THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1159/2017

In the matter between:

THE MILNERTON ESTATES LIMITED **APPELLANT**

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE **RESPONDENT**

Neutral citation: *Milnerton Estates Ltd v CSARS* (1159/2017) [2018] ZASCA 155 (20 November 2018)

Coram: NAVSA ADP, WALLIS and MATHOPO JJA and MATOJANE and NICHOLLS AJJA

Heard: 6 November 2018

Delivered: 20 November 2018

Summary: Income Tax – purchase price of erven in a township sold by developer – sales occurring in one tax year and all suspensive conditions fulfilled in that year – transfer registered and purchase price received in following year – whether purchase price deemed to have accrued in year that sale agreements concluded – s 24(1) of Income Tax Act 58 of 1962 – *stare decisis*

ORDER

On appeal from: Tax Court, Cape Town (Binns-Ward J and assessors)

The appeal is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel.

JUDGMENT

Wallis JA (Navsa ADP, Mathopo JA and Matojane and Nicholls AJJA concurring)

[1] The appellant, the Milnerton Estates Limited, is a property developer. The proceeds of sales of stands in its developments constitute income in its hands, forming part of its gross income and ultimately attracting a liability to pay income tax. Sometimes an agreement of sale in respect of a stand is concluded in one tax year, while transfer of the property to the purchaser and payment of the purchase price occurs in the following tax year. In such cases a question may arise whether the purchase price is to be brought to account in the earlier year, rather than the later year when it is received. The reason is that the definition of gross income in s 1 of the Income Tax Act 58 of 1962 (the Act) provides that gross income includes 'the total amount, in cash or otherwise, received by or accrued to or in favour of' the taxpayer in relation to that tax year. This Court has held that 'accrued to' means that the taxpayer has become entitled to the amount in question, even though its right thereto may not

be immediately enforceable.[1] Those circumstances arose in the present case. The respondent, the Commissioner for the South African Revenue Service (SARS or the Commissioner as the case may be) contended that the purchase price of certain stands was to be included in the earlier tax year, when the agreements of purchase and sale were concluded, while Milnerton Estates contended that it should only be included after it was received in the following year. Was SARS or Milnerton Estates correct?

[2] The facts are pleasantly uncomplicated and common cause between the parties. In 2013 Milnerton Estates concluded twenty-five sale agreements of erven in the Parklands Residential Estate. The purchasers were required to pay a nominal deposit of R5 000 and the balance of the purchase price was payable against transfer. In sixteen instances, where the purchaser had to raise finance and furnish a guarantee, the contracts contained a suspensive condition providing for the eventuality of the finance not being obtained. In all of them the suspensive condition was fulfilled before the end of the 2013 tax year. In the other nine sales the purchaser either deposited the purchase price in cash with the conveyancers or provided a guarantee from a financial institution for the payment of the price. The net result was that in all twenty-five cases the purchase price was fully secured before the end of the 2013 tax year.

[3] Before Milnerton Estates could give possession of an erf to the purchaser it had to obtain the approval of the local authority, the City of Cape Town Municipality, by way of what was referred to as a s 31 certificate, to permit the passage of vehicular traffic on the completed roads in the development. In all but five instances that certificate had

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[1] *Commissioner for Inland Revenue v People's Stores (Walvis Bay) (Pty) Ltd* 1990 (2) SA 353 (A).

been obtained before conclusion of the sale agreement and in the remaining instances it was obtained shortly afterwards. In respect of each erf the s 31 certificate was obtained before the end of the 2013 tax year and Milnerton Estates was, therefore, able to give possession to the purchaser (and in some instances had done so) before the end of that tax year.

[4] Milnerton Estates was obliged to give possession of the erven to each purchaser, either once the purchase price had been secured and the s 31 certificate obtained, or within sixty days of the date of signature of the sale agreement, whichever was the later. Once possession was given Milnerton Estates was obliged, within thirty days, to register transfer of the stands into the names of the purchasers, provided the latter had complied with all their obligations in terms of the agreements. By the end of the 2013 tax year purchasers had in eighteen instances been given possession of their stands. In several cases rates certificates had been obtained and conveyancing documents had either been prepared or were in the course of preparation. The costs of effecting transfer had either been paid or secured.

