



Republic of South Africa

In the High Court of South Africa
Western Cape High Court, Cape Town

In the matter between:

Case No: A63/08

Gideon Stephanus van Heerden

First Appellant

Garth Sterling Le Roux

Second Appellant

Garth Le Roux Marketing CC

Third Appellant

And

The State

Respondent

Judgment Delivered: 23 September 2010

LOUW et ZONDI JJ

[1] The three appellants stood trial as accused numbers 1, 2 and 4 respectively, in the Wynberg Regional court on 49 composite counts. After a trial lasting 36 court days, the three appellants were convicted on the main charge of fraud on each of counts 1, 3 and 4. The first appellant was also convicted on the main charge of fraud on counts 5, 6, 7 and 9.

- [2] The appellants' co-accused at the trial, the erstwhile accused numbers 3 and 5 are two companies, Logoprops 44 (Pty) (Logoprops) and Lodge 816 Fancourt (Pty) Ltd (Lodge 816). They were acquitted on all the counts they were charged with.
- [3] The first and second appellants were sentenced to 6 years imprisonment of which two years were suspended for a period of five years on counts 1, 3 and 4. The third appellant was sentenced to a fine of R 10 000 on counts 1, 3 and 4. The first appellant was sentenced to two years imprisonment, suspended for five years on counts 5, 6 and 7 and to a further two years imprisonment suspended for five years on count 9.
- [4] The appellants appeal with the leave of the court a quo against their conviction and the sentences imposed.
- [5] The state cross appeals with the leave of the court a quo against certain findings by the court a quo. We deal later with the cross appeal.
- [6] The first appellant is an accountant, Mr. Gideon van Heerden who is the proprietor of Financial Management Consultants (FMC), a firm of accountants in George.

- [7] The second appellant is Mr. Garth le Roux.
- [8] The third appellant is the close corporation Garth le Roux Marketime CC (MCC). The second appellant and his wife are the only members of MCC and the second appellant is MCC's sole executive officer. MCC carries on business as an estate agent at the Fancourt golf resort near George (Fancourt).
- [9] The first appellant, who was born in 1964, obtained a B. Acc degree at the university of Potchefstroom. He first did articles in Klerksdorp. Thereafter he preformed his national service in the employ of the South African Revenue Service (SARS) as a tax inspector in Port Elizabeth. After three years with SARS, from 1987 to 1990, he moved to George and joined Fancourt, first as an accountant but later as its financial manager. In February 2001, the first appellant left Fancourt to set up FMC, his own accounting business in George.
- [10] The second appellant was a professional cricket player who retired in 1987 at the age of 37 years. Towards the end of his cricketing career he turned to selling advertising for Sports Illustrated, a sports magazine for about one year. Thereafter he sold time share in the Swiss Farm Excelsior resort in the Franschoek valley. The second appellant formed MCC in 1989 as vehicle through which to carry on his estate agency business in

Franschoek. After about two and a half years, in January 1991, the second appellant moved to George and on 23 January 1991 he concluded a contract of employment with the then owners of Fancourt in terms whereof MCC was employed to sell immovable property at Fancourt. MCC's remuneration consisted of a basic salary in the form of an annual consultancy fee of R60 000, payable at the rate of R5 000 monthly in arrears. In addition MCC was paid a commission on sales.¹ It was expressly provided that commission was payable only once transfer of the property sold had taken place.

[11] The erstwhile owners of Fancourt fell into serious financial difficulties and Fancourt was acquired by Plattner Golf (Pty) Ltd (Plattner) in 1994 out of liquidation. Fancourt consists of three golf courses of which the Links is the most prestigious and membership of which is by invitation only.

[12] On 30 November 1995, the second appellant concluded a new contract with Plattner. This is the contract which governed MCC's entitlement to commission which was in operation when MCC relinquished the

¹ The commission clause provided as follows:

9.2. Commission

The CC shall be entitled, in accordance with Company policy from time to time, to receive commission:

9.2.1 of 2 per centum on all sales in respect of corporate mansions, executive lodges, family homes and erven ('resort property') in the resort development as the case may be, effected and concluded by the CC;

9.2.2 of 0,5 per centum on all national and international sales of resort property effected by or on behalf of the Company subsequent to the effective date.

This commission will be payable once transfer has taken place.

commissions that are relevant to this case.

[13] The second appellant conducts his family affairs through a number of entities. These include MCC, through which he conducts the estate agency business, Logoprops through which he holds a number of property investments, Lodge 816 in which he holds one property at Fancourt and a family trust known as the le Roux Family Trust.

[14] From 2001 the first appellant and FMC were the accountants of the second appellant and the corporate entities through which he conducted his family's affairs.

[15] The appellants' convictions on counts 1, 3 and 4 arise from three transactions which resulted in the admitted omission to disclose the following commission income in MCC's income tax returns for the relevant tax years:

- (a) Count 1: Commission in the amount of R769 250 in respect of which R269 237 in income tax would have been payable during the 1999 tax year.
- (b) Count 3: Commission in the amount of R665 700 in respect of which R199 710 in income tax would have been payable during the 2001 tax year.

- (c) Count 4: Commission in the amount of R550 000 in respect of which R165 000 in income tax would have been payable during the 2003 tax year.

[16] The first appellant's further convictions:

1. on counts 5, 6 and 7, relate to the admitted omission to disclose the same commission income in MCC's VAT returns during the same tax years; and
2. on count 9, relates to him making a VAT input claim on behalf of Logoprops in respect of membership of the Links.

[17] We deal first with the convictions on Counts 1, 3 and 4 which each comprise:

1. a main charge of common law fraud;
2. a first alternative charge of contravening s 104(1)(a) of the Income Tax Act²; and
3. a second alternative charge of contravening s 75(1)(c) of the Income Tax Act³

² S 104(1)(a) reads as follows:

(1) Any person who with intent to evade or to assist any other person to evade assessment or taxation-

(a) makes or causes or allows to be made any false statement or entry in any return rendered in terms of this Act, or signs any statement or return so rendered without reasonable grounds for believing the same to be true;
shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding five years.

³ S 75(1)(c) reads as follows:

(1) Any person who-

- [18] The appellants were convicted on the main charge of fraud on counts 1, 3 and 4. The magistrate found that the appellants had fraudulently misrepresented MCC's income to SARS by submitting MCC's income tax returns for the relevant tax years without reflecting the commissions as part of MCC's gross income. The tax returns had all been prepared by the first appellant and all were signed by the second appellant,
- [19] The appellants contend that the omitted commissions did not form part of MCC's '*gross income*' and that the tax returns were correct. If this contention is upheld, the appellants must be acquitted on counts 1, 3 and 4 because it is an element of all of these counts that MCC's income tax returns were wrong in that they did not contain the omitted commissions.
- [20] The appellants contend further that if it should be found that the omitted commissions did form part of MCC's '*gross income*' and that MCC's tax returns were wrong in not containing the omitted commissions, the appellants must nevertheless be acquitted because the evidence does not establish that the appellants acted with the requisite *mens rea* in omitting the commissions from MCC's tax returns.

(c) fails to show in any return made by him any portion of the gross income received by or accrued to or in favour of himself or fails to disclose to the Commissioner, when making such return, any material facts which should have been disclosed; or shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 24 months.

- [21] We turn to the question whether the omitted commissions did form part of MCC's '*gross income*'.
- [22] It is important to bear in mind throughout the obvious, that is, that the second appellant, MCC, Logoprops and Lodge 816 are separate entities despite that fact that the latter three corporate entities are 'owned' and are controlled by the second appellant.
- [23] The three transactions which resulted in the commissions being omitted from MCC's gross income and which gave rise to counts 1, 3 and 4 were referred to in argument as the Lodge 816 transaction, the Sadowsky transaction and the Links transaction, respectively.
- [24] Before dealing with the three transactions, it is necessary to set out the history of earlier acquisitions of properties at Fancourt by the second appellant.
- [25] In August 1991 the second appellant purchased his first property at Fancourt, a one-eighth share in Lodge 611. The second appellant could not afford the price of R65 000 for the share. He discussed the problem with Mr Freer the then managing director of Fancourt who agreed to assist the second appellant by reducing the price of the share in Lodge

611 against MCC waiving pending commissions. The transaction was recorded as follows in an addendum to the original contract between MCC and Fancourt Holdings. 'It is hereby agreed that progress payments due for your share on Lodge no 611 ... will be deducted from your commissions on real estate by way of a journal entry in the books of Fancourt Holdings. Such method can and will only be used in the event that commissions are due and payable to you at the time of payment'.

[26] There is no evidence as to how the transaction was treated for income tax purposes. The second appellant could not remember. This transaction is significant for two reasons. First, it was the first time the second appellant financed the acquisition of property at Fancourt with a waiver of commission by MCC and secondly, the first appellant had nothing to do with the transaction.

[27] Later, it is not clear precisely when, the second appellant sold his share in Lodge 611 and purchased a one-fifth share in Lodge 820, a larger and more expensive property. He financed the transaction with the proceeds of the sale of his share in Lodge 611 and took out a mortgage bond for the balance.

[28] We now turn to the three transactions which gave rise to the three charges on which both the appellants were convicted.

[29] The Lodge 816 transaction. In April 1998 the second appellant wanted to buy the property at Fancourt known as Lodge 816 from Plattner on behalf of the le Roux Family Trust or its nominee. The second appellant and his family entities did not have sufficient cash to pay the full purchase price of R1,5m. Plattner owed MCC commission of R 500 000 on sales of property at Fancourt effected through the agency of MCC. The second appellant agreed with Ms Diesel the CEO of Plattner that MCC waive its claims to the commissions of R 500 000 and that Plattner in turn reduce the price at which it sold Lodge 816 to the le Roux Family Trust or its nominee, by R500 000 to R1m. The deal was done and the le Roux Family Trust nominated the company, Lodge 816 as the purchaser.

