the purchase and sale of the property was a profit-

making scheme and dismissed the appeal and confirmed the assessment.

[4] The respondent then appealed to the Full Court. In upholding the appeal the Full Court (per Conradie J, Nel and Blignault JJ concurring) noted that usually the purchase of a property with the intention of reselling it as soon as possible would indicate a scheme of profit-making which would make the proceeds of the transaction subject to tax. However, the court reasoned that there was a public law or public policy dimension to the case which the Special Court had overlooked. This was that the Council of the City of Cape Town ('the Council') from whom the respondent leased the property had decided for policy and developmental reasons not to give notice of termination to the respondent. The Full Court found that while the respondent did not have common law ownership of the property, the mix of private rights and public forbearance that she enjoyed gave her a *sui generis* claim to the property that was close to ownership and that had the respondent been the owner of the property and sold it at the time she did, the proceeds would without a doubt have been of a capital nature. The Full Court found that the respondent was to all intents and purposes entitled to treat the property as her own. The respondent should therefore notionally be put in the same category as one who, by force of circumstance, is forced to sell her home. The view of the Full Court was that the respondent was compelled to sell the property because in the circumstances which had developed and over which she had no control the respondent could no longer afford to keep it. Her

primary concern was to salvage what she had invested in the property. She had nothing but the property and could not afford to lose it. It is the correctness of these findings which must be decided in this appeal.

[5] The Commissioner's counsel contended that in certain respects these findings are not supported by the facts, that they ignored the true juristic nature of the transactions involved and that the facts showed clearly that in purchasing the property when she did and then selling the property when she did, the respondent was engaged in a scheme of profit-making.

[6] The Respondent's counsel supported the findings and conclusion of the Full Court. His primary contention was that the respondent had not engaged in a scheme of profit-making and he raised a number of arguments in support of this contention.

[7] Although there is no single all-embracing test of universal application for determining whether a particular receipt is one of a revenue or capital nature, it is well established that if the receipt is '"a gain made by an operation of business in carrying out a scheme of profit-making", then it is revenue derived from capital productively employed and must be income' – *Overseas Trust Corporation Ltd v Commissioner of Inland Revenue* 1926 AD 441 at 453; *Commissioner for Inland Revenue v Pick 'n Pay Employee Share Purchase Trust* 1992 (4) SA 39 (A) at 56H-57G and the cases there cited. This means that receipts or accruals will bear the imprint of revenue if they are not fortuitous, but were designedly sought for and worked for – *Commissioner for*

Inland Revenue v Pick 'n Pay Employee Share Purchase Trust supra at 57F-G.

[8] Two factors which are always of great importance in deciding whether the proceeds of the sale of property are of a revenue or capital nature are the intention with which the taxpayer acquired the property and the circumstances in which the property was sold – *Malan v Kommissaris van Binnelandse Inkomste* 1983 (3) SA 1 (A) at 10B: *Berea Park Avenue Properties (Pty) Ltd v Commissioner for Inland Revenue* 1995 (2) SA 411 (A) at 413J-414A.

[9] In *Natal Estates Limited v Secretary for Inland Revenue* 1975 (4) SA 177 (A) at 202G-H Holmes JA said –

'In deciding whether a case is one of realising a capital asset or of carrying on a business or embarking upon a scheme of selling land for profit, one must think one's way through all of the particular facts of each case.'

[10] Both parties relied on the following passage from the judgment of Corbett JA in *Elandsheuwel Farming (Edms) Bpk v Sekretaris van Binnelandse Inkomste* 1978 (1) SA 101 (A) at 118A-E:

