120/55

G.P.-S.12136—1952-3—2,000. U.D.J. 219.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(Provincial Division).
Provinsiale Afdeling).

Appeal in Civil Case.
Appèl in Siviele Saak.

Appellant,

versus

Respondent.

Appellant's Attorney
Prokureur vir Appellant

Respondent's Attorney
Prokureur vir Respondent

Appellant's Advocate
Advokaat vir Appellant

Respondent's Advocate
Advokaat vir Respondent

Set down for hearing on
Op die rol geplaas vir verhoor op

Application refused.
(Costs of application to be costs in the appeal)

[illegible]

([illegible])

In the matter between :

[illegible] (PTY.) LIMITED   Appellant

and

[illegible]   Respondent

Coram :- Centlivres C.J., [illegible] J.A.

Heard : 3rd [illegible] 1955. Delivered : 5/11/55

JUDGMENT

CENTLIVRES C.J. :- A few days before this matter was called in Court the appellant's Bloemfontein attorneys were notified as follows :-

" The Court has been notified of the fact that Mr. Prior appeared for the appellant company in the Witwatersrand Local Division. If Mr. Prior is not a duly admitted advocate he apparently has no right to appear on behalf of the appellant company.

The Notice of argument in the appeal to the Appellate Division are not signed but it may be that they were drawn by Mr. Prior. If he is not a duly admitted advocate the Appellate Division will require argument to enable it to decide whether he is entitled to the right of audience on behalf of the appellant company. "

[illegible] Prior to [illegible] counsel moved in open court on behalf of the appellant. [illegible] duly admitted advocate the Court questioned his right to appear on behalf of the appellant. [illegible] had the right of audience in what is [illegible] vitally interested in the result of the appeal on the ground of the taxable income of appellant was apportioned to him in terms of Sec. 37 of the Income Tax Act 1961. [illegible] vitally interested in the result of the appeal in favour. [illegible] appellant are different persons. A litigant is entitled to appear in person in any division of the Supreme Court. The appellant, being a male Hindu person, could appear in person and must be represented by a duly admitted advocate apart from certain statutory provisions which allow appearance in very exceptional circumstances to appear in a superior court on behalf of a litigant by duly admitted advocate can represent a litigant in a superior court. As far as the appellant is concerned there is no statutory provision which allow anybody who is not a duly admitted advocate to appear on behalf of a litigant. Our thanks to the Court, having been informed by Mr. Prior that steps could be taken to brief an advocate, postponed the hearing of the appeal to November 10th and ordered the question of costs occasioned by the postponement to stand over until the appeal is heard.

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between :

YATES INVESTMENTS (PTY.) LIMITED Appellant

and

THE COMMISSIONER FOR INLAND REVENUE Respondent

CORAM :- Centlivres C.J., Hoexter, Fagan, Brink et Hall JJ.A.

Heard : 3rd Nov. 1955. Reasons Handed In : 5-11-55

J U D G M E N T

CENTLIVRES C.J. :- A few days before this matter was called in Court the appellant's Bloemfontein attorneys were notified as follows :-

" The Court has taken notice of the fact that Mr. Prior appeared for the appellant company in the Witwatersrand Local Division. If Mr.Prior is not a duly admitted advocate he apparently had no right to appear on behalf of the appellant company.

The heads of argument in the appeal to the Appellate Division are not signed and it may be that they were drawn by Mr. Prior. If he is not a duly admitted advocate the Appellate Division will require argument to enable it to decide whether he is entitled to the right of audience on behalf of the appellant company. "

