THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 394/2013

In the matter between:

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

and

MARIANA BOSCH **First Respondent**

IAN ROBERT McCLELLAND **Second Respondent**

Neutral citation: *Commissioner SARS v Bosch* (394/2013)[2014] ZASCA 171 (19 November 2014)

Coram: BRAND, SHONGWE, WALLIS and PILLAY JJA and DAMBUZA AJA.

Heard: 6 November 2014

Delivered: 19 November 2014

Summary: Share option scheme – s 8A(1)*(a)* of the Income Tax Act 58 of 1962 – employees given option to purchase shares – option to be exercised within 21 days – payment for and delivery of shares to occur in tranches two, four and six years later – whether date of exercise of option or date of payment for and receipt of shares the date for determining any gain to be included in the taxpayer's income – whether contract arising

from exercise of option conditional – whether contracts between employees and trust administering scheme simulated transactions

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ORDER

On appeal from: Western Cape High Court (Waglay, Davis and Baartman JJ, sitting as court of appeal):

1 Leave to appeal is granted.

2 The appeal is dismissed with costs, such costs to include the costs of the application for leave to appeal in the court below and this court, and those consequent upon the employment of two counsel.

JUDGMENT

Wallis JA (Brand, Shongwe and Pillay JJA and Dambuza AJA concurring)

[1] Many companies use share option schemes as a means of retaining staff and providing additional compensation to those staff members who are thought to make a significant contribution to the business activities of the company. Such schemes may take various forms. This application for leave to appeal concerns a scheme (the scheme) referred to as a deferred delivery scheme (a DDS scheme or schemes). In 1997 the Foschini Group (Pty) Ltd (Foschini) implemented the scheme. In 2008 the Commissioner for the South African Revenue Services (the Commissioner) reviewed it and issued additional assessments to income tax in relation to 117 employees and former employees of Foschini. Appeals were lodged on behalf of the employees and the appeals of two of them, the respondents,

Ms Bosch and Mr McClelland, were taken as test cases before the Tax Court. Their appeals were partially successful before Allie J and the Commissioner did not pursue a challenge to those of her findings that were favourable to the taxpayers. Ms Bosch and Mr McClelland appealed to the full court of the Western Cape High Court against the findings that were adverse to them. Their appeals succeeded in a judgment by Davis J[1] in which Baartman J and, in all save one respect, Waglay J concurred. Leave to appeal to this Court was refused. On petition the application for leave to appeal was referred for argument in terms of s 21(3)*(c)*(ii) of the Supreme Court Act 59 of 1959. The parties were directed to be prepared to address the Court on the merits of the dispute and they have done so.

[2] The issues raised in the case are important and, according to the affidavit on behalf of the Commissioner, may affect a number of similar DDS schemes in relation to other companies and taxpayers. The points raised are reasonably arguable and in the principal respect were upheld in the Tax Court. It cannot be said that there were no reasonable prospects of success and, in any event, the fact that the decision had wider implications justified the Commissioner in seeking to canvass the issues before this Court. Accordingly leave to appeal should be granted. The costs of the application for leave to appeal and the costs of the application for leave to appeal to this court are to be costs in the appeal. I turn to deal with the appeal on its merits.

[3] Ms Bosch and Mr McClelland were both senior employees of Foschini between 1998 and 2005, which is the period relevant to this appeal. In September 1998 and again in December 1998 they were each given options to purchase shares in Lewis Foschini Investment Company

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[1] *Bosch and Another v Commissioner, South African Revenue Service* 2013 (5) SA 130 (WCC).

Ltd (Lefic), Foschini's listed holding company, at a price determined as the Middle Market Price[2] of those shares on the Johannesburg Stock Exchange (the JSE) as determined on the date of the notice containing the option. The options had to be exercised within 21 days of the offer and both Ms Bosch and Mr McClelland exercised them within the stipulated period. In terms of the scheme the shares would be delivered in three tranches on the second, fourth and sixth anniversaries of the notice containing the option, subject to certain exceptions to which I will revert. On delivery the purchase consideration became payable. The taxpayers were entitled, instead of taking delivery, to dispose of the shares and to be paid the balance remaining after deducting the costs of sale and the purchase consideration.

[4] We are not concerned with the first two tranches of shares to which Ms Bosch and Mr McClelland became entitled, as the Tax Court held that the gains on those tranches were taxed in terms of the practice then prevailing in the offices of SARS and there was no appeal against that finding. The final tranches that are the subject of this appeal were deliverable on 14 August 2004 and 2 December 2004. These two dates are relevant because there was a potentially relevant amendment to the Income Tax Act 58 of 1962 (the Act) that came into effect from 26 October 2004. If certain of the arguments on behalf of the Commissioner were upheld, the amended provisions would apply in respect of the shares that fell to be delivered on the latter date.