'Where a taxpayer sells property, the question as to whether the profits derived from the sale are taxable in his hands by reason of the proceeds constituting gross income or are not subject to tax because the proceeds constitute receipts or accruals of a capital nature, turns on the further enquiry as to whether the sale amounted to the realisation of a capital asset or whether it was the sale of an asset in the course of carrying on a business or in pursuance of a profit-making scheme. Where a single transaction is involved it is usually more appropriate to limit the enquiry to the simple alternatives of a capital realisation or a profit-making scheme. In its normal and most straightforward form, the latter connotes the

acquisition of an asset for the purpose of reselling it at a profit. This profit is then the result of the productive turn-over of the capital represented by the asset and consequently falls into the category of income. The asset constitutes in effect the taxpayer's stock-in-trade or floating capital. In contrast to this the sale of an asset acquired with a view to holding it either in a non-productive state or in order to derive income from the productive use thereof, and in fact so held, constitutes a realisation of fixed capital and the proceeds an accrual of a capital nature. In the determination of the question into which of these two classes a particular transaction falls, the intention of the taxpayer, both at the time of acquiring the asset and at the time of its sale, is of great, and sometimes decisive, importance. Other significant factors include, *inter alia*, the actual activities of the taxpayer in relation to the asset in question, the manner of its realisation, the taxpayer's other business operations (if any) and, in the case of a company, its objects as laid down in its memorandum of association. The aforegoing principles are trite and require no supportive citation of authority. They have been stated and restated, in various forms, by this Court on numerous occasions.'

It is clear from this passage that the acquisition of an asset for the purpose of reselling it at a profit – even if it is a single, isolated transaction – will usually be regarded as a profit-making scheme. See also *Edwards (Inspector of Taxes) v Bairstow and Another* 1955 (3) All ER 48 (HL) at 58. Although he did not dispute the correctness of this proposition the respondent's counsel contended that it had not been shown that the respondent was a trader or that the property was floating capital. However, as appears from the passage quoted, the asset acquired for the purpose of resale at a profit constitutes the taxpayer's floating capital and it is not necessary that the taxpayer be

characterised as a trader.

[11] Since the respondent's counsel argued that the purchase and sale of the property was not a scheme of profit-making and that the respondent was merely disposing of the interest which she had in the property, it is necessary to consider the salient facts.

[12] These facts appear from the evidence of the respondent, who was the only witness, and the documents. Where the evidence of the respondent and the contents of the documents do not coincide the contents of the documents are taken to be correct. They are contemporaneous documents which were clearly prepared long before litigation was contemplated. It is also clear that the respondent's husband assisted her in entering into and executing the various transactions and that he did so as her agent. There is no suggestion that he exceeded his authority or that he acted without her knowledge.

[13] On 10 September 1973 the respondent and the Council entered into a written agreement of lease in respect of the property. The lease included the following material terms:

(1) The lease commenced on 1 October 1973 and was for an initial period of one year whereafter it was subject to termination at any time by either party giving the other party one month's notice in writing;

(2) Upon the rental being in arrears for seven days or longer, the Council was entitled summarily to cancel the lease and eject the respondent;

(3) On termination of the lease for any reason whatsoever, any

improvements (whether necessary or otherwise) of the land would become the property of the Council without the payment of compensation by the latter, but the Council could require the respondent to remove such improvements.

[14] At the commencement of the lease, the respondent took over from the previous lessee of the property the bungalow structure thereon for approximately R38,000. Thereafter, during the lease, the respondent demolished the bungalow, rebuilt it and effected various improvements to the property. The Receiver of Revenue allowed amounts totalling R90 000 in respect of the cost of these improvements and no other amount was proved in the Special Court.

[15] Prior to 1994 the properties at Clifton belonged to the Council which leased them and permitted the lessees to build bungalows on them. The Council also permitted the lessees to dispose of their bungalows to third parties and where this occurred, entered into leases with such third parties. The lessees were loosely referred to as ‘bungalow owners’.

[16] The lessees of properties in Clifton agitated for some years for greater security of tenure in respect of the properties on which their bungalows stood. Eventually, in 1986, the Council adopted a scheme which would give bungalow site lessees the option to purchase the sites at a fair price and which would safeguard lessees who did not wish to purchase or could not purchase the sites they occupied, and which would at the same time protect the interests of the ratepayers and citizens of Cape Town.

[17] During December 1986 the Council advised the respondent that the property would be offered to her at a price of R228 000. However, no such offer was made.