When the case was called Mr. Prior who is the sole beneficial shareholder in appellant company stated that he appeared on behalf of the appellant. As he was not a duly admitted advocate the Court questioned his right to appear on behalf of the appellant. He contended that he had the right of audience in that he was vitally interested in the result of the appeal as the amount of the taxable income of appellant was apportioned to him in terms of Sec. 37 of the Income Tax Act 1941. But the fact that he was vitally interested in the result of the appeal is irrelevant. Mr. Prior and the appellant are different personae. A litigant is entitled to appear in person in any Division of the Supreme Court. The appellant, being an artificial person, cannot appear in person and must be represented by a duly admitted advocate : apart from certain statutory provisions which allow attorneys in very exceptional circumstances to appear in a Superior Court on behalf of a litigant only a duly admitted advocate can represent a litigant in a Superior Court. As far as the Appellate Division is concerned there are no statutory provisions which allow anybody who is not a duly admitted advocate to appear on behalf of a litigant. For these reasons the Court, having been informed by Mr. Prior that steps would be taken to brief an advocate, postponed the hearing of the appeal to November 18th and ordered the question of costs occasioned by the postponement to stand over until the appeal is heard.

Mr. Hattingh
Of Mr. A.N.F.
L.C.B.

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter of :

YATES INVESTMENTS (PTY.) LIMITED Appellant

vs.

THE COMMISSIONER FOR INLAND REVENUE Respondent

CORAM :- Centlivres C.J., de Beer, de Villiers, Brink et Hall JJ.A.

Heard :- 18th November 1955. Delivered :- 3-12-55.

JUDGMENT

CENTLIVRES C.J. :- This is an appeal from an order of the Witwatersrand Local Division dismissing an appeal from the Special Court for hearing income tax appeals.

The appellant company which was registered in 1936 has an authorised capital of £1,000 divided into 1,000 shares of £1 each, of which 999 shares were issued and fully paid up as at June 30th 1947. It was formed for the purpose of adopting an agreement entered into between C.R. Cliffe and V.H. Russ on the one side and Gollust and Co Ltd on the other side. Under this agreement Cliffe and Russ, acting as trustees for a company about to be incorporated, purchased for £15,000 certain stands in Johannesburg which were in close proximity to the Johannesburg Stock Exchange. Cliffe and Russ were

stockbrokers. They and one Bishop were the original share-holders of the appellant. The only buidding on the stand was a single-storeyed motor garage and for the first three years it was let at a rental of £65 per month and later on for a considerably reduced rental. According to the appellant's memorandum of association one of its objects was " to carry on "in any part of Africa and elsewhere the business of Building "Land and Estate Owners, Dealers in landed property and in all "kinds of movable and immovable property. Financiers, Investors and Speculators, General Dealers, Merchants, Importers "and ~~and~~ Exporters, in any or all the branches and departments "of all such businesses. " There was no direct evidence as to the intention with which the appellant acquired the stands as Cliffe, Russ and Bishop were not called as witnesses before the Special Court, but it was established that, if a suitable building had been erected on the stands it would have provided convenient accommodation for brokers who, like Cliffe and Russ, were not housed in the Stock Exchange Building. There was also evidence that, about the time the stands were purchased, properties in the area where the stands were situate were rapidly increasing in value, and there was every prospect of a profit being made by the appellant upon a re-sale of the stands. It

was a condition of each successive lease of the stands that should the appellant effect a bona fide sale of the stands, or should all the shares in the appellant company be sold, or should the appellant decide to rebuild the premises, the appellant would be entitled to terminate the lease by giving the leasee six months' notice in writing.

In September 1944 the interests of Cliffe, Russ and Bishop in the appellant, viz: their shares and loan accounts, were acquired by one Ambrose for £16,000. In December 1945 J.G. Prior acquired from Ambrose all the issued shares in the appellant for £4,000. From September 1944 to December 1945 no attempt was made to erect a new building on the stands or to improve the existing building and it was not suggested on behalf of the appellant that any such attempt was made by it prior to September 1944. The ~~gross and~~ nett rentals received by the appellant for the various ~~fixed~~ final years dwindled from £236 in 1937 to a loss in respect of each of the years ended on June 30th, 1945, 1946 and 1947.