[5] No doubt on the principle that ‘there’s many a slip, twixt cup and lip’, the appellant contended that at the end of the 2013 tax year its entitlement to the purchase price remained conditional on its performance of the remaining tasks necessary to effect transfer of the stands into the names of the purchasers. It accordingly omitted the purchase prices of these twenty-five stands from its gross income for that year. SARS disagreed. It contended that the purchase price in each instance had accrued to Milnerton Estates in the 2013 tax year, or alternatively that it was deemed to have done so by virtue of the provisions of s 24(1) of the

Act. It accordingly issued an assessment in which it included amounts totalling nearly R6.8 million in Milnerton Estates' taxable income, attracting a liability for income tax of slightly less than R1.9 million. Milnerton Estates' appeal to the Income Tax Court, Cape Town (Binns-Ward J and assessors) was dismissed on the second ground relied on by SARS and, but for that, would have failed in part on the first ground. Binns-Ward J gave leave to appeal directly to this court.

[6] The appeal raised two issues. They were:

(a) Whether the appellant's right to receive the purchase price under these sale agreements accrued to it during the 2013 tax year?

(b) In any event, whether the deeming provision in s 24(1) of the Act deemed those amounts to have been received by the appellant during the 2013 tax year.

There was no need for the Commissioner to rely on the deeming provision in s 24(1) if in fact the purchase price of these stands accrued to the appellant during the 2013 tax year. In that sense, the question whether there was an actual accrual was anterior to the application of the deeming provision. However, in the light of my conclusion that the previous judgment of this Court in *Silverglen Investments*[2] on the effect of s 24(1) is binding authority on the point, it is unnecessary to canvas the potentially complicated question of whether there was an accrual in accordance with ordinary principles.

[7] Section 24(1) reads as follows:

'**Credit agreements and debtors allowance**

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[2] *Secretary for Inland Revenue v Silverglen Investments (Pty) Limited* 1969 (1) SA 365 (A) (*Silverglen Investments*).

Subject to the provisions of section 24J, if any taxpayer has entered into any agreement with any other person in respect of any property the effect of which is that, in the case of movable property, the ownership shall pass or, in the case of immovable property, transfer shall be passed from the taxpayer to that other person, upon or after the receipt by the taxpayer of the whole or a certain portion of the amount payable to the taxpayer under the agreement, the whole of that amount shall for the purposes of this Act be deemed to have accrued to the taxpayer on the day on which the agreement was entered into.'

[8] The Commissioner contended that the requirements of the section were met in that:

(a) the taxpayer (Milnerton Estates);

(b) had entered into agreements with other persons (the purchasers of erven);

(c) in respect of immovable property (the erven);

(d) the effect of which agreements was that transfer would be passed from Milnerton Estates to the purchasers;

(e) upon or after the receipt by Milnerton Estates of the whole of the amount payable to it under the agreements.

On that basis the Commissioner contended that the whole amount was deemed to have accrued to Milnerton Estates on the date on which the agreements were entered into.

[9] Save in respect of item (e) Milnerton Estates did not challenge this analysis. I will revert to that item in dealing with the judgment in *Silverglen Investments*, but first it is necessary to address the other elements of Milnerton Estates' primary argument. It argued that the section is not concerned with cash sale agreements of this type, but only with agreements for the sale of immovable property on credit. It drew a distinction between cash sales and sales of immovable property, where

the purchase price was to be paid in instalments over time, with transfer only being given once the full purchase price had been paid. While not confined to such sales, broadly speaking the distinction for which counsel contended was that between cash sales of immovable property and alienations of land in terms of a contract as defined in s 1 of the Alienation of Land Act 68 of 1981, where the price would be paid in two or more instalments over time.