[5] Ms Bosch elected to sell her shares and receive the proceeds while Mr McClelland elected to take transfer of the shares and pay the

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[2] The Middle Market Price was defined in the scheme as the average middle market price of the shares on the JSC during the previous five days. The Board had an option to reduce this price by no more than ten per cent.

consideration. The interest of the Commissioner was aroused by the fact that when this occurred the value of the shares on the JSE was considerably higher than the consideration paid for them. This emerges from the following table taken from the judgment of the court below. It shows the date on which the shares became deliverable; the market value of the shares on those dates; the consideration payable by Ms Bosch and Mr McClelland and the differences between the prices paid and the value of the shares, realised in the case of Ms Bosch and notional in the case of Mr McClelland. These were the amounts on which the Commissioner levied additional income tax.

Bosch	14/08/2004	R81 106	R20 007	R61 099
Bosch	02/12/2004	R69 671	R10 607	R59 064
McClelland	14/08/2004	R40 621	10 021	R30 600
McClelland	02/12/2004	R92 494	R14 129	R78 365

[6] The section of the Act on which the Commissioner primarily relied in making the additional assessments was s 8A(1)*(a)*, which reads as follows:

'There shall be included in the taxpayer's income for the year of assessment the amount of any gain made by the taxpayer after the first day of June, 1969, by the exercise, cession or release during such year of any right to acquire any marketable security (whether such right be exercised, ceded or released in whole or part), if such right was obtained by the taxpayer before 26 October 2004 as a director or former director of any company or in respect of services rendered or to be rendered by him or her as an employee to an employer.'

[7] The Commissioner's main contention was that when the taxpayers paid the consideration for the shares and received either transfer or, if they elected to sell them, the proceeds, that is when 'the exercise of the right to acquire the shares' occurred in terms of this section. Accordingly

that was when the taxpayers' incomes were taxable on the difference between the market value of the shares and the purchase consideration paid for them. In the alternative and on various grounds the Commissioner contended that the agreements of purchase and sale of the shares concluded in consequence of the taxpayers exercising the options were conditional on the taxpayers remaining employees within the group until the date for delivery of the shares arrived. The argument was that the sale agreement arising from the exercise of the option only became exigible on fulfilment of the conditions at the later date when the price fell to be paid and the shares delivered. If that was correct then in relation to the earlier deliveries they were taxable under s 8A(1)*(a)* and in relation to the two later deliveries in December 2004 they were taxable under s 8C of the Act, which was introduced to deal with DDS schemes. Lastly, the Commissioner contended that the mechanism by which the scheme operated was a simulation and that, once the disguise in which it had been concealed was stripped away, the true exercise of the right to acquire the shares occurred when the shares were paid for and delivered.[3]

[8] By contrast the taxpayers contended that when they exercised the options in 1998 they exercised the right to acquire the shares, albeit that delivery and payment of the consideration was postponed in accordance with the provisions of the scheme. They submitted that it was at that stage that they acquired an unconditional right to the shares and became liable to pay income tax under this section on any increase in market value of the shares between the date of the offer and the date on which they exercised the options (an inconsequential amount). They said that they were not liable to tax on the difference between the market price of the

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[3] Relying upon *Commissioner for the South African Revenue Services v NWK Ltd* 2011 (2) SA 67 (SCA) para 55.

shares on the date of delivery and the consideration payable at that time and rejected the notion that there was any simulation in the scheme or the contracts concluded pursuant thereto.

Interpretation of s 8A(1)*(a)*

[9] The primary issue in dispute was whether the two taxpayers exercised a right to acquire the shares, within the meaning of that expression in s 8A(1)*(a)*, when they exercised the options, or whether they only did so when the time for payment and delivery arrived. That involves the proper construction of the section in accordance with ordinary principles of statutory construction. The words of the section provide the starting point and are considered in the light of their context, the apparent purpose of the provision and any relevant background material.[4] There may be rare cases where words used in a statute or contract are only capable of bearing a single meaning, but outside of that situation it is pointless to speak of a statutory provision or a clause in a contract as having a plain meaning. One meaning may strike the reader as syntactically and grammatically more plausible than another, but, as soon as more than one possible meaning is available, the determination of the provision's proper meaning will depend as much on context, purpose and background as on dictionary definitions or what Schreiner JA referred to as 'excessive peering at the language to be interpreted without sufficient attention to the historical contextual scene'.[5]

[10] The section refers to the exercise by the taxpayer of a right to acquire any marketable security. It does not refer to the acquisition of a

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[4] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18; *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) paras 10-12.

[5] *Jaga v Dönges NO and Another; Bhana v Dönges NO and Another* 1950 (4) SA 653 (A) at 664G – H.

marketable security. That suggests that it is concerned with something prior to the actual acquisition of ownership, which is effected by transfer of the marketable security to the taxpayer. It foreshadows a right that vests in the taxpayer and is capable of being exercised so as to bring about the acquisition of the marketable security. An obvious example of such a right, in the strict sense of that word, would be an option. An option is an offer to sell, joined with a binding contractual undertaking to keep the offer open for acceptance for a specific period.[6] The option holder then has a right to acquire the subject of the option. If they wish to acquire it, they are said to exercise the option, thereby bringing a binding contact of purchase and sale into existence. This is the very language used in the section and it is language apt to describe the situation where a taxpayer has been given an option to buy shares, or some other form of marketable security, and exercises the right to do so. At the time the section was introduced it was commonplace for companies to have in place share option schemes in the form of options to purchase shares exercisable at a future date at a price determined when the option was given.