Plans were prepared by an architect on Prior's instructions for the erection of a building on the stands which in January 1946 was estimated to cost £80,000. Prior did not have the necessary money to finance the building scheme. Prior and one Smulian, an estate agent, stated that they endeavoured

without success to raise the necessary funds for the building but the Special Court was not satisfied that any serious attempt in that direction was made by either Prior or Smulian. In September 1946 the appellant sold the stands for £40,000 and reaped a profit of £24,425. The Commissioner included this sum in the appellant's income in respect of the year ended on June 30th 1947.

The appellant lodged an objection and an appeal on the ground that the profit of £24,425 was of a capital nature which should not have been included in the appellant's taxable income and income subject to super tax.

The Special Court dismissed the appeal. In regard to the period from 1936 to 1944 that Court said in its judgment that, in view of the meagre returns from the stands "it is "difficult to understand why no attempt was made by the com- "pany to erect a revenue producing building upon the stands, "if such was in fact its intention. One looks in vain at "the operations of the company for evidence of a policy or "intention to develop the property. There is a lack of oper- "ation which is inexplicable. There is no evidence of any "lack of funds or other difficulty in embarking upon "a buidding scheme. In the circumstances we are, I think,

"entitled to conclude that the policy of the company was to "hold the Stands for the purpose of a profitable re-sale. "

The above conclusion amounts, in my opinion, to a finding that the appellant originally intended to hold the stands for the purpose of a profitable re-sale.

The Special Court then addressed its mind to the question whether anything occurred during the period after December 1945 to take the stands out of the category of assets held for the purpose of re-sale and it said :

" We are prepared to accept that during this period Mr. Prior did not think exclusively of selling the property as it stood, but at the same time entertained thoughts of a development scheme. There can be no doubt that the property lent itself to a development scheme. However, Prior's financial position was so hopeless that a development scheme sponsored by him was doomed to failure from the outset. He had suffered heavy losses on the race course. His shares in the appellant company were pledged with a firm called the S.A. Underwriters to secure a loan of £9000. Apart from this he had other liabilities. It is nevertheless possible that he entertained the idea of a development scheme. We feel, however, this was not the thought uppermost in his mind. His position was such that a profitable re-sale was the obvious solution of his troubles, and in our opinion the property was held, during this period also, with that object in view. When eventually it was disposed of it was sold in pursuance of the company's policy. "

It will be noted that the Special Court in the above extract from its judgment regarded the mind of the appellant as being the mind of Prior. I have no quarrel with that, as Prior was, after December 1945, the sole beneficial shareholder of the appellant.

Having regard to the fact that one of the objects of the appellant was to carry on the business of dealers in landed property and having regard to the facts proved in evidence, I do not think it can be said that the conclusion that the appellant originally intended to hold the stands for the purpose of a profitable re-sale is a conclusion which could not reasonably be arrived at; Cf. L.H.C. Corporation of South Africa (Pty.) Limited v Commissioner for Inland Revenue (1950 (4) S.A. 640 at p. 646). If I am correct in thinking this, then the conclusion arrived at by the Special Court is a conclusion of fact from which no appeal lies. Sec. 81(1) of Act 31 of 1941.

Mr. Beck in his able argument on behalf of the appellant referred the Court to Commissioner for Inland Revenue v Stott (1928 A.D. 252 at p. 259) where Wessels J.A. said :-

" The question we have to determine is whether the facts as set out in the special case show that the proceeds of the sale of the Ifafa and Bluff properties constitute gross income or capital. In order to arrive at this decision it is necessary to know whether the acts of the taxpayer

" in buying and selling these properties show that he was carrying on the trade or business of a landjobber. Whether he was or was not carrying on such a business is an inference from facts. This inference is a matter of law. "