[30] The Sadowsky transaction. In February 2000 the second appellant purchased a property at Fancourt known as house 2034 from Plattner on behalf of Logoprops. This purchase was part of a larger and complicated series of transactions which also involved a Mr Sadowsky. It is not necessary for purpose of this appeal to set out the detail of the interrelated contracts that were all concluded during February 2000. The essential elements for purposes of this appeal is that these transactions again included a waiver of commissions owed to MCC and included the fact that in terms of a proposal made by the second appellant which was agreed to by Ms Diesel on behalf of Plattner, the second appellant purchased House

2034 in the name of Logoprops at a price which Plattner in effect agreed to reduce from R2,4m by R665 700, being the total of MCC's claims for commissions it waived in favour of Plattner.

- [31] The Links transaction. Membership of the Links golf course at Fancourt is by invitation only and whoever joins the Links is required to make a long term loan deposit of R250 000 and must further pay an annual membership fee of R25 000. In 2002, the second appellant, who had been invited by Mr Plattner to join the Links and second appellant's, friend Mr Mahon applied for Links membership. The second appellant agreed with Mr Mahon to pay his deposit of R 250 000 and the first annual dues of R25 000 to Plattner and Mr Mahon agreed to deposit an equivalent amount in second defendant's bank account in London. The second appellant was consequently obliged to pay Plattner R 550 000 for himself and Mr Mahon. He was not able to do so in cash and second appellant arranged with Mr du Plessis who had succeeded the first appellant who had by this time left Fancourt as financial officer, to settle the amount of R 550 000 by a waiver of commission earned by MCC on sales of Fancourt property effected by MCC. The second appellant then arranged for the Links membership to be issued to Logoprops. He did so, he testified, because the first appellant had advised him that there might be a tax benefit in doing so.

[32] Two points must be emphasised at the outset. MCC relinquished the commissions before it received the commissions and MCC received nothing in return for relinquishing the commissions. The benefit derived from MCC relinquishing the commissions went to the second appellant and two of the entities owned and controlled by the second appellant, namely Lodge 816 and Logoprops. The benefit obtained by Logoprops and Lodge 816 was that it enabled them to buy the Fancourt properties at prices reduced by the amounts of the commissions and Logoprops and Mr Mahon also acquired Links membership and one year's subscription without paying Plattner anything. Mr Mahon in turn, paid the equivalent amount in foreign currency into second appellant's bank account in London. It is important, in our view, to bear in mind that the question is not whether the second appellant or the Le Roux Family Trust or Logoprops or Lodge 816 or all of them should have paid tax on the commissions. The question is whether MCC was liable to pay tax on the commissions, which should consequently have been included in MCC's tax returns as part of MCC's gross income.

[33] It is common cause between the state and the appellants that MCC relinquished the commissions before the properties in question were transferred to the purchasers. The state and the appellants differ on whether MCC's right to payment of the commissions was conditional on

the transfer of the properties. The appellants contend that the MCC's claims to payment of the commissions were subject to the suspensive condition that transfer of the properties take place. The state contends that the transfer of the properties did not constitute a suspensive condition and that payment of the commissions was merely postponed in each case until the transfer took place.

[34] The answer to this dispute lies in the proper interpretation of the contract between MCC and Plattner and not in an interpretation of the individual contracts of sale between Plattner and the buyers.

[35] MCC's contract with Plattner was concluded on 30 November 1995. The commission clause reads as follows:

9.1 The Consultancy (MCC) shall be entitled to receive commission of 5 (five) per centum on all its sales in respect of Corporate mansions, executive lodges, family homes and erven in the resort development effected and concluded by the Consultancy.

[36] The state accepts that the use of the words 'effected and concluded' postulate two requirements. Ms Hendry submitted that clause 9.1 means that MCC was unconditionally entitled to the commission as soon as the contract of sale was entered into and all the suspensive conditions, if any, in the particular contract of sale were met. All that was postponed until

transfer of the property was the payment of the commission. In her heads of argument, she put this contention as follows:

‘once all conditions of the sale have been met, transfer is a certain albeit future event.’

[37] We agree with the submissions of Mr Trengove, who appeared for the second appellant, that the ordinary meaning of the words used contain two separate requirements namely that the contract of sale must not only be ‘effected’, that is, be entered into by Plattner and the purchaser, but also that the sale was ‘concluded’. The latter could not again mean that the contract was made. The use of the word ‘concluded’ must have been intended to add a further requirement. We agree with counsel’s contention that the sale, having been made, that is ‘effected’ when it was entered into, was only ‘concluded’ when it was finally given effect to by the transfer of the property.

[38] This interpretation, based on the ordinary meaning of the words used in the contract is supported both by the history of the contract and by the way the parties to the contract understood and implemented the contract.

[39] The contract between MCC and the erstwhile owners of Fancourt is the predecessor of the contract between MCC and Plattner. Clause 9.2 of the

earlier contract is quoted above. It provides that MCC was entitled to commission on sales 'effected and concluded', but continued to expressly provide that the commission was only payable 'once transfer has taken place', that is, that MCC claim to commission was subject to the express condition that transfer of the property sold did occur. Unlike the earlier contract, the contract between MCC and Plattner does not expressly provide that commission is only payable once transfer has taken place. There is no suggestion however, that when Plattner and MCC later concluded their contract, the parties to the latter contract intended, by not repeating the express term regarding transfer, to change the position with regard to MCC's entitlement to commission. The contract with Plattner must accordingly, in our view, be seen in the aforesaid context, to mean that the payment of commission was subject to the transfer of the property sold.

[40] In addition to this historical context, it is clear from the evidence of the second appellant, confirmed as it was by a number of the witnesses on behalf of the State, that if a sale did not proceed to a successful transfer, MCC was not entitled to the commission on the sale.

[41] All the witnesses who testified in regard to the manner in which the contract was implemented confirmed that Plattner had a strict rule that MCC was only entitled to payment of the commission upon transfer of the

properties sold. This appears from the evidence of Mr van Vuuren the SARS investigator who commenced his investigation of the second appellant's tax affairs in June/July 2003, Ms van Zyl⁴ the chartered accountant who was employed by Plattner in various capacities since 2004, Ms Louw who was employed by Plattner as 'development bookkeeper' from 1999 to 2001, Mr du Plessis who was employed by Plattner from April 2001 first as development accountant, and thereafter as chief financial officer, Ms Pirrie the sole member of Pirlak CC who worked as a sub-agent to MCC in the selling of Fancourt property, Ms Ingrid Diesel, who was first employed at Fancourt in 1991 and who became the chief executive officer of Plattner in 1995.

[42] The sub-contract concluded between MCC and Pirlak CC on 15 May 1999 in respect of which Ms Pirrie testified, also strengthens the conclusion that the payment of commission was dependant on the successful transfer of the property sold. This sub-contract, which was clearly intended by the parties thereto to accord with the position which existed between MCC and Plattner, expressly provided that in respect of sales 'introduced and concluded' by Pirlak CC, MCC would pay commission to Pirlak CC 'on transfer'.

[43] The magistrate commenced his reasoning on the issue of the waiver of the commission by stating that the role of the second appellant should not

⁴ Van Zyl, stated: 'As daar geen oordrag is nie is daar ook geen kommissie betaal nie.'

be ignored and by pointing out that in his view this was a case of a barter in which the second appellant 'as the common denominator traded MCC's right to the commissions for a benefit to Logoprops, Lodge 816 or other entity'. In the process, the magistrate held, MCC 'received a major tax advantage.' This approach of the Magistrate does not account for the fact that the second appellant, a natural person and the corporate entities controlled by him, are all separate persona in law. On the other hand, the magistrate, recognising the existence of separate entities in law, held that 'the corporate veil' between the second appellant and the corporate entities controlled by him, needed to be pierced.

[44] We agree with Mr Trengove's submissions that the piercing of the corporate veil is not appropriate in this case and that, in any event if it were done, would not further the State case. It is clear from the evidence that the second appellant established the separate corporate entities in good faith for sound commercial reasons and that the waiver of the commissions occurred lawfully, in good faith and for practical commercial reasons, namely, the second appellant's lack of cash. There is no evidence that the waivers were done for income tax purposes. There was no fraud or other improper conduct in the establishment of the corporate entities or in the use of the separate corporate entities by the second appellant in the conduct of the affairs of those entities.⁵ In any event, if

⁵ In the *Shipping Corporation of India v Erdoman Corporation* 1994 (1) 550 (A) at 566E, Corbett, CJ stated: 'I do not find it necessary to consider, or attempt to define, the

the separate legal entities were to be ignored, the consequence would be that the benefit of the waived commissions accrued to the second appellant personally. The state case is, however, that the commissions accrued to MCC. A piercing of the corporate veil will not assist the State case.

- [45] In considering the question whether MCC had divested itself of the commission prior to its accrual, the magistrate cautioned against becoming 'so technical that you may run the risk of being unable to see the wood for the trees' and concluded that even if MCC intended divesting itself of the commissions before it became unconditionally entitled to it on transfer, this intention should 'not be seen in isolation'. The real intention was, so the magistrate appears to reason, that MCC would only divest itself of the commissions after the transfer of the properties occurred. This is so, the magistrate held, because it was 'improbable', since Plattner would not have put itself at risk, that Plattner would have given the benefit of discounts to Logoprops and Lodge 816 before MCC was unconditionally entitled to the commissions waived. 'The real set-off or

circumstances under which the Court will pierce the corporate veil. Suffice it to say that they would generally have to include an element of fraud or other improper conduct in the establishment or use of the company or the conduct of its affairs. In this connection the words '*device*', '*stratagem*', '*cloak*' and '*sham*' have been used (see the discussions in *Lategan and Another NNO v Boyes and Another* 1980 (4) SA 191 (T) at 200E-202A; *Dithaba Platinum (Pty) Ltd v Erconovaal Ltd and Another* 1985 (4) SA 615 (T) at 624B-625J; and the recent decision of the English Court of Appeal in the case of *Adams and Others v Cape Industries plc and Another* [1991] 1 All ER (Ch & CA) at 1022b-j, 1024d-1025f).

barter would ... have occurred not when (MCC) agreed with Plattner not to be paid the commission, but when the condition was met (upon transfer)', the magistrate concluded.