[11] Where an offer is made to sell a marketable security to a taxpayer, not linked to any undertaking to keep the offer open for a defined period, the taxpayer has a right to acquire that marketable security for so long as the offer remains open for acceptance. Until it is withdrawn the right vested in the taxpayer is the same as that created by an option and the exercise of that right has the same effect, namely to bring into existence a contract of purchase and sale in respect of the marketable security. In each instance the exercise of the right takes the form of an agreement to purchase the marketable security on the terms offered. The only

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[6] *Hersch v Nel* 1948 (3) SA 686 (A) at 695; *Venter v Birchholtz* 1972 (1) SA 276 (A) at 283D-284B.

distinction between the two situations is that in the case of an option the offeror is obliged to keep the offer open for a defined period, whereas in the ordinary case the offer will be revocable at the will of the offeror at any time before acceptance.

[12] Other possible circumstances giving rise to a similar right to acquire a marketable security, capable of being exercised by acceptance, are the allotment of shares in a company, a rights issue to existing shareholders or an offer to make a donation or enter into an exchange in relation to a marketable security. In each instance the taxpayer acquires a right to acquire the marketable security capable of being brought to fruition by acceptance. In saying that, one does not need to go beyond the conventional conception of rights as legal rights. For so long as it is open to the taxpayer to accept the allotment, follow the rights or, by acceptance, to conclude a contract of donation or exchange, they have a right to acquire shares capable of being exercised by them. Linguistically therefore the section refers naturally to the type of situation described in this and the preceding paragraphs. The characteristic of each of those situations is that they do not necessarily mean that the exercise of the right brings about the immediate acquisition of the marketable security in the sense of title to it as an asset. When that occurs will depend upon the terms of the contract that results from the taxpayer's exercise of the right.

[13] The alternative construction espoused by the Commissioner fits less naturally with the wording of the section. It requires not only the initial exercise of the right that leads to the entitlement to acquire the marketable security, but the enforcement of the resulting contract thereafter. Cases, in which it has been said that the ordinary legal

meaning of the word 'acquire' is to acquire ownership,[7] were cited to us. However, all that those cases demonstrate is that whether this is the correct meaning is always dependent upon context and that the word may have a broader meaning of the acquisition of the right to acquire ownership (a *ius in personam ad rem aquirendam*).[8] Thus s 2 of the Transfer Duty Act 40 of 1949 imposes transfer duty on property acquired by any person pursuant to a transaction, but there is clear authority that this does not mean the acquisition of ownership, but merely acquisition of a right to acquire ownership in due course on fulfilment of the contractual obligations of the acquiring party.[9] There is nothing to indicate that s 8A(1)*(a)* was directed at performance of the contract resulting from a prior exercise of rights, as opposed to the exercise of a right leading in due course, in accordance with the applicable contractual provisions, to the acquisition of ownership of a marketable security.

[14] The Commissioner did not contend that the exercise of an option does not fall naturally within the language of the section, irrespective of when the resulting contract of purchase and sale is to be performed. That accords with the view of the revenue authorities from 1969 when s 8A was incorporated into the Act. There was a suggestion soon thereafter that the section was confined to the exercise of an option and did not cover any other situation, but that suggestion was laid to rest by the decision of the full court in *Secretary for Inland Revenue v Kirsch*,[10] which dealt with an allotment of shares and not an option. It was argued that the offer to allot shares was a simple offer revocable at will and therefore the

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[7] *Transvaal Investment Co Ltd v Springs Municipality* 1922 AD 337 at 341, 347 and 358; *Secretary for Inland Revenue v Hartzenberg* 1966 (1) SA 405 (A) at 409A-H.
[8] *Corondimas and Another v Badat* 1946 AD 548 at 558.
[9] *Minister of Finance v Gin Bros and Goldblatt* 1954 (3) SA 7 (O) at 10G-H; *Hartzenberg,* supra, fn 7.
[10] *Secretary for Inland Revenue v Kirsch* 1978 (3) SA 93 (T) at 95B-E.

taxpayer had no 'right to acquire a marketable security' unless the offer was embodied in an option. The court rejected this contention. In giving the judgment of the court Coetzee J held that acceptance of an allotment of shares was no different from the exercise of an option and said:

'Respondent's counsel makes the submission (in his heads of argument) that the most important single difference in the tax consequences between these two classes of transactions (options and outright sales) is that, in the case of an option falling within the provisions of s 8A, the liability for tax will arise and be determined not when the employee or director acquires that right but only when he exercises the right and provided that at that date the market value of the shares exceeds the price which he is obliged to pay for the shares. By way of contrast, he says, in the case of a simple offer and acceptance the gain will be assessable to tax immediately the contract is concluded. This exposition is without merit as the postulated difference is contradicted by his own statement (correct) that in both cases liability for tax arises when the offers are accepted, not before. This "difference" is non-existent. The only real difference in law between the two classes is that, in the case of the first, the offer is irrevocable (usually for a period) and, in the case of the second, it is revocable at will. The legal results in all respects, of acceptance, in both classes are identical. At that moment the contract comes into being and only then an obligation to allot the shares arises.'