[18] The Council recognized that the lessees had invested large sums in improving sites and accordingly recommended the conclusion of fresh leases for a period of 20 years at rentals based on the site values and the introduction of a rent rebate scheme. It was also envisaged at that time that, on expiry of the 20 year lease, sites (and all improvements thereon) would revert to the Council for disposal by the Council.

[19] On 31 January 1994 the Council passed the following resolution:

'1. That the Clifton Bungalow Sites be sold to existing Lessees at market value.

2. That those existing Lessees electing not to purchase the sites they currently lease, be permitted to continue to lease their respective sites for a period of 20 years in terms of a new agreement which would provide for *inter alia* a market related monthly rental; no assignment of the lease during the 20 year period, except to spouses will be permitted.

2.1 That the Lessees shall have the option at any time during the 20 year lease period to purchase their sites at the then prevailing market prices.

3. That in exceptional cases where undue hardship can be shown to exist, the Executive Committee be authorised to determine a rebated lease rental considered in such circumstances to be fair and reasonable subject to the proviso that such rental as may be determined shall escalate over a determined period of time to yield a rental at the end of such period which will be market related.'

The Council then addressed a letter to the respondent advising her of the terms of this resolution and informing her that the price of the property as at 1

December 1993 had been determined at R802 000. Implementation of this resolution was to be subject to objection in terms of s 124 of the Municipal Ordinance. There were objections.

[20] On 24 May 1994 the Council passed the following resolution:

'1. That the objections to the sale of the Clifton Bungalow Sites to the present Lessees be not upheld.

2. That the decision of Council dated 1994-01-31 to sell the Clifton Bungalow Sites to the present Lessees at market value as set out in Schedule "A" column D folios 12-14, plus VAT if applicable, be reaffirmed – the market prices stated to remain valid for a period of 3 months from the first day of the month following the adoption by Council of this resolution.

3. That those Lessees electing not to purchase the Sites they currently lease, be permitted, subject to the provisions of the Municipal Ordinance to continue to lease their respective Sites for a period of 20 years in terms of a new agreement which would provide for, *inter alia* a market related monthly rental as set out as Schedule "C" Column D (folios 15-17).

3.1 That the Lessees shall have the option, at any time during the 20 year lease period to purchase their Sites at the then prevailing market prices.

4. That in exceptional cases where undue hardship can be shown to exist, the Executive Committee be authorised to determine a rebated lease rental considered in such circumstances to be fair and reasonable subject to the proviso that such rental as may be determined shall escalate over a determined period of time to yield a rental at the end of such period which will be market related.

5. That the Lessees be granted a period of 3 months from the first day of the month following the adoption by Council of this resolution within which to sign the Deeds of Sale or Agreements of Lease, as the case may be, failing which the Sites be offered for sale at

the then current market values.'

The Council advised the respondent of the terms of this resolution in a letter dated 3 June 1994.

[21] The respondent knew then that she had three choices –

(a) to acquire the property (including the bungalow) at the price of R802 000;

or

(b) to enter into a new lease whereby she could carry on leasing the property for a period of 20 years. (This lease agreement would provide for a market-related monthly rental, determined every three years, together with an option whereby the lessee would be able to acquire the property at any time during the 20 year lease period at a determined market value and it would provide that the building structures and erections already existing on the land were the property of the Council and that any additional buildings, structures and erections which were in future erected on the land whether necessary or otherwise, would immediately upon their construction become the property of the Council without any payment of compensation); or

(c) to vacate the property in order to afford the Council an opportunity to sell it (together with the bungalow) at the then current market value to third parties.

[22] When she received this offer from the Council the respondent did not have the means to purchase the property or to pay a market related rental.

[23] At about the same time various banks and financial institutions approached the respondent to provide her with financial assistance. One of these banks was Investec Bank Ltd ('Investec') which offered to provide bridging finance for a period of 12 months to enable the respondent to purchase the property and find a buyer for it. On 5 August 1994 Investec described the nature of the transaction which it intended to enter into with the respondent as follows –

'Terry and Catherine Wyner are purchasing their Clifton Bungalow with a view to selling it within a year. The deal that we have put together gives them the opportunity to capitalise all charges and interest during the year and settle the loan in one lump sum when the property is sold.'