Mr. Beck, relying on the above statement by Wessels J.A., contended that the inference drawn by the Special Court from the facts placed before it was a question of law and that it was open to this Court to come to a different conclusion. I do not agree with this contention. The statement by Wessels J.A. is somewhat cryptic and the vexed question as to how to distinguish questions of fact from questions of law is discussed in Morrison v Commissioner for Inland Revenue (1950 (2) S.A. 449 at pp. 455 - 7). This question was, in my view, set at rest as regards the point I am now considering, by the case of Commissioner of Taxes v Hepker (1933 A.D. 192 at p. 196) where Stratford J.A. said :-

" Roos J.A., delivering the judgment of the Court" (in Ochberg v Commissioner for Inland Revenue - 1931 A.D. 215 at p. 196) "said :-

' The next question was dealt with by the Court a quo ' as being a finding of fact, viz. that the intention of ' the appellant, when purchasing the properties in ' question was not to invest his money but for the ' speculative purpose of purchasing with a view to ' making profits on resale. It seems to me that the ' question whether a person bought a property for a

" ' specific purpose is a question of fact and in no sense ' of the word a question of law.' Now this decision is very much to the point and, in my judgment, is conclusive that the decision, against which it is now sought to appeal was one of fact and not of law. "

It is interesting to note that in Hepker's case the appeal was struck off the roll on the ground that there was no right of appeal because the only point in issue was a question of fact and not of law. Hepker's case seems to me to be very much in point in this case, more especially as the test whether a company was carrying out a scheme for profit-making is not quite the same as the test in the case of an individual. See Platt v Commissioner for Inland Revenue (1922 A.D. 42 at p. 51), Stott's case (supra at p. 262) and the Leydenberg Platinum case (1929 AD 137 at p. 145). A company may carry out an isolated transaction as a profit-making scheme whereas it may not be so in the case of an individual, "so that 'continuity' "(as it has been called) is a necessary element in the carrying "on of a business in the case of an individual but not of a company." (per Stratford J.A. in the Leydenberg Platinum case supra at p. 145).

"It is possible" says Gunn in Sec. 583 of his Commonwealth Income Tax (4th ed.) "for a company or any other taxpayer to "change from a trader to an investor and vice versa, but, with "reverence, it is as difficult to make the change for taxation

" purposes as it is for a rope to pass through the eye of a "needle." That such a change of intention can take place is clear from Commissioner for Inland Revenue v Leydenberg Platinum Limited (~~1929 A.D. 137~~ supra at p. 148) and New Mines Ltd. v Commissioner for Inland Revenue (1938 A.D. 455 at p. 460/1). But, as the burden of proving that the sum of £24,425 was not liable to tax rested on the appellant (see Sec. 78 of the Act) it was for it to prove that there was such a change of intention. According to the judgment of the Special Court the most that the appellant succeeded in proving was a possibility that it entertained, after Prior became its sole shareholder, the idea of a development scheme. After saying that this was a possibility, the Special Court went on to say "We feel, "however, this was not the thought uppermost in his (Prior's) "mind" - a mind, which I have already explained was also the mind of the appellant. Having said that, the Special Court added that the property was held "during this period also" (i.e. as well as during the previous period) with the object in view of a profitable re-sale. In these circumstances it cannot, in my opinion, be said that the appellant succeeded in discharging the burden of proof which rested on it.

For these reasons the appeal must be dismissed with

costs. There remains the question of the costs occasioned through the postponement of the hearing of the appeal from November 3rd, when it was first called, to November 18th. At 9.30 a.m. on October 31st the appellant's Bloemfontein attorneys were notified that if Prior intended to argue the appeal on behalf of the appellant the Court would require argument whether he was entitled to appear in this Court on behalf of the appellant. He nevertheless appeared and unsuccessfully contended that he was entitled so to appear. In these circumstances the appellant must pay the costs wasted by the postponement of the hearing of the appeal from November 3rd to November 18th.

Chas C Miller

de Beer JA
de Villiers JA
Brink JA
Hall JA
} concur.