[15] Subsequent cases have accepted the correctness of *Kirsch*, as have writers on income tax. It clearly identified the act of acceptance of the offer in the case of an option, or the acceptance of the offer to allot shares, as the event that gives rise to a potential liability to tax, rather than the performance of the contract. I accept that the problem confronting the court differed from the present case in that the principal argument was that the section was confined in its operation to options and did not cover other transactions, such as an allotment of shares. Accordingly the court was not directly concerned with the possibility of a right being exercised,

giving rise to a contract of purchase and sale, but the terms of the contract being such as to delay performance of the obligations under that contract to a much later date. It did, however, recognise that the allotment of shares would not occur simultaneously with the acceptance of the offer to allot shares and cited the example of a rights offer where the acceptance and performance of the resulting contract occur at different times. Nonetheless it identified the acceptance of the offer and the conclusion of the contract as the event that attracted liability to tax under s 8A. That is supportive of the contentions of the taxpayers.

[16] The issues in this case appear to have come to the fore in practical terms when companies and their advisers started to adopt DDS schemes, which according to the evidence occurred in the early to mid 1990s. This led Mr Alberts, then employed in the law interpretation division of the revenue services and, at the time of the hearing in the Tax Court, the Group Executive for Interpretations and Rulings at SARS, to prepare and submit to the legislation committee a memorandum dealing with share option schemes generally and DDS schemes in particular. He accepted, in the memorandum, which was prepared on 6 March 1996, that the exercise of a right to acquire a marketable security in the context of a DDS scheme occurred when the option was accepted and did not suggest that s 8A(1)*(a)* was open to the alternative interpretation now advanced on behalf of the Commissioner in this court. Instead he recommended an amendment to the Act to deal with that situation. The practice of SARS until the issue of the revised assessments in issue in this appeal was that the acceptance of the option in a DDS scheme was the time at which the right to acquire a marketable security was exercised for the purpose of

determining any taxable gain received by a taxpayer in terms of s 8A(2)*(a)* of the Act.

[17] There is authority that, in any marginal question of statutory interpretation, evidence that it has been interpreted in a consistent way for a substantial period of time by those responsible for the administration of the legislation is admissible and may be relevant to tip the balance in favour of that interpretation.[11] This is entirely consistent with the approach to statutory interpretation that examines the words in context and seeks to determine the meaning that should reasonably be placed upon those words. The conduct of those who administer the legislation provides clear evidence of how reasonable persons in their position would understand and construe the provision in question.[12] As such it may be a valuable pointer to the correct interpretation. In the present case the clear evidence that for at least eight years the revenue authorities accepted that in a DDS scheme the exercise of the option and not the delivery of the shares was the taxable event, fortifies the taxpayers' contentions.

[18] Lastly on the issue of the proper interpretation of s 8A(1)*(a)* some weight must attach to the fact that in October 2004 the Act was amended by the insertion of s 8C, which in part at least was enacted in order to render taxable the gains made by beneficiaries of DDS schemes when

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[11] *R v Detody* 1926 AD 198 at 202; *Nissan SA (Pty) Ltd v Commissioner for Inland Revenue* 1998 (4) SA 860 (SCA) at 870E-H. Similarly in the area of contractual interpretation there is authority that the manner in which the contract has been performed over a period of time may be relevant in selecting which of two competing constructions is to be preferred. *Shill v Milner* 1937 AD 101 at 110-111; *Shacklock v Shacklock* 1949 (1) SA 91 (A) at 101; *MTK Saagmeule (Pty) Ltd v Killyman Estates (Pty) Ltd* 1980 (3) SA 1 (A) at 12F-H.

[12] The same point was made in a contractual context in *Comwezi Security Services (Pty) Ltd v Cape Empowerment Trust Ltd* [2012] ZASCA 126, para 15.

they took delivery of shares under these schemes. It does this by providing that the critical date for determining a tax liability is the date of vesting of the shares in the taxpayer. As explained in the Explanatory Memorandum accompanying the amending legislation when it was placed before Parliament, the existing provisions of s 8A(1)*(a)* 'fail to fully capture all the appreciation associated with the marketable security as ordinary income'. That not only identifies the purpose of the amendment,[13] but is also a permissible guide to Parliament's understanding of the existing section.[14]

[19] Weighing all relevant contextual and background material it points consistently in favour of the construction of the section in the manner for which the taxpayers contend. That reinforces the linguistic analysis. I conclude that when the section speaks of the exercise of a right to acquire a marketable security it is concerned with the action by the taxpayer that gives rise to a binding contract under which the taxpayer will be entitled, subject to compliance with the terms of the contract, to acquire the marketable security, whether the acquisition by transfer to the taxpayer occurs immediately or is postponed to a future date. The contrary contention by the Commissioner must therefore be rejected.

Conditionality

[20] The further submissions on behalf of the Commissioner can conveniently be dealt with under the single heading of conditionality.

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[13] *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) at 562E-563A.