The facility would amount to R1 030 000. This included a cash advance of R880 000 and interest thereon at the rate of 14 % for a period of 12 months. Repayment in full would take place at the end of 12 months and the facility would be secured by a first mortgage bond for the amount of R1 030 000.

[24] On 23 August 1994 the Investec Credit Proposal confirmed the intention of the respondent to purchase the property and then resell it. It appears from the proposal that Investec was aware that the price of R802 000 for which the respondent could purchase the property was much less than the market value. Investec's assessment of the market value was R2 550 000 which was said to be 'Still Conservative'.

[25] By 28 August 1994 Investec had granted the respondent the facility of R1 030 000 to enable the respondent to purchase and pay all related costs

pertaining to the property and to cover all interest for a period of one year. The respondent signed the Deed of Sale on 29 August 1994 knowing that she could sell the property for a price well in excess of the purchase price of R802 000.

[26] On 19 September 1994 the respondent and her husband were listed with Seeff Estate Agents. On 5 October 1994 the respondent took transfer of the property. In March 1995 the respondent gave a mandate to Seeff to sell the property and on 4 September 1995 the respondent sold the property for R2 850 000. Because there would be a delay in giving transfer the respondent requested Investec to extend the date for repayment of the facility to 1 February 1996. The relevant Credit Proposal confirms the transaction in the following terms –

'Cathy Wyner is one of the Clifton Bungalow owners that we structured a special deal for. She was wanting to sell the bungalow, so the deal was structured over 12 months with no payments. The loan ends on 21 October 1995 and the residual plus all interest is due on that day. The house has been sold and the transfer is only going through on 31 January 1996.'

[27] On receipt of the purchase price the respondent repaid the Investec facility, paid the purchase price of another property in Clifton which she had bought and invested the balance of the proceeds with Charter House Investments.

[28] It is clear from these facts that when the respondent accepted the Council's offer to purchase the property for R802 000 she knew that the

property was conservatively valued at R2 550 000 and that if she could find a buyer she would be able to realise a profit on the sale of the property; and that the respondent and Investec had devised a scheme whereby the respondent could realise that profit. It is also clear that the respondent acted in accordance with that scheme –

(1) she obtained the necessary financial assistance from Investec to purchase the property and hold it for a sufficiently long period to enable her to find a buyer;

(2) she purchased the property with the fixed intention of reselling it at a profit within a period of 12 months;

(3) she set about achieving her objective of making a profit soon after she purchased the property – on 19 September 1994, before she had taken transfer of the property, she gave her particulars to the estate agent and in March 1995 she gave the estate agent a mandate to sell the property;

(4) she sold the property on 4 September 1994 for R2 850 000;

(5) she did not purchase the property to live in it.

On the face of it this was a scheme of profit-making as described by Corbett JA in the *Elandsheuwel* case.

[29] Notwithstanding these facts and despite conceding that if any other person had purchased the property with the intention of selling it for a profit the application of the usual tests would probably result in the conclusion that the proceeds of the sale were of a revenue nature the respondent's counsel

argued that the respondent had not engaged in a scheme of profit-making. He submitted that –

(1) the position of the respondent was *sui generis*. As lessee of the property only she was able to purchase the property. The 'discount' of R1 748 000 was not something she 'designedly sought for and worked for' but was fortuitous: it flowed from the respondent's position as lessee and the Council's decision, over which she had no control, to offer Clifton properties to the lessees at prices below their true market value;

(2) when the respondent purchased the property she contemplated that she might or probably would have to sell it within a year because of her financial position but that that did not make the respondent a speculator engaged in a scheme of profit-making: the respondent did not sell the property to make a profit *per se*, but to enable the respondent to do what any sensible person would have done in her situation: she disposed of the property which she had been fortunate enough to acquire at a discount to market value – a fortuitous occurrence which was entirely beyond her control – to repay the Investec loan which she could not afford to service and acquired a similar, cheaper residence in the same area;