[46] The magistrate's conclusion that Plattner would not have put itself at risk is not supported by the evidence. None of the witnesses who had knowledge of Plattner's affairs stated that Plattner would not have given unconditional discounts in exchange for MCC waiving commissions that would be paid only after transfer. The evidence was, in fact, to the contrary and the witnesses all stated not only that MCC's commissions were only paid after transfer but also that Plattner did give unconditional discounts in exchange for the commissions waived by MCC, at the time when the transfers had not yet taken place.

[47] In the alternative, the magistrate concluded, MCC's claim to the commission was not conditional upon transfer taking place and 'the barter or set-off occurred immediately when the contract was effected and concluded (meaning that any suspensive condition in the contract was fulfilled)'. It followed, the magistrate concluded, that MCC was unconditionally entitled to the commissions at the time that the waiver occurred.

[48] Finally, dealing with the fact that the commissions were only paid to MCC

once transfer took place, the magistrate held:

“It is clear that only the payment of these commissions were “sacrificed”. Accused 4 (MCC) earned them and would be entitled to them when the underlying contracts were effected and concluded. The common practice was that payment would only follow on transfer. The amounts therefore accrued to accused 4 at that earlier time. The addendum to sales contract referred to in par 18 above, agreeing that *“over & above the offer in the contract purchaser agrees to pay to the seller R500 000 (five hundred thousand) in commissions as they arrive, schedule to be agreed”* (my underlying), confirms this interpretation.”

- [49] The magistrate concluded that the sales were ‘effected’ when they were made and that the sales were ‘concluded’ when the contracts of sale were no longer subject to any internal suspensive conditions to the sales themselves. In our view, this interpretation does not accord with the ordinary meaning of the words used, the history of the contract and with the manner in which the parties (MCC and Plattner) understood and implemented the contract. In our view, the magistrate was wrong in concluding that the contract provided for a mere delay in the payment of commission to the date of transfer.

[50] In law a distinction is drawn between a suspensive condition and a time clause. A condition qualifies a contractual obligation by making its operation and consequences dependent on the happening of an uncertain future event, *a dies incertus an*. If it is both certain that an event will occur and when it will occur, *a dies certus an, ac quando* or certain that it will occur but uncertain when it will occur, *dies certus an, incertus quando*, it is not a condition but a time clause.

See: de Wet and van Wyk, Die Suid Afrikaanse Kontraktereg en Handelsreg, 5th Ed, at 146; 147 and van der Merwe, et al, Contract: General Principles, 3rd Ed, at 287; 294.

[51] Transfer is an uncertain future event which may never occur even though all the suspensive conditions in the contract of sale may have been fulfilled. Where payment of the commission is postponed until such an uncertain future event occurs, it is subject to a suspensive condition suspending the obligation to pay. In Southern Resources Ltd v Furdell [2009] ZASCA 150 par [11] the SCA again confirmed this to be the position. Ms Diesel expressly testified that the way the parties implemented the contract was that MCC was not entitled to commission on sales which were cancelled before transfer. If the transfer does not occur, MCC forfeits the commission on the sale. As was pointed out in

argument by Mr Trengove, it makes no sense to say that MCC remained entitled to commission because its right to the commission was not dependent on transfer but that if transfer does not take place, MCC could never claim the commission because the payment of the commission ‘would only follow on transfer’. This is simply another way of saying that payment of the commission was dependent on transfer, an uncertain future event, taking place.

[52] The commissions were waived by MCC before it became unconditionally entitled to payment of the commissions and, the evidence is clear, MCC also did not receive anything in return for waiving the commission.

[53] We turn to the question whether the commission waived by MCC before it became unconditionally entitled thereto, nevertheless formed part of its “gross income” and therefore constituted taxable income in the hands of MCC. MCC’s gross income in terms of section 1 of the Income Tax Act is “the total amount, in cash or otherwise, received by or accrued to or in favour of” MCC.

[54] Since it is common cause that MCC never received the waived commissions, the question is whether these commissions nonetheless “accrued” to MCC.

[55] An amount “accrues” to a taxpayer when the taxpayer becomes unconditionally entitled to it. See Hersov’s estate v CIR 1957 (1) SA 471 (A) at 481 H- 482A; Mooi v SIR 1972(1) SA 575 (A) at 684D-G; CIR v Cactus Investments 1999 1 SA 264 (T) at 275H-J; Hochberg v CIR 1933 CPD 256 at 264.

[56] Meyerowitz on Income Tax 2007. 2008 at 16.18 puts it as follows:

“There can be no accrual until the taxpayer has become entitled to a right to payment. So, if the right to payment depends upon the fulfilment of a condition, there can be no accrual until the condition has been fulfilled. The condition, it is considered, may relate either to the taxpayers entitlement to payment or to the quantum to which he is entitled. Thus in the case of a builder, where the contract provides for payment on architect’s certificates there is no accrual until the architect issues his certificate. This applies equally to the retention monies even after the building has been completed. Where there is no provision for payment and no payment before the completion of the contract, there is no accrual before the contract is completed.”

[57] At 6.26 Meyerowitz considers the accrual of commissions earned and states the following:

“If commission is payable on the conclusion of the contract, e.g. when the principal confirms the order booked by the agent, that will be the date of accrual. If the commission is only payable after delivery of the goods ordered (in this case the equivalent of transfer of the properties sold) or upon payment by the debtor, the date of accrual will be date of delivery (transfer in this case) or payment as the case may be”.

[58] In *Silke on South African Income Tax* page 2-12-2 paragraph 2.7 the authors deal with the same point in the following manner:

“Restating this principle before this same court in Hochberg v CIR, Watermeyer J, who delivered the judgment of the court, made it clear that before an amount can accrue in terms of this principle, the taxpayer’s right to claim payment must be unconditional. If the right to claim future instalments is conditional or dependant on performance by the taxpayer of certain obligations or the fulfilment of certain terms – for example, the obligation to deliver property or render services or the approval of a third party – there can be no accrual under the Act until the obligations have been complied or the conditions fulfilled, since until these events have taken place the taxpayer is not entitled to claim payment.”

[59] We next consider the question whether MCC was lawfully entitled to waive the commissions and thereby divest itself of the income before it accrued

to it and thus lawfully avoided liability to pay income tax on the commissions waived. In CIR v King 1947 (2) SA 196 (A) at 211 – 212, Watermeyer CJ held that it was legitimate for a taxpayer to divest itself of income before it accrued to it and so to avoid liability on income tax and stated the following:

“This scheme for calculating the taxable amount affords several opportunities for the ingenious person to put into operation a transaction which is designed to free himself from taxation in respect of monies which should be taxable in his hands because they are in reality his income for the year. (By the words “in reality his income” I mean they are the produce of his capital or his labour or both). For example, seeing that the “gross income” of a person is defined as the total amount “received by or accrued to or in favour of that person”, a taxpayer can while retaining the ownership of his capital, arrange for the fruits of that capital, which are in reality his income, to be received by someone else and thus he can free himself from taxation in respect of these monies”.

[60] In Taxpayer v Commissioner of Taxes, Botswana (1980) 43 SATC 118 at 131 Maisels, P held as follows:

“I agree with counsel for appellant that income does not “accrue” (in the ordinary sense of that expression) to or in favour of a taxpayer who has

ceded his right to claim and receive the income and has thus divested himself of that right. There is as is demonstrated in the cases quoted by appellant's counsel an important distinction between a disposal of income after it has accrued to a person and a disposal by him of a right to income which would only accrue in the future. In the former case, as the income has already accrued to the party who disposes of it, it remains taxable in his hands. In the latter case the income accrues to the recipient of the right and not to the person who has disposed of the right".

See also CIR v Cactus Investments 1999 (1) SA 264 T at 281 F-H where it was stated by Wunsh J with reference to the decision of the then appellant division in First National Bank of SA Limited v Lynn N.O. and Others 1996 (2) SA 339A:

"A person can effectively divest himself or herself of a right which is to accrue in the future by means of a cession thus removing one possible obstacle to the view that a person could, for tax purposes, divest himself or herself of a right to income by ceding it before it accrues".

[61] In this case MCC waived the right to the payment of the commissions at a time when the payment of the commissions was still conditional upon the transfer of the properties sold. On the principles set out above, there was no actual accrual of the commissions waived by MCC.

[62] Paragraph (c)(ii) of the definition of gross income in the Income Tax Act provides for the deemed accrual of income in certain circumstances.

[63] Paragraph (c) of the definition of gross income includes any amount ... received or accrued in respect of services rendered or to be rendered or any amount ... received or accrued in respect or by virtue of any employment or the holding of any office. Provided that:

- (i) (this sub paragraph is not relevant to our enquiry and excludes from paragraph (c) certain fringe benefits)
- (ii) any amount received by or accrued to or for the benefit of any person in respect of any services rendered or to be rendered by any other person shall for the purposes of this definition be deemed to have been received by or to have accrued to the said other person.

[64] The court a quo found that the benefit of the reduced prices paid by Logoprops and Lodge 816 for the properties purchased by them from Plattner constituted “amounts” which had accrued to them “in respect of services rendered” by MCC and that those amounts should accordingly be deemed to have accrued to MCC.

[65] Mr Trengove submitted that:

1. the discounts Logoprops and Lodge 816 received from Plattner did not constitute 'amounts' which accrued to them and, in any event,
2. the discounts did not accrue to Logoprops and Lodge 816 in respect of 'services' rendered by MCC within the meaning of paragraph (c)(ii).

[66] We turn first to the question whether the discounts received by Logoprops and Lodge 816 were "amounts" within the meaning of paragraph (c)(ii). In Commissioner for Inland Revenue v People's stores Pty Limited 1990 (2) SA 353 AD at 363I - 364A Hefer JA held the following:

The first and basic proposition is that income although expressed as an **amount** in the definition need not be an actual amount of money but may be "every form of property earned by the taxpayer whether corporeal or in incorporeal, which has a money value . . . including debts and rights of action" (per Watermeyer J at 209 in Lategan v CIR 1926 CPD 203). This proposition is obviously correct so that very little need be added to what Watermeyer J himself said in support thereof.