[10] In support of this argument counsel drew attention to the opening words 'subject to the provisions of s 24J'. That section deals with contracts under which interest may accrue to the creditor as part of the transaction and provides for the method by which the accrual of interest in any accrual period is to be determined. It is true that this is not a provision applicable to the sales in issue here, but I do not think that suffices to remove them from the ambit of s 24(1). The effect of the insertion of the reference to s 24J in s 24(1) was to bring the latter section fully into line with the former, so that, in the case of agreements falling under both, the determination of the accrual in respect of interest would take place under s 24J.

[11] Reliance was also placed on s 24(2) which empowers the Commissioner, where at least twenty-five percent of the amount payable under an agreement falling within s 24(1) only becomes due and payable on or after the expiry of a period of not less than 12 months after the date of the said agreement, to make an allowance over and above the allowance under s 11(j) for potential bad debts. I accept that the predominantly this provision will find application with conventional finance agreements in respect of movables. However, it was contended that s 11(j) had no application to a cash sale of the type in this case. I

accept that it is difficult, and may be impossible, to envisage a situation in which it could find application to a cash sale. Even if that is correct, however, it does not necessarily follow that the effect of s 24(2) is to remove from the ambit of s 24(1) agreements that otherwise fall within its terms. Nonetheless, it is a factor that together with other factors might point in favour of a more restrictive construction of s 24(1) in relation to the range of agreements covered by it.

[12] The argument then focussed on the heading to the section and its express reference to both credit agreements and debtors allowance.[3] The point was stressed that these agreements were not credit agreements, but cash sales. A debtor's allowance, or provision for doubtful debts, has little application in relation to such agreements. This was reinforced by its obvious reference to the provisions of s 24(2) and the reference therein to s 11(j) of the Act, which provides for the deduction from income of an allowance in respect of doubtful debts in the course of determining the taxpayer's taxable income. There is undoubtedly some force in this and it is reinforced by the fact that in the original version of the Act in 1962 the heading was 'Hire-purchase or other agreements providing for postponement of passing of property concerned'. That was amended to read 'Credit agreements and debtors allowances' in 1986, no doubt in the light of the repeal of the Hire-Purchase Act 36 of 1942 and its replacement by the Credit Agreements Act 75 of 1980. However, that force is mitigated by the fact that the amendment was effected after the

[3] As to the permissibility of referring to the heading see *President, Republic of South Africa and Another v Hugo* [1997] ZACC 4 1997 (4) SA 1 (CC) para 12, fns 13-15. A reference to the section's amendment by s 16(1) of the Income Tax Act 65 of 1986 makes it clear that this is a heading and resolves the doubts expressed in *S v Liberty Shipping & Forwarding (Pty) Ltd and Others* 1982 (4) SA 281 (D).

judgment in *Silverglen*, without any corresponding amendment to exclude cases of the present type from the ambit of the section.

[13] Lastly, counsel urged upon us cases that hold that in undertaking statutory interpretation the court should adopt a practical approach and that provisions in a statute should be construed having regard to their situation in the statute, so that, chameleon-like, they take colour from their surroundings. The latter is hardly a strong argument when the surrounding provisions of the Act do not demonstrate any significant pattern. If one goes back to the Act as it stood in 1962 the three preceding sections bore respectively the following headings: 'Deduction of alimony, allowance or maintenance'; 'Amounts to be taken into account in respect of values of trading stocks'; and 'Deductions not allowed in determination of taxable income'. The two that followed were 'Income of beneficiaries and estates of deceased persons', since amended to read 'Taxation of deceased estates', and 'Determination of taxable income from farming'. I am unable to discern any pattern from these, much less from the multitudinous intervening sections that have over the years been inserted into the Act between these original provisions.

[14] I am unconvinced that these arguments, even taken collectively, would suffice to permit a restrictive interpretation of the language of s 24(1) to confine its application to credit agreements properly so called, as opposed to all sale agreements, where ownership passes from seller to purchaser 'upon or after receipt by the taxpayer of the whole or a certain portion of the purchase price'. Saying that ownership passes on or after receipt of the whole purchase price is an apt description of cash sales, while saying that ownership passes upon or after receipt of a certain portion of the purchase price encompasses sales on credit.

