IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINICIAL DIVISION)

REPORTABLE

CASE No.: 291 / 01

In the matter between:

C M WYNER Appellant

and

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

JUDGMENT BY : JH CONRADIE,J et HC NEL, J et AP BLIGNAULT, J

For the Appellant : Adv. T. S. Emslie SC

Instructed by : MESSRS HOFMEYR HERBSTEIN & GIHWALA INC.
21st Floor, 2 Long Street,
CAPE TOWN, 8001

P.O. Box 1221
CAPE TOWN, 8000

(Ref.: Mr. R. G. Bricout) Tel: (021) 405 6026

For the Respondent : Adv. O. Rogers SC
Adv. L. Fichardt

Instructed by : THE STATE ATTORNEY
Liberty Life Centre
22 Long Street
CAPE TOWN, 8001

Private Bag X9001
CAPE TOWN, 8000

(Ref.: Mr. S Omar) Tel: (021) 421 0116

Date of Hearing : Monday, 28th January 2002

Judgment delivered on : Friday, 8th March 2002

THE HIGH COURT OF SOUTH AFRICA

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CASE NO: 291/01

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C.M. WYNER **Appellant**

and

COMMISSIONER FOR THE SA REVENUE SERVICE **Respondent**

JUDGMENT DELIVERED ON : ***8th MARCH 2002***

CONRADIE, J

This is an appeal against the judgment of Traverso D JP delivered in the special court for hearing income tax appeals. She held that the proceeds of the sale of erf 484 Clifton, sold by the appellant in the 1996 year of assessment constituted gross income. The appellant contends that the proceeds of the sale were capital so that the assessment in terms of which she was taxed on this receipt should not have been confirmed.

Before the Cape Town suburb of Clifton became the playground of the rich it was the dumping ground of the poor. During the early part of the twentieth century, when the land at Clifton still belonged to the British Admiralty, holiday sites at Clifton were leased to campers. After 1918 demobilized World War I soldiers were allowed to erect structures on the land in order to help overcome a serious housing shortage. The arrangement was not intended to be a permanent one. Tenure was held by way of short term leases. In 1923 the Clifton bungalow area was donated by the British Admiralty to the City of Cape Town ('the Council'). In

the same year the Clifton and District Bungalow Owners' Association ('the Association') was formed. The papers show that as early as 1935 the inhabitants of the area thought of themselves as a settled community and wished to transform their tenure, which had remained as precarious as before, into something more durable.

In 1948 calls for freehold tenure were renewed. The Council was not unsympathetic, but there was an obstacle to surveying the land. By 1972, however, diagrams for each site which were up to deeds office standard could be produced, and by 1984 the Council's Housing Committee recommended that all the leasehold titles in Clifton be converted to freehold on condition that the entire area be declared a national monument. This was proposed in order to preserve the character of the area, and indirectly was an acknowledgement of the Clifton tenants' contribution to its attractiveness. A provisional declaration was made in August of the same year.

In 1986 the Council resolved to sell bungalow sites to the existing lessees. However, the area (which was zoned public open space) had to be rezoned and subdivided and this took time. In May 1988, sites were being offered for sale to their lessees, but it was not until 1992 that four sites on fourth beach Clifton were sold by auction. This prompted the Association to bring an action against the Council for transfer of sites to their members. There was an abortive attempt by the Council to sell the sites in 1993 and again, on slightly different terms, in 1994.

In the course of the last eighty years or so there was much debate about the anomalous situation of the Clifton bungalow owners. I say 'owners' because it was - despite what the leases said - always accepted by the Council that the structures erected on the land belonged to the lessees. This was one reason that termination of the short - term leases was never envisaged. Another was the Council's desire to retain the uniquely attractive features of the Clifton beachfront. Yet another was that the lessees, many of whom had been there for many years, had spent time and money on beautifying the area and should not be displaced by wealthy newcomers who had made no such contribution.

I think it is safe to say that at least since 1948 the Council's attitude was that the Clifton bungalow owners were there to stay. People began selling their sites or, more accurately the improvements, which, as we have seen, were considered to belong to them. In every sale the Council readily agreed to enter into a similar (short- term) lease with the new 'owner'. It was the furthest thing from anyone's mind that such a lease might be terminated for any reason other than non-performance.

The appellant was one of the people who bought a bungalow from someone else. On 10 September 1973 she concluded a lease with the Council for one

year, terminable on one month's notice. The appellant paid R38 000 to the seller for the improvements on the site. This was a considerable sum in 1973: adjusted by the consumer price index it would be the equivalent of R571 903 in 1995. The improvements were almost entirely demolished to make way for a new home. The cost of rebuilding was an estimated R30 000. (R451 502 in 1995 values). In 1982 and 1986 further improvements were made to the site at an estimated cost (in 1995 terms) of R264 212. By 1995, the appellant had invested in the site (in 1995 values) R1 287 617. This is what she stood to lose if she were to be evicted from the site.

Eventually in 1995 came the long-awaited offers to the Clifton bungalow owners to sell the sites to them. In the appellant's case the price demanded by the Council was R802 000. The appellant would have dearly liked to buy the site and remain in the house but she did not have the money to do so. Even if she could have borrowed the R802 000, she would not have been able to pay the interest.

The appellant could not save her investment by ceding the lease because by that time the Council would no longer agree to the cession of leases; the offer to purchase which it made to bungalow owners was also not cedeable.