At 364H – I Hefer JA however pointed out:

It must be emphasised that income in a form other than money must

in order to qualify for inclusion in the “gross income” be of such a nature that a value can be attached to it in money. As Wessels CJ said in the Delfos case 1933 AD 42 at 251: “ the tax is to be assessed in money on all receipts or accruals having a money value. If it is something which is not money’s worth or cannot be turned into money, it is not to be regarded as income”. (See also Mooi v SIR (supra) at 6838 –F). On the other hand, the fact that the valuation may sometimes be a matter of considerable complexity of the Lace Proprietary Mines case (supra) at 279-281) does not detract from the principle that all income having a money value must be included. How the valuation is to be done depends of course, entirely on the nature of the income and the circumstances of the case.

[67] The question is therefore whether the discounts received by Logoprops and Lodge 816 on the price of the properties purchased by them at less than market value constitute “amounts”. In CIR v Hersov 1952 (1) SA 485 (A) a company agreed with a director to compensate him for waiving certain rights and for agreeing to vote his shares in favour of a resolution sponsored by the company. The compensation received by the director was in the form of shares issued to him at a price well below the market value. One of the questions in the case was whether the discount was taxable in the hands of the director. The court held that the discount on the price of the shares was not taxable in the hands of the director and pointed

out that

“We know that the market value of the shares were much greater than the normal value but the mere fact that the taxpayer buys a commodity at a bargain price does not entitle the fiscus to demand payment of income tax on the difference between the real value of the commodity and the price paid for it”.

[68] In Commissioner v Brummeria Renaissance 2007 (6) SA 609 SCA the court held that the benefit of an interest free loan given in exchange to occupants of a retirement village of a right to occupy units in the village for life, constituted “amounts” that were received or accrued to the developer of the village. SARS has issued the following note on the interpretation of Brummeria. It is made clear that SARS understands Brummeria to apply only where the recipient of an interest free loan receives it in exchange for goods sold, services rendered or some other benefit granted by the recipient to the lender:

‘It is evident from the facts of the Brummeria case, that the rights to use the interest free loans were intended by the lenders (the occupiers of the units) to be in exchange (or as a *quid pro quo*) for the life rights granted by the borrower. It, therefore, logically follows that the principles from that judgment may be applied in all cases where benefits in the form other than

money (such as the right to use an interest free loan) are granted in exchange (or as a *quid pro quo*) for goods supplied, services rendered or any other benefit given.'

[69] The magistrate held that the discounts received by Logoprops and Lodge 816 did constitute "amounts" for the purposes of paragraph (c)(ii). This is so, it was held because "it is improbable that these are normal discounts in the commercial sense" and because of the role played by the second appellant, being the member and director of both Logoprops and Lodge 816, he "would obviously not have allowed accused 4 (MCC) to sacrifice commission it earned without getting similar value in return in another form".

[70] In our view Mr Trengove correctly pointed out that the *quid pro quo* for the discounts received by Logoprops and Lodge 816 were not given by those entities themselves but were given by MCC. Logoprops and Lodge 816 therefore received the discounts without giving anything in return therefor. The fact that MCC was prepared to waive the commissions so that Logoprops and Lodge 816 could get a benefit occurred because the second appellant controlled all three these entities. The fact that they were all controlled by one person, does however, not remove the fact that they are separate legal entities.

[71] Mr Trengove further submitted that even if the court should hold that the discounts given to Logoprops and Lodge 816 constituted “amounts”, the question remains whether paragraph (c)(ii) deems those amounts to have been received by or to have accrued to MCC. In terms of paragraph (c)(ii) the amounts are deemed to be received by or accrued to MCC if Logoprops and Lodge 816 received the amounts in respect of services rendered by MCC. Mr Trengove submitted that if paragraphs (c)(ii) is applied literally the amounts received are deemed to be received by the natural persons who rendered the estate agency services in consideration for which Plattner granted the discounts to Logoprops and Lodge 816. The people who rendered these services were either the second appellant, MCC’s other staff and agents or MCC’s sub-agent, Ms Pirrie. On the State’s own case the literal application of paragraph (c)(ii) cannot therefore be applied.

[72] In Commissioner v Professional Contract Administration 2002 (1) SA 179 (T) the full bench of the then Transvaal Division of the High Court considered the problems created by a literal application of the provision of paragraph (c) (ii) and held that paragraph (c)(ii) should not be applied literally in all cases where a company provides a service to its customers and receives payment for it. If paragraph (c)(ii) is applied literally, the payment must be deemed to have been received, not by the company, but by the company’s employees who actually rendered the service. (See

185F-I). The court held that paragraph (c)(ii)

applies only where the substance of a contract (as opposed to its form) demonstrates that the contract concluded between a body corporate and a third party, is one where the member of the body corporate and not the body corporate itself, in fact renders the service. (At 191B-C).

[73] This is then an instance where the courts recognised that a literal application of paragraph (c)(ii) cannot be applied.

[74] A further instance where a literal application of paragraph (c)(ii) is not followed is the SARS practice note of 2 September 1985. The relevant part reads as follows:-

It is accepted that this deeming provision is not of application where a natural person (Mr X) is nominated by his employer to act as a director of a company (company A) in which the said employer is a shareholder and where any directors fees which may become payable by company A in respect of the directorship of Mr X are in terms of a contract payable by company A either to the employer direct or to Mr X subject to a condition requiring Mr X to pay the directors fees over to and for the benefit of the employer. The director's fees will therefore not be subject to tax in the hands of Mr X but will be

taxed in the hands of the employer.

Meyerowitz commented on this practice note in an article in the Taxpayer 1985 at page 187, where he pointed out that the practice was at variance with the 'uncompromising language' of paragraph (c)(ii). Although agreeing that the practice is 'a proper one according to the reality of a situation which is common in business arrangements', Meyerowitz added that

'in view of the uncompromising language of paragraph (c)(ii) which does not admit of a possible construction supporting this practice, that paragraph should be legislatively amended to support the practice'.

[75] Silke on South African Income Tax Vol 1 page 4 – 177 para 4.68 is of the same view, pointing out that 'SARS has usurped the function of the legislature' and suggests that an amendment to paragraph (c)(ii) is necessary to give effect to the 'otherwise commendable objective of SARS'.

[76] The above two examples given by Mr Trengove of instances where paragraph (c)(ii) should not and is not applied literally, do not apply directly to the facts of this case. These are simply two examples of instances where the literal application of paragraph (c)(ii) is not followed

by our courts and by SARS itself.

- [77] Paragraph (c)(ii) concerns amounts received in respect of “services rendered or services to be rendered”, a phrase capable of a wide and narrow interpretation. It includes services rendered by an independent contractor and services rendered under a contract of employment. Mr Trengove submitted that the context, history and purpose of paragraph (c)(ii) show that a narrow interpretation is the proper one. He illustrates the further anomalies that are created when paragraph (c)(ii) is applied literally to the services of an independent contractor such as MCC in this case, as opposed to the services of an employee, with the following example and we quote from his heads of argument:

Take an example of an owner who employs a contractor to build a house for R1m. The contractor in turn employs a sub-contractor to build a house for R800 000.00. There is no diversion between the substance and the form of their contracts. On completion of the house, the owner pays the contractor R1m. The contractor in turn pays the sub-contractor R800 000.00. But if paragraph (c)(ii) is applied to these facts, the sub-contractor is deemed to have received the full R1m (because it rendered the service of building the house) and the contractor is deemed to have received

nothing. This can clearly not be correct. There must be a further limitation read into paragraph (c)(ii) to avoid such an absurd result.

[78] We do not repeat herein the full argument addressed in the heads of argument by Mr Trengove in support of these submissions because in our view it is not necessary to decide the issue of the correct interpretation of paragraph (c)(ii) on this point in these proceedings.

[79] In our view it has been clearly demonstrated that the meaning of paragraph (c)(ii) in the context of this case is obscure and uncertain. This is relevant to the question whether the State has proved beyond reasonable doubt that the appellants acted with the necessary mens rea. If MCC's income tax returns were wrong in not reflecting the commissions waived because those commissions must be deemed to have accrued to MCC, the question of mens rea remains to be considered.

[80] In considering the mens rea of the first and second appellants, we do so on the assumption, but without deciding that the commission waived by MCC must be deemed to have accrued to MCC and that, for this reason, it formed part of MCC's gross income.

[81] It was common cause during the course of argument between the State

and the appellants that both the main charge of fraud and the first alternative charge of contravening of section 104 (1)(a) of the Income Tax Act require proof of mens rea in the form of intention or dolus. We agree with counsel in this regard.

[82] The first appellant did not testify as to his own state of mind. The second appellant gave evidence and denied that he knew that the commissions waived by MCC had to be included as part of its gross income.

[83] We first consider the implications of the first appellant's decision not to testify or call any witnesses.

[84] In Osman and Anor v Attorney & General Transvaal 1998 (4) SA 1224 (CC) and S v Boesak 2001 (1) SA 912 (CC) the Constitutional Court dealt with an accused's right to remain silent at the trial. In Osman it was put as follows at paragraph [22]:

“Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a *prima facie* case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that, absent any rebuttal, the prosecution's

case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice”.

This statement was endorsed in Boesak at paragraph [24].

‘The right to remain silent . . . arises again at the trial stage when an accused has the right to be presumed innocent, to remain silent, and not to testify during the proceedings. The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence’.

[85] The first appellant therefore had the choice whether to testify. In making this decision he is required bear in mind that if the evidence of the state remains uncontested, a conviction may follow because the court has

concluded that the evidence is sufficient, in the absence of an explanation, to prove his guilt.

- [86] The magistrate considered the following aspects of the evidence to be significant. The first appellant was an accountant. He had worked for SARS for 5 years. However, he did not work in their VAT section as the magistrate found. Thereafter he worked as a financial manager at Fancourt before he started FMC. He advised clients on various tax related issues – and he *‘obviously has at least a working knowledge of Tax Law’*. The magistrate appears to conclude that this constituted evidence calling for an answer from the first appellant. The magistrate puts it as follows:

‘If accused 1 honestly believed that the income tax treatment of the ‘sacrificed’ commissions were correct, he should have explained to the court why he held that belief. I do not find it strange that he elected not to testify. He would unquestionably have experienced major problems during cross-examination explaining such belief’.