[14] *Patel v Minister of the Interior and Another* 1955 (2) SA 485 (A) at 493A-D; *National Education Health and Allied Workers Union v University of Cape Town and Others* 2003 (3) SA 1 (CC) para 66.

The Commissioner's submissions around this topic arose in consequence of a concession on behalf of the taxpayers that if the exercise of the option gave rise to a contract subject to a suspensive condition then s 8A(1)*(a)* would not be triggered. It is unnecessary to deal with the correctness of the concession. There were three threads to the Commissioner's argument. The first was that the contracts concluded by the taxpayers when they exercised the options were subject to a suspensive condition that they remain in the employ of Foschini until the dates upon which each tranche of shares fell due for delivery. The second was that even if the contracts were not subject to such a true suspensive condition they should for tax purposes be treated as if they were. It was contended that the contracts were contingent in the sense referred to in *Commissioner for Inland Revenue v Golden Dumps (Pty) Ltd*[15] and for that reason were to be treated as being subject to what counsel termed 'fiscal conditionality'. Lastly it was contended that the fact that receipt of the shares was subject to a reciprocal obligation on the part of the taxpayers to pay the consideration therefor, made the contracts conditional.

[21] The necessary starting point for a consideration of these contentions is the scheme itself. It defined the rights that the taxpayers acquired pursuant to the options granted to them. The options did not vary those terms. They merely set out the number of shares to be acquired; the consideration payable therefor; and the dates upon which the shares would in the ordinary course become deliverable. This was so even though the scheme was embodied in a contract between Lefic, Foschini and Foschini Ltd and, from 1999 (after the options in this case had been exercised), was administered by a trust (the Trust). The terms of

[15] *Commissioner for Inland Revenue v Golden Dumps (Pty) Ltd* 1993 (4) SA 110 (A) at 118E-G.

the options were such that the contracts of sale concluded by participants incorporated the terms of the scheme.

[22] The stated purpose of the scheme was to give employees an incentive to promote the continued growth of the company. From time to time the Board of Foschini would identify employees whom it wished to encourage in this way and would offer them an option to purchase a specified number of shares in Lefic at the price determined by the Board. The Foschini Group (Pty) Ltd in conjunction with Foschini would grant the option. An employee given such an option had 21 days from the date of the offer (referred to as the notice date) within which to exercise it, failing which it would lapse. If the option was exercised the employee would not be entitled to immediate delivery of the shares, nor would they acquire any of the ordinary rights attendant upon ownership of shares, such as the right to dispose of them, the right to vote at meetings of shareholders or the right to receive dividends. Subject to certain qualifications to which I will revert, they would only become entitled to delivery of the shares against payment of the price on the second, fourth and sixth anniversaries of the notice date. Although the scheme did not spell this out expressly, in practice, when payment became due, this was demanded, but employees were given the choice to sell the shares and to receive the proceeds less the costs of sale.

Suspensive condition

[23] A suspensive condition is one that suspends the exigible content of a contract, either in whole or in part, pending the occurrence of an uncertain future event.[16] In contending that the contracts for the purchase

[16] *Odendaalsrust Municipality v New Nigel Estate Gold Mining Co. Ltd* 1948 (2) SA 656 (O) at 666; *Design & Planning Service v Kruger* 1974 (1) SA 689 (T) at 695C-F; *Palm Fifteen (Pty) Ltd v Cotton*

of shares concluded by the taxpayers were subject to a suspensive condition the Commissioner needed to identify in what respect the exigible content of the contract was suspended pending a future uncertain event. The argument advanced was that upon conclusion of the contract a participant acquired no benefit and the sale was not implemented 'in any meaningful sense'. The term of the scheme that provided that the shares would only become deliverable, and the consideration therefor payable, on the second, fourth and sixth anniversaries of the notice date ensured that the benefit to the participant only accrued if they were still in employment on those dates. In the ordinary case, if the participant was dismissed for misconduct or poor work performance or resigned before any of those dates their entitlement to receive the shares would fall away. The mechanism whereby this was done would ordinarily be a resale of the outstanding shares to the trust at the same price as the taxpayer had purchased them.

[24] It was submitted that this automatic consequence of the participant ceasing to be employed, meant that until the date for delivery arrived nothing actually happened in the performance of the contract. This, so it was said, created an artificial situation because the price of the shares on resale was the same as the price when the option was exercised and the agreement concluded and was discharged by set-off against the original consideration payable by the participant The right to set off was created by deeming that the consideration payable by the participant was due on the date of termination of their employment.

Tail Homes (Pty) Ltd 1978 (2) SA 872 (A) at 887; *Jurgens Eiendomsagente v Share* 1990 (4) SA 664 (A) at 675F-H.