[15] This takes me back to the Commissioner's point (e) in the analysis in para 8 above. Counsel for Milnerton Estates seized upon the requirement that ownership should only pass 'on or after' receipt of the purchase price. He pointed out that, for ownership to pass in respect of immovable property, it is necessary for the transfer of the property from seller to buyer to be registered in the Deeds Registry. In the ordinary course, and certainly as applied in these twenty-five cases, that would occur before the seller received the purchase price. The common and almost inevitable practice, as happened here, is that a guarantee is provided for payment that is only payable on proof of registration into the name of the purchaser. There may be cases where a stakeholder, such as the conveyancer or possibly an estate agent, holds the purchase price in trust until registration and then pays the seller, but the occasions on which a seller receives the purchase price prior to transfer will be rare. Payment simultaneously with transfer is physically impossible.[4] Counsel relied on this, both to buttress his argument that s 24(1) is only concerned with credit agreements, and also as a separate argument that the particular transactions in this case did not fall within the section.

[16] Whatever appeal this argument might otherwise have had, it is incompatible with the decision of this Court in *Silverglen Investments*. The background to that decision was the following. The taxpayer concluded a contract for the sale of property to one Ebrahim. In terms of the provisions of the Group Areas Development Act 69 of 1955, as amended, this triggered a pre-emptive right to acquire the property in favour of the Group Areas Development Board. The Board exercised that

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[4] For the reasons explained in *Breytenbach v Van Wijk* 1923 AD 541 at 546-547.

right by way of a letter dated 10 December 1962 and the terms of its acquisition had been agreed by 30 May 1963. The 1963 tax year ended on 30 June 1963. Transfer was effected and the purchase price paid in August 1963. The taxpayer was obliged to account for this as part of its taxable income. If it could do that in the 1963 year it would benefit from certain allowances, but if it had to do so in the 1964 year those allowances would have been removed.

[17] On those facts the taxpayer contended that s 24(1) applied and that the whole of the purchase price should, for the purposes of the Act, be deemed to have accrued to it when its contract with the Board was concluded, either in December 1962 or by no later than 30 May 1963. The Secretary contended that the deeming provision had no application. The first ground for this contention was said to be that the arrangements under which the Board acquired the property did not constitute an agreement within the meaning of that expression in s 24(1) of the Act. The Court rejected that contention and it need not detain us.

[18] The second contention was that the purchase price had to be payable before or simultaneously with transfer, whereas under the arrangements in that case, no amount was payable until transfer had been effected. The Court rejected this contention saying:[5]

'Counsel for the appellant made the further point that sec. 24 of the Income Tax Act deals, in relation to immovable property, with an agreement under which transfer is to be passed upon or after receipt by the owner of the whole or a certain portion of the amount payable to him under the agreement, i.e. according to counsel, an agreement under which the passing of ownership is suspended notwithstanding that the purchaser is given time to pay, and the consideration is payable before transfer, whereas in this

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[5] At p 74A-F.

case no amount is payable until the transfer has been effected. There is no substance in this. The meaning of "amount payable . . . under the agreement" is not limited to an amount payable before transfer, and in the case of an immovable it is inappropriate to speak, as in the case of movable property delivered under a hire-purchase agreement, of the suspension of the passing of ownership, as ownership could in any case not pass under an agreement before transfer.

In my opinion the Board acquired these affected properties by an agreement such as is described in sec. 24, and the consideration payable under the agreement must be deemed to have accrued on or before 30 May 1963, i.e. during the tax year ended 30 June 1963.'

[19] It is a well-known expedient of our law to treat the provision of a guarantee for payment against transfer, or the lodging of the purchase price with a suitable stakeholder, as discharging the purchaser's obligation to pay the purchase price *pari passu* with transfer.[6] It is I think clear that, in saying that in regard to immovable property it was inappropriate to speak of the suspension of the passing of ownership, as ownership could not pass before transfer, the Court had in mind that expedient. In law the guarantees provided by the purchasers of erven from Milnerton Estates constituted payment of the purchase price, such payment being concurrent with transfer of ownership by registration in the Deeds Registry. The agreements accordingly provided for Milnerton Estates to pass ownership to the purchasers upon or after receipt of the whole of the purchase price in terms of s 24(1). The purchase price was therefore deemed to be received in its entirety in the 2013 tax year, not the 2014 year, when payment was in fact made. That is what was decided in *Silverglen Investments* and it applies equally to the present case.