- [87] Turning to the evidence implicating the first appellant in respect of count 1, the magistrate pointed out that at the time the commissions were ‘sacrificed’, the first appellant was employed as the financial manager at Fancourt – and that he would have known that SARS would be unaware

of the fact that MCC had earned the commissions because MCC had not issued invoices in respect of the commissions while Plattner issued an invoice for R1,14m to the purchaser while reflecting a selling price in its books of R1,5m. This, the magistrate concluded, justified the inference that the first appellant had 'facilitated the misrepresentation' to SARS by the second appellant and by MCC. The magistrate ended his comments regarding first appellant's mens rea in respect of count 1 with the comment:

'If he did not (facilitate the misrepresentation) he should have told us that'.

[88] Turning to the events giving rise to count 4, the magistrate pointed out that by this time, the first appellant was the accountant for MCC and the second appellant. As accountant, the magistrate concluded, the first appellant 'clearly knew' that the commissions waived were used to acquire the Links membership and commented:

'If he did not know this, he should have told us that'.

[89] Taking the three counts of fraud relating to income tax together, the magistrate concluded that the first appellant 'was patently involved in these transactions and indisputably knew that income tax would not be

paid by (MCC) when the transactions were concluded in this manner. In the absence of an explanation, the only reasonable inference is that he knew that this was illegal’.

[90] The magistrate appears to have reasoned as follows: Because the first appellant knew the facts of the transactions and that the commissions were waived by MCC and enured to the benefit of Logoprops and Lodge 816, it was first illegal not to declare the commissions as part of MCC’s gross income and secondly, that, in the absence of an explanation, the first appellant must be held to have known this to be illegal.

[91] The second appellant gave evidence and denied that he knew that the waived commissions was part of MCC’s gross income and required to be reflected as such in MCC’s tax returns.

[92] It is for the State to prove that the appellants knew or foresaw (*dolus*), or ought to have known (*negligence*) that in the circumstances of this case, the waived commissions did form part of MCC’s gross income. In our view, for the reasons stated hereunder, the State did not discharge this onus.

[93] The State case in regard to the appellants’ mens rea is based entirely on circumstantial evidence. The two cardinal rules of logic set out R v Blom

1939 AD 188 at 202 – 203 must therefore be satisfied:

1. The inference to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.
2. The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences there must be a doubt whether the inference sought to be drawn is correct.

[94] We have found that the commission did not actually accrue to MCC. In line with our assumption that for purposes of this judgment, it was nevertheless deemed to have accrued to MCC, the issue of mens rea must be determined on the basis that the commissions must be deemed to have accrued to MCC in terms of paragraph (c)(ii).

[95] The court a quo first proceeded on the incorrect premise that mens rea could be determined on the basis that the commissions actually accrued or that it was deemed to have accrued or both. If the commissions actually accrued to MCC the commissions cannot also be deemed to have accrued to it. It cannot be both.

[96] The question of the first and second appellants' mens rea in regard to the

main charge of fraud and the first alternative charge is therefore whether the state has proved that the appellants acted *dolo malo*, that is that they subjectively knew, or foresaw the possibility, that the waived commissions were deemed to have accrued to MCC and that they proceeded to complete and sign MCC's tax returns with such knowledge or foresight.

- [97] At the time that the commissions were waived by MCC and also when the tax returns for the relevant tax years were submitted by the first and second appellants the authoritative statement on the issue of whether the benefits received by Logoprops and Lodge 816 constituted "amounts" in their hands was that of the Appellate Division in Hershov's case where Centlivres CJ stated:

"the mere fact that a taxpayer buys a commodity at a bargain price does not entitle the fiscus to demand payment of income tax on the difference between the real value of the commodity and the price paid for it". (At 491E-F)

This is how the law was understood at the time. The judgment of the SCA in Brummeria was handed down in September 2007. This was long after the events that gave rise to the charges in this case. The statement of the SCA in Brummeria clearly applies to the law as it was between 1998 and 2002 when the commissions were waived and the tax returns were

submitted. However, the question is whether the only reasonable inference is that, at the time the first and second appellants submitted MCC's tax returns, they appreciated the implication of paragraph (c)(ii) to be in line with the principles set out subsequently in the Brummeria judgment. To answer this, regard must be had to the law as it was understood at the time. One cannot judge the state of the appellants' knowledge and foresight during the period between 1998 and 2002, in the light of the statement of the law as pronounced by the SCA in September 2007.

[98] It is against this background that the question must be asked whether the State has proven beyond reasonable doubt that the first and second appellants knew or foresaw the possibility that the waived commissions must be deemed to have accrued to MCC. In our view, the State has not discharged this onus.

[99] The second appellant testified that the transactions that involved MCC waiving the commissions were entered into by the entities controlled by him as a means of funding the acquisition of the immovable properties and the Links membership. This evidence was confirmed by the witnesses van Vuuren, du Plessis and Diesel. Over a period of some 12 years, beginning in 1991, the second appellant, openly and without any attempt at concealment, from time to time made use of this way of funding the

acquisition of property. The inference is unavoidable that the waiver of commissions was not used as a device to avoid paying income tax. The court a quo therefore correctly, on the evidence before it, held that 'there was not a conspiracy between (the first and second appellants) regarding this scheme'.

[100] We have referred earlier to the magistrate's findings in regard to the first appellant's mens rea. In our view, the magistrate was wrong in finding that the evidence adduced, seen as a whole, justified the inference that the first appellant had acted with the knowledge that his conduct was unlawful. The facts simply do not prove that the first appellant knew or foresaw the possibility that the commissions were deemed to have accrued to MCC.

[101] The magistrate concluded that the second appellant had greater knowledge of tax issues than he was prepared to disclose to the court. Even if this were the case, there is no evidence that justifies the (only reasonable) inference that the second appellant knew or foresaw that the commissions waived by MCC were deemed to form part of MCC's gross income in circumstances where the income was not received by MCC and where MCC did not receive anything in return for the waiver. The magistrate stated, however:

I can however not accept as reasonably possibly true his evidence that he did not see the income tax advantage in dealing with the commissions in the way they did. Any businessman, and definitely a very successful businessman like him, consciously structuring his business in the most tax-effective manner, would have realised that a major income tax benefit will follow if these commissions were not invoiced and paid out by Plattner in the normal way. It is not possible that he honestly believed that he (as MCC) did not have to pay income tax on amounts in excess of half a million rand earned at each of these occasions. The income tax benefit is so glaring that he would have been extremely foolish not to utilise this scheme on a regular basis.

[102] The magistrate's conclusion is that the second appellant's evidence given, 6, 8 and 10 years after the transactions were done, about his appreciation of the income tax implications at the time, cannot reasonably possibly be true. In our view, on all the evidence, the only reasonable inference is not that "he (as MCC)" knew or ought to have known that the commissions were deemed to have accrued to MCC at the time.

[103] The second alternative charge in counts 1, 3 and 4 is framed under section 75(1)(c) of the Income Tax Act, which makes it an offence for any taxpayer who fails "to show in any return made by him any portion of the gross income received by or accrued in favour of himself".

[104] The State and the appellants accept that negligence is the required mens

rea for this offence.

[105] The test for negligence is authoritatively laid down in Kruger v Coetzee 1966 (2) SA 424 at 430E-F in the following terms:

For the purposes of liability, culpa arises if:

- (a) a Diligens paterfamilias in the position of the defendant
 - (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss;
 - (ii) would take reasonable steps to guard against such a currence; and
- (b) the defendant failed to take such steps.

[106] The question to be asked is again related to the meaning and the interpretation of paragraph (c)(ii) of the Income Tax Act. The question is whether a reasonable accountant in the case of the first appellant and a reasonable businessman taxpayer in the position of the second appellant would have realised that the waived commissions might have been deemed to have accrued to MCC in terms of paragraph (c)(ii).

[107] We agree with Mr Trengove's submission that whatever the proper

interpretation of paragraph (c)(ii) might be, the meaning of paragraph (c)(ii) is obscure and uncertain. The meaning of paragraph (c)(ii) is relevant to the question of the first and second appellants' mens rea, that is whether they knew or ought to have known that the commissions should have been included in MCC's gross income because of the deeming provision contained in paragraph (c)(ii).

[108] In our view the State has not proved beyond reasonable doubt that a reasonable accountant and a reasonable taxpayer would have been aware of the correct interpretation of paragraph (c)(ii) and the implications of such interpretation. A reasonable person in the position of the first and second appellants would at best for the State have taken expert advice on the issue of whether the waived commissions must be deemed to have accrued to MCC. Had they done so, the answer they would then have received would probably have been in line with the then knowledge and appreciation of whether the waived commissions constituted amounts in the hands of MCC. As indicated earlier the pronouncement of the then Appellate Division in Hersov's case constituted the state of the law as understood by our courts at the time.

[109] In our view therefore the State has also not proved beyond reasonable doubt that first and second appellants were negligent in filling out the relevant income tax returns.

[110] It follows that the appellants were both wrongly convicted on counts 1, 3 and 4 on the main charge of fraud. They are also not guilty on any of the alternative charges on counts 1, 3 and 4.

[111] We now turn to the conviction of the first appellant on the Vat related charges, counts 5, 6, 7 and 9, each of which comprises:

1. a main charge of common law fraud;
2. a first alternative charge of theft;
3. a second alternative charge of contravening section 59 (1)⁶(a) read with sections 1 and 28 (1)⁷(a) and (b) of the Value-added Tax Act, 89 of 1991;

⁶ (1) Section 59 (1) reads as follows: Any person who with intent to evade the payment of tax levied under this Act or to obtain any refund of tax under this Act to which such person is not entitled or with intent to assist any other person to evade the payment of tax payable by such other person under this Act or to obtain any refund of tax under this Act to which such other person is not entitled-

- (a) makes or causes or allows to be made any false statement or entry in any return rendered in terms of this Act, or signs any statement or return so rendered without reasonable grounds for believing the same to be true; or
- (b) ...
- (c) prepares or maintains or authorizes the preparation or maintenance of any false books of account or other records or authorizes the falsifications of any books of account or other records; or
- (d) makes use of any fraud, art or contrivance whatsoever, or authorizes the use of such fraud, art or contrivance ...

shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 60 months.