[25] What this argument lacked was any articulation of the terms of the suspensive condition. The scheme itself contained no clause that could, even remotely, be construed as a suspensive condition. Clause 7.3 which provided for the postponed delivery dates did not purport to suspend the operation of the contract until those dates. The argument therefore required that the proposed suspensive condition be inferred by way of a tacit term of the scheme. The test for that is well established. It was expressed by Nienaber JA in *Wilkins NO v Vogel*[17] in the following terms

'A tacit term, one so self-evident as to go without saying, can be actual or imputed. It is actual if both parties thought about a matter which is pertinent but did not bother to declare their assent. It is imputed if they would have assented about such a matter if only they had thought about it - which they did not do because they overlooked a present fact or failed to anticipate a future one. Being unspoken, a tacit term is invariably a matter of inference. It is an inference as to what both parties must or would have had in mind. The inference must be a necessary one: after all, if several conceivable terms are all equally plausible, none of them can be said to be axiomatic. The inference can be drawn from the express terms and from admissible evidence of surrounding circumstances. The onus to prove the material from which the inference is to be drawn rests on the party seeking to rely on the tacit term. The practical test for determining what the parties would necessarily have agreed on the issue in dispute is the celebrated bystander test. Since one may assume that the parties to a commercial contract are intent on concluding a contract which functions efficiently, a term will readily be imported into a contract if it is necessary to ensure its business efficacy; conversely, it is unlikely that the parties would have been unanimous on both the need for and the content of a term, not expressed, when such a term is not necessary to render the contract fully functional.'

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[17] *Wilkins NO v Voges* 1994 (3) SA 130 (A) at 136H – 137D. See also 143D–I. *Food and Allied Workers Union v Ngcobo NO and Another* 2014 (1) SA 32 (CC) para 37. Whether one can ever, by way of a tacit term, render an unconditional contract subject to a suspensive condition, is an open question. *Rockbreakers & Parts (Pty) Ltd v Rolag Property Trading (Pty) Ltd* 2010 (2) SA 400 (SCA) para 24.

[26] I would add only this to that exposition. If a party contends for a tacit term it is incumbent on them to formulate that term so as to give effect to what they say should be imputed to the contracting parties. The term must be capable of 'clear and exact' formulation.[18] In doing so it must be borne in mind that the more complicated the term the less likely it is that both parties would have readily expressed assent to it on the basis that 'of course, that goes without saying'.[19]

[27] Neither before the court below nor in this court was there any attempt on behalf of the Commissioner to formulate the term that was contended for. Eventually, after prompting from the bench, it was suggested in this court that the words 'provided such Participant is in the employ of the company at the relevant time' should be inserted in the preamble to clause 7.1, so that it would read as follows:

'On exercise of an Option in respect of any Shares, the Participant shall, provided such Participant is in the employ of the company at the relevant time, become entitled to delivery thereof against payment of the portion of the Consideration attributable thereto, on the following dates …'

[28] There are a number of difficulties with this formulation. First, it is by no means clear that it imports conditionality into the contract. It is after all couched not as a condition, but as a proviso. Second, it does not cater for the fact that the shares were deliverable in three tranches at different dates. The effect of the condition, if it be such, is to fragment a single contract of purchase and sale into three separate contracts, each subject to a different suspensive condition, that is, one for the sale of one third of the shares subject to the participant remaining in the employ of Foschini for two years and two others for the sale of similar quantities of

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[18] *Rapp and Maister v Aronovsky* 1943 WLD 68 at 75.
[19] *Desai and Others v Greyridge Investments (Pty) Ltd* 1974 (1) SA 509 (A) at 522H – 523A.

shares, subject to the participant remaining in the employ of Foschini for four and six years respectively. Third, the proposed condition does not address the various situations in which delivery of the shares might occur at other times, and in different quantities, by virtue of the provisions of clause 7.1.4 of the scheme.

[29] Clause 7.1.4 appears after the clauses dealing with delivery occurring in three tranches and reads as follows:

'provided that, in the case of a Participant whose service with the Company is terminated for the reasons set out in 10.1 or if an Event occurs as provided for in 8.2 or if the Board at the Participant's request in its absolute discretion decides, the Company shall be entitled to effect earlier delivery of the Sale Shares to the Participant against payment of the Consideration by the Participant who shall be obliged to effect payment therefor on a date or date earlier than the aforesaid anniversaries of the Notice Date as may be determined by the Board.'

Clause 10.1 provided for acceleration of the delivery dates on the surrender of the participant's estate or their sequestration; or the termination of their employment on death, or superannuation, or for reasons of ill-health or any other reason approved by the Board; or generally if the Board thought it advisable to do so. Clause 8.2 dealt with a reorganisation of the group of companies in various ways.

[30] It is clear from clause 7.1.4 that continued employment until each of the three anniversaries of the notice date was by no means a requirement for receipt of the shares. A wide variety of circumstances would entitle the participant to receive the shares notwithstanding the fact that they did not remain in the employ of the company for the full period. Thus a person who died, or was retrenched, or retired either in the ordinary course or on grounds of ill-health, would still be entitled to receive the shares. In addition the board had a wide discretion to permit

even someone who resigned or was dismissed to receive all or some of the shares. All of these possibilities were inconsistent with the suggested suspensive condition making entitlement to receipt of shares dependent upon continued employment at the date of delivery.