At the same time the Council made an alternative offer to bungalow owners to hire their sites. In terms thereof, the appellant was given the opportunity of entering into a lease for twenty years with an option to purchase the site at market value at any time during the currency of the lease. While she was a lessee she would be expected to pay rent at rates dictated by the market from time to time. It was, the appellant considered, not a satisfactory solution to her predicament. She had no idea whether she would in the years to come be able to pay a market rental for the site, and no assurance that she would be financially able to buy it later.

The appellant accordingly decided to follow the only course which was sensibly open to her: she decided to buy the property and, because she could not afford to keep it, resell it as soon as she could. Investec Bank provided the money. It structured a package in terms of which the whole purchase price was lent to the appellant and interest was capitalized for a year. This meant that the appellant would not be burdened by repayments if she managed to resell the property within a year. Everything went according to plan. Little more than a year later, the site was resold for R2 850 000. This sale and, it seems, others as well, attracted the attention of the Commissioner.

Mr *Rogers* on the Commissioner's behalf contended before us that the appellant owned nothing of any value before she accepted the Council's offer to sell the site to her. It was only by accepting the offer that she acquired a disposable asset. She acquired it, what is more, with the

admitted intention of reselling it as soon as she could.

I agree that usually this would indicate a scheme of profit-making and make the proceeds of the transaction subject to tax. However, this is an unusual case. There is a public law, or at least a public policy, dimension to it that I think, with respect, the court *a quo* overlooked. The lease gave the appellant no more than the right to remain on the property until a notice of termination came from the lessor. But the lessor was also the Council which, as local authority, was vested with powers of control over the area; and it decided that, for policy and developmental reasons, it would, whatever its lease said, not give such a notice. Its promises as lessor conflicted with its conduct as administrator. I think that in determining the tax consequences of the relationship between the parties it would be wrong to take account only of the former and ignore the latter. The appellant did not have common law ownership of the property, but 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. Had the appellant been the owner of the property and sold it at the time when she did the proceeds would without a doubt have been of a capital nature. The question really is whether the claim which she had to the site which was less than ownership but more that a monthly tenancy was sufficiently distinct from ownership to change the fiscal characterization of the proceeds of its sale. I do not consider that it was. She was to all intents and purposes entitled to treat the site as if it was her own, and I think that one should notionally put her in the same category as one who, by force of circumstance, is forced to sell her home. If the appellant had had her way, she would not have sold it. She had lived there for more than twenty years and she would have wished to continue living there. She was compelled to sell the property because, in the circumstances which developed (and over which she had no control), she could no longer afford to keep it. Her primary concern, and she said so repeatedly, was to salvage what she had invested in the property. She had nothing but the property and could not afford to lose it. This was her subjective intention. The objectively ascertainable facts set out above do not conflict with it.

For the proceeds of the sale of an asset to be classed as revenue a taxpayer must have embarked on a scheme of profit-making. If one sells only or mainly to make the best of a bad situation, any resultant profit is not taxable. In *ITC 1283* 41 SATC 36 a Portuguese resident of Angola fled to Namibia. Since he could not export currency, he bought coffee beans and exported these to Namibia. In this way he smuggled his capital out in coffee beans. When he converted the coffee beans into South African currency, he made a profit. The court held that his purpose was not to carry on a trade but to save as much as he could of his investments in Angola. Similarly,

the appellant's purpose was not to carry on a trade but to safeguard her investment. The sale to her should be seen as a device for turning her inchoate title into one that was transmissible.

The respondent in *Commissioner for Inland Revenue v Paul* 1956 (3) SA 335 (A) bought more land than he needed because the seller would not part with a smaller portion. At the time of the purchase he intended selling the portion that he did not require. The court held that despite the purchase of the land with the intention of immediately reselling some of it the transaction was not a profit-making scheme. Similarly, the purchase and immediate resale in the present case, exceptionally, does not indicate a profit-making purpose. The price paid to the Council should be seen as an amount to convert the appellant's inchoate title into a registrable one.

In *ITC 427 50* SATC 25 the taxpayer exercised an option with the intention of turning it to immediate account. It was held, following *Commissioner for Inland Matla Coal Ltd v Revenue* 1987 (1) SA 108 (A), that the taxpayer's intention was to be determined at the time the option had been acquired. In the present context the case illustrates no more than that the intention of a taxpayer at a time prior to the decision to buy and sell may properly be taken into account to determine the character of the sale proceeds.

In *Commissioner for Inland Revenue v Pick 'n Pay Employee Share Purchase Trust* 1992 (4) SA 39 (AD) the Trust, in the words of Smalberger JA who gave the judgment for the majority, 'bought when it was obliged to and sold when it was required to.' There was found to have been no profit-making scheme and the proceeds of the sales of shares which were held for the benefit of employees were not revenue receipts. I think that the same can be said of the appellant in this case. She bought when she had to and sold when she had to. If what she had to do can appropriately be described as a 'scheme', it was a salvage and not a profit-making scheme. The profit was an incidental, though I dare say not unwelcome, by-product of the sale. But that was not enough to have turned it into a revenue receipt.

There are other indications from the objective facts that the appellant had no wish to embark on a scheme of profit-making. She had never dealt in immovable property before. After repaying Investec Bank's loan, she spent part of the proceeds of the sale of the site on buying another bungalow in Clifton and invested the rest, exactly as one would expect a person who merely changes investments to do. In my view she has discharged the onus of showing that the proceeds of the sale were a capital receipt.

The appeal succeeds with costs which are to include the costs of senior counsel.

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J.H. CONRADIE

I agree:

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H.C. NEL

I agree: **……**

A.P. BLIGNAULT