⁷ (1) Section 28 (1) (a) and (b) reads as follows: Subject to subsection (4), every vendor shall, within the period ending on the twenty-fifth day of the first month commencing after the end of a tax period relating to such vendor or, where such tax period ends on or after the first day and before the twenty-fifth day of a month, within the period ending on such twenty-fifth day-

- (a) furnish the Commissioner with a return reflecting such information as may be required for the purpose of the calculation of tax in terms of section 16; and

4. a third alternative count of contravening section 59 (1) (c) read with sections 1 and 28 of the Value-added Tax Act;
5. a fourth alternative count of contravening section 59 (1) (d) read with sections 1 and 28 of the Value-added Tax Act;
6. a fifth alternative count of contravening section 58 (d)⁸ read with sections 1 and 28 of the Value-added Tax Act.

[112] The basis of the charges against the first appellant on counts 5, 6 and 7 is that if MCC had included the “*sacrificed*” commissions in its gross income the first appellant should have disclosed that income in the MCC’s VAT returns as MCC was a VAT vendor.

[113] The charge against the first appellant on count 9 relates to him making a VAT input claim on behalf of Logoprops in respect of Links membership.

[114] Count 5 alleges fraud against SARS with theft and contravention of the VAT Act in the alternative by the first appellant for not including R709 250-00 commission income in the MCC’s VAT return on which R107 695-00 VAT was payable.

(b) calculate the amounts of such tax in accordance with the said section and pay the tax payable to the Commissioner or calculate the amount of any refund due to the vendor...

⁸ Section 58 (d) reads as follows: Any person who -

(a)...

(d) fails to comply with the provisions of section 14 or section 28 (1) or (2), section 29 or section 30... shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 24 months.

[115] In count 6 a similar fraud against SARS with theft and contravention of the VAT Act in the alternative is alleged against the first appellant for not including R665 700-00 commission income in MCC's VAT return on which R93 198-00 VAT was payable.

[116] Count 7 alleges fraud against SARS with theft and contravention of the VAT Act in the alternative by the first appellant for not including R550 000-00 commission income in MCC's VAT return on which R77 000-00 VAT was payable.

[117] As regards count 9 it also alleges fraud against SARS with theft and contravention of the VAT Act in the alternative by the first appellant for claiming a VAT input in the amount of R33 771-00 on behalf of Logoprops in respect of the Links membership.

[118] The first appellant was convicted on the main charge of fraud on counts 5, 6, 7 and 9. In relation to counts 5, 6 and 7 the magistrate found that the first appellant fraudulently misrepresented the MCC's income to SARS by submitting MCC's VAT returns for the relevant periods without disclosing the correct VAT amounts.

[119] With regard to count 9 the magistrate found that the first appellant had fraudulently misrepresented to SARS that Logoprops was entitled to claim

an input tax credit for the VAT when he knew that Logoprops had not incurred the input tax in the course of making taxable supplies.

[120] As regards counts 5, 6 and 7 the first appellant contends that the omitted commission amounts did not form part of the MCC's gross income and that VAT was not payable on those amounts.

[121] In relation to count 9 the first appellant alleges that the VAT return, in which the input tax was claimed, was not completed and signed by him. It was signed by Mrs Marsha Van Heerden. He contends that accordingly vicarious liability does not apply.

[122] In so far as it related to the involvement of the first appellant the evidence of the second appellant was to the following effect. In about 1997 the second appellant engaged FMC (the first appellant's bookkeeping firm) to provide bookkeeping and accounting services and to complete and submit the income tax and VAT returns of the second appellant's family entities.

[123] The bookkeeping and accounting services the first appellant and FMC rendered to the second appellant and his family entities from about 1997 were provided in the following manner.

1. The second appellant gave FMC all invoices, cheque and credit card statements on a regular basis. FMC wrote up their books of account from these source documents.
2. FMC prepared and submitted VAT returns for MCC and Logoprops every two months. The second appellant normally did not see these returns because FMC would prepare, sign and submit them to SARS. FMC also paid the VAT by direct electronic transfer from MCC's bank account. FMC merely informed the second appellant how much VAT had to be paid. The second appellant's role was to ensure that there was enough money in the bank to meet the payments.
3. FMC prepared annual financial statements and income tax returns of the second appellant and his family entities. FMC determined both the accounting and the income tax treatment of all their income and expenditure.
4. FMC submitted the annual financial statements together with the accounts and vouchers upon which they were based, to the auditors to do their annual audit. The auditors performed their audit in terms of section 300 and reported on them in terms of section 301 of the Companies Act 61 of 1973. Their audit reports were always unqualified.

5. Once the financial statements had been audited, the first appellant presented them and the income tax returns based on them to the second appellant for signature. The second appellant signed them, usually without any explanation or discussion. He trusted the second respondent to prepare these documents correctly. He had the added comfort of knowing that the auditors had audited the annual financial statements and had no reason to mistrust these experts.

6. MCC did not generate and submit invoices for the commissions sacrificed.

[124] We first consider the question whether the first appellant was correctly convicted on counts 5, 6 and 7.

[125] Count 5 relates to the commission in the amount of R769 250-00 which was sacrificed against the price of Lodge 816. Count 6 relates to the Sadowsky transaction and the commissions in the amount of R665 700-00 that were sacrificed. Count 7 relates to the commissions in the amount of R550 000-00 which were sacrificed against the purchase of the Links memberships.

[126] It is common cause that the omitted commission amounts were not included by MCC for output tax purposes. The State contends that MCC should have levied and paid VAT on the commissions sacrificed and

placed a reliance on section 7 (1)⁹ of the VAT Act for this contention. It argues that the first appellant was aware that MCC had not made out invoices for the commissions sacrificed and that as the person responsible for the preparation of the VAT returns he would also know that in the absence of invoices, the sacrificed commissions would not be reflected as output VAT.

[127] Regarding how the sacrificed commissions should have been treated from the point of the VAT Act the magistrate found that had MCC as a VAT vendor included the sacrificed commissions in its gross income, it should have levied and paid over VAT on those amounts. The magistrate reasoned that MCC's liability for output tax arose at the time of the supply of the service in terms of section 7 (1) of the VAT Act.

[128] He went on to state that the fact that MCC did not issue invoices to Plattner could not assist it as it rendered services on which VAT was payable. The magistrate accordingly held that he was satisfied that *"potential prejudice is always present when proper accounting and invoicing does not take place"*.

⁹ (1) Section 7 (1) provides Subject to the exemptions, exceptions, deductions and adjustments provided for in this Act, there shall be levied and paid for the benefit of the National Revenue Fund a tax, to be known as the value-added tax-

- (a) on the supply by any vendor of goods or services supplied by him on or after the commencement date in the course or furtherance of any enterprise carried on by him;
- (b) on the importation of any goods into the Republic by any person on or after the commencement date; and
- (c) on the supply of any imported services by any person on or after the commencement date,

calculated at the rate of 14 per cent on the value of the supply concerned or the importation, as the case may be.

[129] In finding the first appellant to have had a requisite *mens rea* for fraud the Court *a quo* had this to say at paras 55 and 56 of its judgment:

“55. Accused 1, as accountant and ex employee in SARS’s VAT section undoubtedly knew VAT had to be levied on services rendered. It is true that he did not sign all the VAT returns. The uncontested evidence however is that accused 2 only dealt with him at FMC. As accused 1 was personally involved in Plattner’s bookkeeping, he clearly knew that the manner in which these transactions were done (Plattner not invoicing the accused for the actual purchase prices and accused 2 and 4 in return not invoicing Plattner for services rendered) would result in accused 4 not levying and paying over VAT. He did not have to sign the VAT returns personally to realise this.

56. In the absence of any explanation the court is satisfied that accused 1 had the required intent regarding the non-payment of VAT when he was involved in these transactions. As the court has accepted as reasonably possibly true (regarding count 4) that accused 1 (when not employed at Fancourt anymore) did not know about the “sacrifice” of commission regarding the Mahon Links membership transaction, it follows that it is reasonably possibly true that he also did not have intent regarding the VAT treatment of these commissions relating to count 7.”

[130] We disagree with the Court *a quo*'s finding on how the sacrificed commissions should have been treated for purposes of output tax. The Court *a quo* found that because MCC should have included the sacrificed commission amounts in its gross income it follows that it should have levied and paid over VAT on those amounts.

[131] There is no evidence to support its finding. In the first place in terms of the mandate agreement concluded between MCC and Plattner payment of commission was subject to suspensive condition, namely upon registration of transfer of the property sold. Commission was not paid if transfer did not take place.

[132] Secondly, in terms of section 7 (1) of the VAT Act, VAT is levied and paid on the supply by a vendor of goods or services supplied by him. Section 9 determines the time of supply and which is deemed to take place at the time an invoice is issued by the supplier or the recipient in respect of that supply or the time any payment of consideration is received by the supplier in respect of that supply.

[133] The VAT Practice Note No 4, paragraph 1 and SARS Ruling No 87 prescribing when an estate agent must account for VAT collected on his commission, provides as follows:

“When an estate agent (who is a registered vendor) earns a commission in respect of the sale of a property, the agreement of sale in question will not be regarded as an invoice for determining the time of supply of the agent’s services in terms of section 9 (1) of the Act .

The estate agent will therefore be required to account for the output tax on the commission in his tax return for the tax period during which the commission is actually paid to him (or released from his trust account for this purpose) or during which he issues a separate invoice to the seller for the commission payable, whichever is the earlier.”

[134] The magistrate was in the circumstances wrong to find that MCC’s liability for output tax arose at the time the service was rendered. In the present case MCC did not invoice Plattner for the sacrificed commissions nor did it receive payment of the sacrificed commissions. The service was therefore not supplied for purposes of VAT.

[135] The next question is whether the State had proved that the first appellant had an intention (*mens rea*) to defraud SARS.

[136] *Ms Hendry* submitted on behalf of the State that the only possible inference to be drawn from the proven facts is that the first appellant was

aware of the fact that there were no invoices for the set-off commissions and that the first appellant as the person responsible for the preparation of the VAT returns for MCC was aware that in the absence of invoices the set-off commissions would not be reflected as output VAT.