[31] Apart from these difficulties the proposed clause would run counter to other express provisions of the scheme. It would for example nullify entirely the clause providing that on termination of employment by dismissal or resignation the shares would be resold to Foschini (or the Trust) at the price originally paid for them. That is dismissed by the Commissioner, but it overlooks the fact that as an alternative to the resale Foschini (or the Trust) was entitled, at its election, to cancel the sale and an amount payable by the participant would then be determined. These two provisions need to be seen alongside one another. If in the interim the value of the shares had gone up the trust would no doubt be satisfied to retain shares having a higher value than when it had sold them. However, if the value of the shares had gone down in the interim, there might be advantages to the trust in cancelling the contract and recovering the loss in value from the former employee. That seems to be why it was given the option of cancellation and recovering an amount calculated on a different basis. Importing a suspensive condition would deprive it of that right; because, the effect of non-fulfilment of a suspensive condition is that the contract comes to an end automatically.[20] That follows necessarily from the fact that no action lies to compel the performance of a suspensive condition.[21] If there is no right to compel performance there can be no question of a breach warranting cancellation of the contract.

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[20] *Design and Planning Service v Kruger* ante, fn 16.
[21] *Scott and Another v Poupard and Another* 1971 (2) SA 373 (A) at 378H.

[32] Lastly, I can see no practical reason for importing the suggested suspensive condition into the contract. It was perfectly workable without that term and achieved precisely the aims of the parties. It recognised that it would operate into the future over a period of years and that the individual circumstances of the participants might alter during that time. That was the reason for the discretion in clause 7.1.4 and the fact that employees who were sequestrated, or were retrenched, or retired in the ordinary course or who had good grounds for wising to resign, could nonetheless take up the shares even though they would not remain in employment up to the three critical dates. It also made allowance for changes in the business circumstances of Lefic. For all those reasons I can see no basis for importing the suggested suspensive condition into the scheme.

Fiscal conditionality

[33] Accepting that the contracts in terms of which the taxpayers purchased shares were not subject to a suspensive condition, it is difficult to appreciate on what basis they can be treated as subject to such a condition for fiscal purposes. In the heads of argument counsel explained that the contention was that for the fiscal purpose of attracting a liability for tax in terms of s 8A(1)*(a)* and in order to justify the tax consequences of that section, there must be sufficient certainty at the time that the liability to tax is imposed that the shares would be acquired in the future.

[34] This proposition lacked any foundation in the text of s 8A(1)*(a)* or in any other provision of the Act. Once the section was held to apply by virtue of the exercise of an option bringing into existence a contract of purchase and sale, the tax consequences followed from the language of the section itself. Any gain realised by the taxpayer in the year in which

the right was exercised was to be included in the taxpayer's income for that year. Leaving aside situations where the amount of the gain could be determined in consequence of the realisation of the shares simultaneously with the exercise of the right, s 8A(2)*(a)* provides that a gain shall be deemed to be made if the market value of the marketable security at the time the right is exercised exceeds the consideration given therefor. The effect of that deeming is to render the taxpayer liable to pay tax on an amount so determined irrespective of whether, at the end of the day, after delivery of the shares, the taxpayer enjoyed a *de facto* gain. If, at the time the shares became deliverable in terms of this scheme, they were worth less than the purchase consideration and the taxpayer invoked the stop loss provision in the scheme that entitled them to compel Foschini (or the Trust) to repurchase the shares at the price payable by the taxpayer, any tax already paid would not be recoverable. Nor, if the taxpayer nonetheless elected to pay for the shares and have them transferred into their name, could they recover any tax already paid if their optimism that the share price would recover proved unfounded.

[35] In advancing this contention counsel relied on the following passage from the judgment of Nicholas AJA in this court in *Golden Dumps*:[22]

'There is no difference in principle between a case where liability is contingent in the legal sense and one where it is contingent in the popular sense. In the field of accounting a contingency is understood as

"… a condition or situation, the ultimate outcome of which, gain or loss, will be confirmed only on the occurrence, or non-occurrence, of one or more uncertain future events".

(See Faul *et al Financial Accounting* at 475.)

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[22] *Commissioner for Inland Revenue v Golden Dumps (Pty) Ltd* 1993 (4) SA 110 (A) at 118E-H.

A liability is contingent in that sense in a case where there is a claim which is disputed, at any rate genuinely disputed and not vexatiously or frivolously for the purposes of delay. In such a case the ultimate outcome of the situation will be confirmed only if the claim is admitted or if it is finally upheld by the decision of a court or arbitrator. Where, at the end of the tax year in which a deduction is claimed, the outcome of the dispute is undetermined, it cannot be said that a liability has been actually incurred. The taxpayer could not properly claim the deduction in that tax year, and the receiver of revenue could not, in the light of the onus provision of s 82 of the Act, properly allow it.'