(3) there are two important features in this case – the respondent's evidence that she always wished to acquire the property and that the probabilities are overwhelming that she wished to do so in order to live there – and that her disposition of the proceeds of the sale was entirely consistent

with someone who was not engaged in a scheme of profit-making;

(4) the fact that the respondent had lived on the property for more than 20 years and had always wished to purchase it in order to live in it are important considerations which the Court a quo properly took into account in recognising that the respondent had an interest in the property which she had realised due to force of economic circumstances: this approach correctly recognised the fact that there was a public law or public policy dimension to the respondent's relationship with the Council and that in a real economic sense the respondent's intention was to salvage what she had invested in the property;

(5) the choice faced by this court is whether to adopt a narrow approach which focuses mainly on the purpose of purchasing the property with the intention of selling it some 12 months later and the sale thereof, or to adopt a broader approach which takes into account the fact that the respondent had occupied the property for more than 20 years as well as the fact that the respondent bought and sold the property some 12 months later in the context of her prior occupation as lessee, who had an 'interest' in the property that was no less real for being unexpressed.

[30] The respondent's counsel also argued that the right to acquire an asset for less than its market value is an accrual which arose from her position as lessee and the Council's willingness to sell the property to her at a price well below market value and as such it was an accrual of a capital nature; and he

compared the respondent's position to that of a legatee to whom a property is bequeathed in terms of a will. He contended that in deciding whether or not to adiate the rational legatee will recognise that he or she will receive nothing in the absence of adiation and will ordinarily adiate even if the property bequeathed is surplus to his or her needs and will be immediately disposed of for this reason. He submitted that what is received pursuant to adiation will invariably be of a capital nature and that the proceeds of such disposal will ordinarily be of a capital nature despite the legatees intention on acquisition to dispose of the property as soon as possible.

[31] It is immediately apparent that a number of arguments raised by the Respondent's counsel are in direct conflict with the facts. The respondent acknowledged that the descriptions of the transactions in the Investec documents were correct. These documents are consistent with the respondent's own evidence that when she purchased the property she had the intention of reselling the property within a period of 12 months. She knew that she could make a (considerable) profit and she intended to make such a profit. She did not purchase the property to live in it and she intended to sell the property as this was an essential part of the scheme. She required the proceeds to repay Investec and pay for the other property in Clifton which she had purchased. She obviously knew that she would still have other funds available to invest.

[32] The arguments that the right to acquire an asset for less than its market

value is an accrual and that the respondent's position is comparable with that of a legatee to whom a property is bequeathed in terms of a will ignore the juristic nature of the transactions whereby the respondent realised the profit and they therefore do not assist the respondent. The amount on which the Receiver of Revenue, Cape Town, sought to levy tax did not accrue to the respondent when the Council offered to sell the property to her. It accrued to her when she received payment of the purchase price after she resold the property. With regard to a legatee the respondent's counsel relied on *Commissioner for Inland Revenue v Brooks* 1964 (2) SA 566 (A) at 574-575 for his contention that what is received pursuant to adiation will invariably be of a capital nature and that the proceeds of its disposal will ordinarily be of a capital nature despite the legatee's intention on acquisition to dispose of the property inherited as soon as possible. However that case did not deal with such a situation. The issue for decision was whether the inheritance received by the heir was of a revenue or capital nature. The Court held that it was of a capital nature. But the Court did not state that it is an absolute rule that the receipt of an inheritance is a receipt of a capital nature. This will always depend upon the facts. It must be emphasised that the present case is not concerned with the receipt of the property and whether such receipt is a receipt of a capital or revenue nature. It is concerned with the profit made on the resale of the property and whether such profit is a receipt of a revenue or capital nature. The Commissioner's counsel referred to *Commissioner for*

Inland Revenue v Strathmore Exploration Ltd 1956 (1) SA 591 (A) in which it was held that the mere fact that a property was acquired by way of inheritance was not sufficient to justify a decision that no part of the proceeds of realisation is subject to tax. The Court found on the facts that the acquisition of the inheritance and its subsequent disposal were suggestive of a carefully arranged and businesslike plan (i e a profit-making scheme) and that the taxpayer had not discharged the onus of disproving this. Accordingly it held that the profit was taxable. These cases illustrate the importance of the facts in every case and the dangers of reasoning by analogy. The issue of whether the proceeds of the disposal of a property by a legatee who decided to adiate in order to make a profit on the realisation of the inherited property are of a capital or revenue nature is not the issue to be decided in the present case.