[137] *Ms Hendry* further submitted that there was a prima facie inference that the first appellant knew that VAT on the commission amounts sacrificed was not declared and there was no evidence to refute it as the first appellant did not testify. For this proposition she relied upon **S v Boesak** supra at para [24].

[138] In this regard the Court *a quo* found that the requisite *mens rea* had been established on the part of the first appellant. This finding was based on the ground that the first appellant, “*as an accountant and ex-employee in SARS’ VAT section, undoubtedly knew that VAT had to be levied on services rendered*”. It accordingly concluded that in the absence of any explanation it was satisfied that the first appellant had the required intent regarding the non-payment of VAT when he was involved in the relevant transactions.

[139] In our view there is no evidence either direct or circumstantial to support the finding and the conclusion reached by the Court *a quo*. The evidence is that the mandate agreement pursuant to which the commission was payable, rendered the payment of commission subject to a suspensive

condition, namely it was payable upon transfer of the property. It was not disputed that MCC did not receive commission if transfer failed to materialise.

[140] MCC waived the relevant commissions before it became unconditionally entitled to them. It did not receive payment or consideration. The state witnesses from Plattner testified that MCC did not invoice it for the relevant commissions nor did it receive payment. Under section 9 (1) of the VAT Act, VAT liability is triggered by either the invoice or the receipt of consideration. There is no evidence to show that the first appellant knew that the law required him to disclose the sacrificed commissions in the VAT returns despite the fact that MCC did not invoice Plattner for them and did not receive payment.

[141] The next question is whether the evidence adduced established the crime of theft which is the first alternative to counts 5,6 and 7.

[142] The first alternative charge reads:

“Theft

In that on or about the dates mentioned in column 2 of annexure “A” and at or near George in the Regional Division of the Western Cape accused no 1, 2 and 4 did unlawfully and intentionally steal the amounts as

mentioned in column 4 of annexure "A" the property of or in the lawful possession of the commission of South African Revenue Services and/or Plattner Golf (Pty) Ltd."

[143] A crime of theft is committed by unlawfully and intentionally appropriating someone else's property. A failure to pay a debt even if it causes the creditor to suffer loss does not constitute a crime of theft.

[144] There is no evidence that either the first appellant or the second appellant collected the sacrificed commissions, on which the VAT would have been payable, from Plattner and that being so, a conviction on a charge of theft cannot be sustained.

[145] The second, third and fourth alternative charges are statutory offences under section 59 (1)(a), (c) or (d) of the Act.

[146] The offences listed in this section relate to acts and omissions aimed at evading the payment of VAT or to obtain an undue refund. The maximum period of imprisonment which could be imposed is 60 months.

[147] To sustain a conviction for the offences under section 59 (1) (a), (c) or (d) of the VAT Act, the State must prove that the acts specified in the section were committed with intent to evade the payment of tax levied under the

Act or with intent to assist any other person to evade the payment of tax payable by such other person under the Act.

[148] It was submitted by the State that should the Court not confirm the conviction on the main count it should convict the first appellant for contravening section 59 (1) (a), (c) or (d) of the VAT Act on the ground that there was an obligation to levy and pay VAT the moment MCC sold the properties on which it earned the commissions sacrificed and that if MCC did not receive payment it should have passed a credit note.

[149] We disagree with the State's contention regarding when the obligation to pay commission arose in terms of the mandate agreement. The obligation to pay commission did not arise immediately upon conclusion of the relevant sale agreements for the sale of properties. The payment of commission in terms of the mandate agreement was subject to the suspensive condition and if that condition failed payment would not materialise. It is therefore not the sale but transfer of property which triggered the payment of commission.

[150] There was no evidence that at the time of the completion of the relevant VAT returns the first appellant knew or foresaw that the sacrificed commissions constituted gross income of MCC and that they should have been disclosed in the VAT returns.

[151] In the circumstances there is no basis upon which it can be contended that the first appellant contravened section 59 (1) (a), (c) or (d) of the VAT Act.

[152] We next turn to deal with the fifth alternative to counts 5, 6 and 7 under section 58 (d) of the Act. This section makes it an offence for any person who *“fails to comply with the provisions of section 14 or section 28 (1) or (2), section 29 or section 30”*.

[153] An offence contemplated in this section may be committed by a vendor or a non-vendor.

[154] The provisions of section 14 or section 28 (1) or (2), section 29 or section referred to in section 58 (d) relate to the obligation to furnish declarations in form VAT 215 (declaration in respect of imported services on the supply of imported services under section 14 (1), or to furnish the information required in form VAT 201 (Return for remittance of value-added tax for VAT payable to SARS or Refundable to the vendor under section 28) or to form VAT 216 (Return in respect of sale of goods towards the settlement of a debt of the owner of the goods under section 29).

[155] The relevant provisions for the purpose of this case are contained in section 28. This section prescribes the procedure for submitting VAT 201 Return for remittance of VAT and paying VAT to SARS.

[156] *Mens rea* in the form of *culpa* is a requirement for an offence under section 58 (d) of the VAT Act. The test for negligence is whether a reasonable person in the same circumstances would have foreseen that the act or omission would constitute a transgression of the statute concerned and, having foreseen, would have taken precautions to ensure that the transgression did not occur.

[157] In the present case the State must show that it was negligent for the first appellant not to disclose the sacrificed commissions, that is to say it must show that if the first appellant had exercised reasonable care, he would have foreseen that omitting or excluding the sacrificed commissions from the MCC's Vat returns constituted an offence.

[158] The question is whether a reasonable accountant in the position of the first appellant, who had been told that the commission amounts in question had been sacrificed, would have foreseen that to exclude them in the relevant VAT returns would constitute a contravention of section 58 (d) of the VAT Act and, having foreseen, would have taken precautions to ensure that the sacrificed commission amounts were disclosed in the VAT returns.

[159] In our view the State has not proved beyond a reasonable doubt that a reasonable accountant in the position of the first appellant would have

foreseen that to exclude the sacrificed commission amounts in the VAT return would constitute a contravention of section 58(d) of the VAT Act.

[160] As indicated earlier, the basic rule is that the time of supply of either goods or services is deemed to be the earlier of the time any payment is received by the supplier or an invoice is issued. The date when any payment of consideration is received by the supplier triggers the time of supply, if it has not already arisen by reference to the issue of an invoice.

[161] The event which triggers the time of supply did not occur in the present case as MCC did not invoice Plattner, (the recipient of services) for the commissions waived and neither did it receive payment of the commissions sacrificed.

[162] Finally, we turn to consider the conviction relating to count 9 (with theft and contravention of the VAT Act in the alternative). This charge relates to the Links membership.

[163] In relation to this count the evidence was that the second appellant (Mr Le Roux) was invited by Plattner to apply for the Links Golf Club membership. He had to pay R250 000-00 for membership and R25 000-00 for subscription fee, which he did not have.

[164] The second appellant then approached Mr Du Plessis, who at the time was the financial controller at Fancourt and asked him if MCC could waive some of its commissions owed by Fancourt to it to pay for the membership. Mr Du Plessis agreed and he authorised Mr Lindegue to implement the arrangement.

[165] At the same time the second appellant needed money to upgrade his house in London but lacked the necessary funds. He approached his friend, Mr Mahon, who at the time lived in London to assist him with funds. Mr Mahon wanted to become a member of Links Golf Club.

[166] The second appellant undertook to pay for Mr Mahon's Links membership as a way to repay Mr Mahon. The second appellant again approached Mr Du Plessis of Fancourt and asked him to pay for Links membership through the sacrifice of commissions owed by Fancourt to MCC. Mr Du Plessis agreed and the arrangement was implemented.

[167] The second appellant later transferred his Link membership to Logoprops (Pty) Ltd which was his company that owned property at Fancourt and according to him that became necessary because in terms of Links Golf Club rules one has to own property at Fancourt to be eligible for Links membership.

- [168] The Vat implications in relation to the Links membership transaction is that FMC claimed on behalf of Logoprops VAT input on the Links membership. It claimed and received an input tax credit for the VAT component on the Links membership fee in an amount of R33 771-00.
- [169] The only basis on which the State contends that the input VAT tax credit was not justified, is that it was disqualified by the provision of section 17(2) (b) of the VAT Act. This section provides that the vendor is not entitled to an input tax credit in respect of membership of any club, association or society of a sporting, social or recreational nature.
- [170] The question is whether the amount of R250 000-00 and R25 000-00 constituted fees or subscriptions paid in respect of membership of the Links Golf Club.
- [171] After stating that Logoprops could only claim an input VAT credit if the input tax was incurred in the course of making taxable supplies, the Court *a quo* found that it seemed improbable that Logoprops acquired the Links membership in the course of making taxable supplies because unlike MCC it did not sell Fancourt properties. It further stated that Logoprops could not use the Links membership to entice potential clients in buying property at Fancourt.

[172] In paragraph 76 of its judgment the Court *a quo* went on to hold as follows:

“76. If the court is wrong in making this finding, and the input tax was indeed incurred in the course of making taxable supplies, it is self-evident that at least the annual dues of R25 000 (on which R3070 VAT was claimed) is a “fee or subscription in respect of membership of a club of sporting or social nature” and therefore disqualified under s 17(2)(b) of the VAT Act. Input tax in respect of “any fees or subscriptions paid by the vendor in respect of membership of any club, association or society of a sporting, social or recreational nature” can not be claimed according to s 17(2)(b). The defence correctly did not suggest that these annual dues should be categorised as a loan (as is the position regarding the membership fee of R250 000 which is refundable). Accused 2 correctly conceded that this R25 000 is “an annual fee, that’s subscriptions”.

[173] In convicting the first appellant of VAT fraud the Court stated that it was apparent, that the second appellant had acquired the Links membership in the name of Logoprops *“for tax purposes”* and the possibility that VAT could be reclaimed was the underlying motivation. It accordingly held that *“in the absence of any explanation the finding has to be made that*

accused 1 (first appellant) knew that accused 3 (Logoprops) was not entitled to claim this input tax”.