[36] The context in which that statement was made demonstrates that it has no application in the present situation and provides no warrant for a principle that a contract not subject to a suspensive condition can for fiscal purposes be treated as if it is so subject, in other words as an entirely different contract. The case arose from a dispute between the taxpayer (Golden Dumps) and a former employee, Mr Nash. Golden Dumps and Mr Nash concluded a contract under which, on fulfilment of certain conditions, Mr Nash would be entitled to purchase certain shares. When he demanded delivery of the shares and tendered payment of the price Golden Dumps disputed his entitlement to them. The dispute was the subject of lengthy litigation[23] where Mr Nash ultimately succeeded with his claim. Golden Dumps then purchased the shares in the open market in 1985 and received in return a considerably lesser sum by way of the purchase price. It sought to set this off against income in its tax return for the 1985 year, but the Commissioner disallowed the deduction on the ground that the liability had arisen in 1981 and the judgment merely confirmed the existence of that liability so that for the purposes of s 11*(a)* of the Act it was not an expense 'actually incurred' in the production of income in the 1985 year. The passage from the judgment of

[23] *Nash v Golden Dumps (Pty) Ltd* 1985 (3) SA 1 (A).

Nicholas AJA, on which the Commissioner relies in the present case, merely explains why, in view of the liability's contingent nature until the court determined the claim against Golden Dumps, no expense was actually incurred. It has no bearing on the construction of either the scheme or s 8A(1)*(a)* of the Act.

Reciprocity

[37] The principle the Commissioner sought to invoke under this head was one common to many contracts, where performance by the one party is conditional upon reciprocal performance by the other. However, it can have no application in determining when a liability to pay tax in terms of s 8A(1)*(a)* arises. That is determined by the terms of the section and the key event is the exercise of the right to acquire the marketable security, not performance of the contract arising from the exercise of that right, The rights obtained by the taxpayers by the exercise of the options was unconditional. In order to enforce performance by delivery of the shares the price needed to be paid, but even accepting that this involved reciprocity, so that a refusal to pay the price would stultify any demand for delivery of the shares, that would not render the rights acquired by the taxpayers conditional. Cases that deal with different concepts under the Act, such as when income accrues, so as to attract a liability for the payment of tax, or an expense is incurred for the purpose of claiming a deduction, are unhelpful in the context of a provisions such as s 8A(1)*(a)*. Accordingly all the Commissioner's arguments under the general head of conditionality fall to be rejected.

Substance over form

[38] The argument under this head was based on the passage in *NWK*[24] where Lewis JA said:

'If the purpose of the transaction is only to achieve an object that allows the evasion of tax, or of a peremptory law, then it will be regarded as simulated. And the mere fact that parties do perform in terms of the contract does not show that it is not simulated: the charade of performance is generally meant to give credence to their simulation.'

[39] Using that as the foundation the Commissioner argued that dishonesty is not a requirement for simulation and that, as the scheme had clearly been formulated to enable the participants to avoid any significant tax liability under s 8A(1)*(a)*, it should be treated as giving rise to a conditional entitlement to shares that would only trigger the application of the section on payment for and delivery of the shares.

[40] That submission involved a misunderstanding of the judgment in *NWK* as was pointed out in *Roshcon*.[25] There I stressed that simulation is a question of the genuineness of the transaction under consideration. If it is genuine then it is not simulated, and if it is simulated then it is a dishonest transaction, whatever the motives of those who concluded the transaction. The true position is that 'the court examines the transaction as a whole, including all surrounding circumstances, any unusual features of the transaction and the manner in which the parties intend to implement it, before determining in any particular case whether a transaction is simulated.'[26] Among those features will be the income tax consequences of the transaction. Tax evasion is of course impermissible

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[24] *NWK* ante fn 3.
[25] *Roshcon (Pty) Ltd v Anchor Auto Body Builders CC and Others* 2014 (4) SA 319 (SCA).
[26] *Roshcon* para 37.

and therefore, if a transaction is simulated, it may amount to tax evasion. But there is nothing impermissible about arranging one's affairs so as to minimise one's tax liability, in other words, in tax avoidance. If the revenue authorities regard any particular form of tax avoidance as undesirable they are free to amend the Act, as occurs annually, to close anything they regard as a loophole. That is what occurred when s 8C was introduced.

[41] Once that is appreciated the argument based on simulation must fail. For it to succeed, it required the participants in the scheme to have intended, when exercising their options to enter into agreements of purchase and sale of shares, to do so on terms other than those set out in the scheme. That is manifestly implausible and was not suggested to either Ms Bosch or Mr McClelland in evidence. Their approach was simply that they were being offered an opportunity to acquire shares on the terms of the scheme and they accepted those offers. As Watermeyer JA said in *Randles Brothers & Hudson*[27] in regard to a contention that certain agreements of purchase and sale were not genuine 'there was no material advantage to be gained by pretending to enter into a contract of sale which could not be gained by entering into a real contract of sale.' Similarly in this case there was no advantage to the parties in entering into a conditional contract of purchase and sale when they were free to enter into an unconditional contract and postpone performance of the obligation to pay the purchase price and deliver the shares. The Commissioner's contentions based on the notion of substance over form must be rejected.

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[27] *Commissioner of Customs and Excise v Randles Brothers & Hudson Ltd* 1941 AD 369 at 402.

Conclusion

[42] Leave to appeal is granted but the appeal is dismissed with costs, such costs to include the costs of the application for leave to appeal in the court below and this court and those consequent upon the employment of two counsel.

M J D WALLIS
JUDGE OF APPEAL

Appearances

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