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[6] *Breytenbach v Van Wijk* supra, 546-547 endorsing *Trichardt v Muller* 1915 TPD 175 at 178. See also *Hammer v Klein and Another* 1951 (2) SA 101 (A) at 105E-G.

[20] As a last resort counsel sought to contend that *Silverglen Investments* was wrongly decided. The fact that this argument was not contained in the heads of argument perhaps explains the failure to address the limited circumstances in which this Court departs from its previous decisions.[7] Be that as it may, I am not only unpersuaded that this is a proper case to do so, but am of the view that *Silverglen Investments* was correctly decided. Counsel's strongest point, in favour of the contention that the Court fell into error, was that the consequence of upholding the interpretation in *Silverglen Investments* would be to bring all sales of immovable property subject to suspensive conditions within the ambit of s 24(1). The consequence, so he submitted, was that sellers of immovable property might be liable to pay income tax on amounts the recovery of which was uncertain and in circumstances where, if the worst happened and the transaction failed for any reason, they might not be able to recover the tax they had paid. He also instanced the potential for the sale to give rise to a capital gain in the first year and a capital loss in the second in circumstances where the taxpayer might have no corresponding gain against which to offset that loss.[8]

[21] I am not convinced that these points, even if valid, are sufficient justification for departing from a considered judgment of this court. If there are such anomalies and they are as serious as was suggested the remedy lies in the hands of the legislature. However, I am not convinced that either point is valid. In *Corondimas v Badat*[9] this Court held that when a contract of sale is subject to a true suspensive condition 'there

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[7] Recently reaffirmed in *Patmar Explorations (Pty) Ltd and Others v Limpopo Development Tribunal and Others* [2018] ZASCA 19 2018 (4) SA 107 (SCA) para 3.
[8] Relying on *New Adventure Shelf 122 (Pty) Ltd v Commissioner: South African Revenue Service* [2017] ZASCA 29; 2017 (5) SA 94 (SCA).
[9] *Corondimas and Another v Badat* 1946 AD 548 at 551.

exists no contract of sale unless and until the condition is fulfilled'. While that decision has been subject to fierce academic criticism,[10] it has not been overruled. The agreements with which s 24(1) is concerned will in the ordinary course be agreements of purchase and sale. If subject to a true suspensive condition then, until the condition is fulfilled, on a proper interpretation of the section there may well be no binding agreement that ownership be passed upon or after receipt of the amount payable to the taxpayer. I make no definite finding on a point that does not arise for decision. We have not had the benefit of full argument, nor do we know whether there is any significance in the accounting treatment of these agreements, but this may provide an answer to counsel's concern.

[22] As regards the other concern with capital gains, the determination of the amount of any capital gain falling to be included in the taxpayer's taxable income is a matter dealt with in the Eighth Schedule to the Act. It is not apparent to me that the provisions of s 24(1) apply in determining when an accrual occurs for the purpose of para 3 of the Eighth Schedule. There is no reference back to s 24(1) and on its face the Schedule seems to provide a self-contained method for determining whether a capital gain or loss has arisen. Again I refrain from any definitive decision on the point, but it may be an answer to the concern expressed by counsel. For present purposes both points raised in criticism of the decision in *Silverglen Investments* are not sufficiently weighty to justify our departing from the decision of our predecessors.

[23] The Tax Court was accordingly correct to dismiss the appeal on the grounds that it was bound by *Silverglen Investments*. This appeal must

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[10] *Geue v Van der Lith* 2004 (3) SA 333 (SCA) paras 8-12.

suffer the same fate. It is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel.

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M J D WALLIS

JUDGE OF APPEAL

Appearances

For appellant:	T S Emslie SC (with him S R Kotze)
Instructed by:	David Borman & Strong, Cape Town; Webbers, Bloemfontein.
For respondent:	R T Williams SC (with her C D Tsegarie)
Instructed by:	State Attorney, Cape Town and Bloemfontein.