[174] It is clear from paragraph 76 of its judgment that the Court *a quo* was not certain on how to characterise the amounts R250 000-00 and R25 000-00 paid for Links membership from the VAT point of view. The onus was on the State to prove beyond reasonable doubt that these two amounts were subscriptions for membership of the Links Golf Club and were accordingly hit by the provisions of section 17 (2) (b) of the VAT Act. The State did not lead evidence of what the two amounts were paid for. It did not adduce any evidence of the contractual arrangement in terms of which the fee was paid.

[175] In the circumstances the Court *a quo* should have acquitted the first appellant on this count as the State failed to prove that the fee paid for Links membership was disqualified from input tax credit by section 17 (2) (b).

[176] There is another basis upon which the first appellant's conviction on count 9 cannot stand. It is common cause that the VAT 201 form in which the input tax was claimed was not completed by the first appellant but Mrs Marsha van Heerden who worked for FMC.

[177] There is no evidence that the first appellant authorised Marsha Van Heerden to claim the input tax or had knowledge of the contents of the relevant VAT return form in which input tax was claimed.

[178] The first appellant was charged in his personal capacity. It was pointed out by the Court in **Ex Parte Minister of Justice: in Re Rex v Nanabhai** 1939 AD 427 at 429:

“There is no doubt that as a general rule a person is not criminally liable unless he has what is called mens rea. This is usually expressed by the maxim: actus non facit reum nisi mens sit rea. This is a sound rule, for a person is not to be subjected to the stigma and other consequences of a crime unless he had what is sometimes called a guilty mind. And from this it follows that in general a person is not criminally liable for an act or omission, unless he himself has committed or omitted the act or has authorised it.” (Rex v Wunderlich, 1912, T.P.D. 1118). But vicarious liability of this kind can, of course, be imposed by an Act of Parliament either expressly or by necessary implication. In the present case we have no such express imposition...”

[179] The Court a quo should have acquitted the first appellant on the main count in the absence of the evidence that he had completed the VAT 201

return in which a Vat refund was claimed or had authorised the person who completed it to claim the VAT refund.

[180] The next question is whether the evidence presented established the crime of theft which is the first alternative to the main count. There is no evidence that the first appellant completed the VAT return in which the VAT refund was claimed or that he had authorised the claim or was aware of the claim.

[181] In view of the fact that he was charged in his personal capacity and that there is no evidence that he completed or authorised the completion, of the relevant VAT return or that he was involved in the calculation of the VAT, there is also no basis for finding him guilty on the second, third, fourth, fifth alternatives to count nine.

[182] The conviction of the first appellant on counts 5, 6, 7 and 9 must consequently be set aside.

[183] Finally, we turn to the cross-appeal by the State. Pursuant to a notice filed by the state in terms of Rule 67 (11) of the Magistrates' Court Rules, read with section 310 of Act 51 of 1977, the magistrate stated a case setting out the facts and reasons for his decisions. The questions of law which the stated case poses are the following:

MINIMUM SENTENCE LEGISLATION

1. **WHETHER** the Regional magistrate erred in law in finding that the fraudulent non-disclosure for income tax purposes of income in the amount of R769 250 (count 1), R665 700 (count 2) and R550 000 (count 4) respectively, did not constitute “any offence relating to fraud involving amounts of more than R500 000” as envisaged in Part 11 of Schedule 2 read with section 51(2) of the Criminal Law Amendment Act 105 of 1997; and
2. **WHETHER** the Regional Magistrate erred in law in holding that the provisions of Part 11 of Schedule 2 read with section 51(2) of the Criminal Law Amendment Act 105 of 1997 did not find application in the circumstances; and

ACQUITTAL OF ACCUSED 1 AND 2 ON COUNT 2

3. **WHETHER** the only reasonable inference to be drawn from the stated facts was that fraud (or one of the alternative counts) was committed; and

THE ADMISSIBILITY OF OPINION EVIDENCE

4. **WHETHER** the evidence of Mr Van Vuuren regarding how SARS applied the relevant tax legislation to the circumstances which he investigated in this matter constitutes opinion evidence on matters of law and whether it was correct to exclude such evidence; and
5. **WHETHER** the evidence of Messrs Crisp, Fortuin and Silver in respect of the correctness or otherwise of the tax treatment under scrutiny in the trial amounts to opinion evidence on matters of law and whether it was correct to exclude such evidence.

[184] In regard to the question of the admissibility of the opinion evidence, Ms Hendry on behalf of the state informed us during argument that the state does not ask for the matter to be referred back to the regional court for the evidence which was excluded to be heard by the magistrate. The state also does not ask that this court hear the evidence on appeal. The state made it clear that it did not want the answer to the questions posed by the stated case to affect the outcome of this case at all. In the application before the magistrate, it was stated by the state that it wanted the matter canvassed *'for future reference only'*. The issue has consequently become academic and will have no impact on the conviction, acquittal or sentence of the appellants. We must therefore, as our courts have

consistently done in the past, in these circumstances, decline to give a decision on this point.¹⁰

[185] We turn to the questions posed in relation to the minimum sentence legislation. The regional magistrate held that for three independent reasons, the minimum sentence provisions do not apply in this case;

1. The amounts involved are less than R500 000.00;
2. The state did not forewarn the appellants that it would rely on the minimum sentence provisions and by its conduct created the impression that it did not; and
3. The appellants were not convicted of scheduled offences for purposes of the minimum sentence provisions.

[186] The question of law reserved by the magistrate only applies to the first ground on which the court a quo decided the issue in favour of the appellants. The point reserved is consequently entirely academic because the decision not to apply the minimum sentence provisions will remain standing on the other two grounds even if this court were to hold against the magistrate on the first ground. Once again we are not obliged

¹⁰ See Attorney-General, Transvaal v Flats Milling Company (Pty) Ltd and Others, 1958 (3) SA 360 (A) 370H-372G; Attorney-General, Free State v Ramokhosi 1999 (3) SA 588 (SCA) at 593E-G.

to decide the issue and must, in our view, decline to decide this academic issue.¹¹

[187] The point reserved in respect of the acquittal of the appellants on count 2 relates to a profit of R 365 000 which arose from the Sadowsky transaction. It is not necessary in our view to restate the facts of that transaction. The case reserved turns on the alleged personal liability of the first and second appellants for income tax, each for one half of the aforesaid profit in the amount of R 182 500 which they did not disclose in their personal income tax returns.

[188] The question reserved is 'whether the only reasonable inference from the above (stated) facts (is) that fraud (or one of the alternative counts) was committed.'

[189] The magistrate considered the facts relating to the transaction and then made the finding of fact that *'It seems clear that the profit of R 365 000 (the difference between R 1,7m selling price and R 1 335 000 buying price) on the original Lodge 718 contracts, was earned by Lodge 718 Fancourt (Pty) Ltd when the property was sold under the first morning contract. This contract was however cancelled later. Under the first afternoon contract, this profit was relinquished. The benefit went to accused 3 (Logoprops) (by way of a reduction in the purchase price of*

¹¹ See Attorney-General, Transvaal v Flat Milling Co and Other, supra 374 DE.

*House 2034. Accused 1 and 2 (Mr van Heerden and Mr le Roux) did not make the profit. If Lodge 718 Fancourt (Pty) Ltd should be deemed to have made this profit, SARS should issue an assessment in this regard against it". These findings of fact are part of the facts incorporated in the stated case. The facts found show that one half of the profit went to Logoprops (a company controlled by the second appellant) and the other half went to the first appellant's family trust. Regarding the profit that went to the first appellant's family trust, the magistrate commented as follows: 'It is difficult to avoid the inference that all is not above board regarding this payment. I am, however, not convinced on the current evidence that the finding could be made that fraud (or any of the alternative counts) were proven. **If the payment of the R 182 500 to accused 1's Family Trust had tax implications, SARS should issue an assessment in this regard.'** (our emphasis).*

[190] The high water mark of the submissions by Ms Hendry, on behalf of the state was that:

1. the only inference to be drawn from the proven facts was *that colloquially speaking and in the minds of the respondents (first and second appellants) the R 365 000 was a profit which they split between them.* This in our view does not assist the state. The finding of fact was that the first and second appellants did not make the profit. The fact that during the trial there were loose references

to the profit as having been made by the first and second appellants, personally, does not justify the inference that it was in fact the appellants who made the profits.

- 2 Further, that, in the alternative, it should be found that the full benefit of R 365 000 accrued to Lodge 718 Fancourt (Pty) Ltd and that the first and second appellant are guilty of contravening section 104(1)(a) of the Income Tax Act because they had not reflected the transaction in their accounting records and in this way assisted Lodge 718 Fancourt (Pty) Ltd to evade the payment of income tax. The charge against the first and second appellants was, however, that they committed the offences by not reflecting the amounts in their income tax returns for the years in question.

[191] The stated case posed does not raise a question of law. It raises questions of fact which was decided, on the facts, in favour of the first and second appellants.¹² It is therefore not a question which is open for decision by this court on appeal. It follows that the cross-appeal by the state must fail.

[192] The appellants (respondents in the cross appeal) ask for the costs of the cross appeal. A costs order is a matter of the discretion of the court. There is no reason why the normal rule that costs follow the event should

not be followed in this case. (See Attorney General, Transvaal v Lutchman 1959 (2) SA 583 (A) at 588 B-C).

[193] The following orders are therefore made:

1. The appeals by the first, second and third appellants against their conviction on all the counts they were convicted on, are upheld;
2. The first appellant is acquitted on counts 1, 3, 4, 5, 6, 7 and 9 and his conviction and the sentences imposed on the said counts are set aside;
3. The second and third appellants are acquitted on counts 1, 3 and 4 and their conviction and the sentences imposed on the said counts are set aside;
4. The cross-appeal by the state is dismissed; and
5. The state is ordered in terms of section 311(2) of Act 51 of 1977 to pay the first, second and third appellants' cost in the cross-appeal.

¹² See *Magmoed v Janse van Rensburg* 1993 (1) SA 777 (A) at 808A-8099; *S v Basson* 2005 (1) SA 171 CC paras [46] – [49] at 192-194.

W.J. LOUW, J

Judge of the High Court

I agree.

D.H. ZONDI J

Judge of the High Court