[33] The real issues are therefore whether the respondent had a *sui generis* interest in the property that was close to ownership and whether the respondent was obliged to realise this interest in order to salvage what she had invested in it.

[34] The respondent's counsel was unable to define the nature of the interest which the respondent allegedly had other than that disclosed in the documents. During the period 1973-1994 the respondent was a lessee and after the first year she was a monthly tenant. On termination of the lease, for any reason whatsoever, any improvements on the land whether necessary or

otherwise, would become the property of the Council without payment of compensation. The fact that the respondent had incurred expenditure in rebuilding the bungalow and effecting other improvements on the land did not alter the nature of her relationship with the Council or give her any right in respect of the property. Her rights were determined by the terms of the lease agreement. She had the right to use and enjoy the property against payment of the rental. She was not the owner of the property and she had no other real rights in respect of the property. Even if the Council had decided not to terminate the lease – a fact which was not established – the property was not an asset of the respondent.

[35] The respondent's counsel suggested that the discounted offer made to the respondent gave her an interest. He was not able to explain how this occurred. While this was obviously a very attractive offer it had no commercial value in itself. It was an offer made to the respondent only. It could not be transferred to a third party. It also did not give any right in respect of the property itself. A further difficulty with the argument is that it ignores the juristic nature of the transactions whereby the respondent made the profit. The respondent did not purport to dispose of any (notional) interest which she may have had. She purchased the property for a price, took transfer and become the owner, and then resold the property for a much higher price, thereby realising the profit.

[36] The argument that the profit was not designedly sought for and worked

for and was fortuitous cannot be accepted. A distinction must be drawn between the making of the discounted offer, which clearly was fortuitous, and the acquisition of the property for resale, which was anything but fortuitous. With the assistance of Investec the respondent devised a scheme whereby she could make the very large profit which was inherent in the offer. She clearly seized the opportunity to make this profit.

[37] The fact that the respondent acquired a cheaper residence in the same area with the proceeds of the sale does not alter the revenue nature of the purchase and sale of the property. The character of the proceeds from the sale of the property is determined by whether the property was purchased and held for investment or for resale. If the second and cheaper property were in the future to be sold, the character of the proceeds of that sale would be determined by assessing whether the respondent purchased the cheaper property for investment or for resale.

[38] In support of its conclusion the court *a quo* referred to ITC 1427 50 SATC 25, *Commissioner for Inland Revenue v Paul* 1956 (3) SA 335 (A) and the majority judgment in *Commissioner for Inland Revenue v Pick 'n Pay Employee Share Purchase Trust* supra. All these cases were decided on facts which are very different from the facts of the present case. In each case the court found on the facts of that case that the taxpayer had not embarked on a scheme of profit-making. In the present case the facts show clearly and unambiguously that in buying and selling the property the respondent was

indeed engaged in a scheme of profit-making.

[39] I therefore do not agree with the reasoning and findings of the court *a quo* that the mix of private rights and public forbearance gave the respondent a *sui generis* claim to the property which was close to ownership, that the respondent was to all intents and purposes entitled to treat the site as her own and that she should notionally be put in the same category as someone who by force of circumstance is forced to sell her home. In my view this reasoning and the findings ignored the juristic nature of the relevant transaction.

[40] The appeal is therefore upheld with costs, such costs to include the costs consequent upon the employment of two counsel. The assessment issued in respect of the respondent for the 1996 year of assessment is confirmed.

B R SOUTHWOOD
ACTING JUDGE OF APPEAL

CONCUR:

HOWIE P
NAVSA JA
NUGENT JA
CLOETE JA