278/55.

218/52.

G.P.-S.103675—1954-5—1,000. U.D.J. 219.

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

(Appellate Provincial Division).
Provinsiale Afdeling).

Appeal in Civil Case.
Appèl in Siviele Saak.

Commissioner for Inland Revenue ..... Appellant,

versus

JOHANNA BURGER ..... Respondent.

Appellant's Attorney Vandé VN. *Respondent's Attorney* Leib, Bekker,
Prokureur vir Appellant *Prokureur vir Respondent*

Appellant's Advocate A S Vil E Evans *Respondent's Advocate* R S Welsh
Advokaat vir Appellant *Advokaat vir Respondent*

Set down for hearing on
Op die rol geplaas vir verhoor op Wednesday, 5th Sept., 1956.

(WLD)
1, 3, 5, 8, 9.

9.45 – 10.40

10.45 – Application by Mr. McEwan for postponement refused.

– after further argument,
at 10.40 — Application for an extension of time for filing of record & dismissal with costs, including any costs thereof occasioned by the fact that the appeal and application were set down for hearing on the Pretoria instead of the Grahamstown date.

(Appl. : No 103/56)

Registrar 5/9/56.

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between :

THE COMMISSIONER FOR INLAND REVENUE Appellant

&

JOHANNA BURGER. Respondent

CORAM : Centlivres C.J., Hoexter, Steyn, de Villiers et Brink JJ.A.

Heard : 5th September 1956. Reasons Handed In. ~~Delivered~~ : 10.9.56.

J U D G M E N T

CENTLIVRES C.J. :- The Commissioner for Inland Revenue applied for an order condoning his failure to lodge, within the time prescribed by Rule 6(5), the record in an appeal which he had noted. The judgment appealed against was delivered in the Witwatersrand Local Division on December 9th, 1955 and the appeal record should have been lodged with the Registrar on March 9th, 1956. The Deputy State Attorney at Johannesburg wrote to the respondent's attorneys on April 3rd, 1956, informing them that he had then been instructed by the Commissioner to prosecute the appeal a[illegible] enquiring whether they were prepared in terms of Rule 6(5) t[illegible] agree to an extension of time for the lodging of the record u[illegible] April 20th. On April 11th the respondent's attorneys wrote t[illegible]

the Deputy State Attorney declining to agree to an extension of time. On May 25th the Commissioner lodged with the Registrar a petition asking for condonation together with the record on appeal. On June 5th notice was given by the Registrar to the parties that the application and the appeal were set down for hearing on September 5th.

The Commissioner in his petition, which was signed by the Chief Revenue Officer (Legal), alleged that the reason for the delay in lodging the record was a misunderstanding which arose between himself and his attorney, the Deputy State Attorney. The main causes of the misunderstanding were stated to be as follows :

(1) On December 24th, 1955, the Commissioner instructed his attorney to note an appeal so as to preserve his rights pending a decision whether to prosecute the appeal or not which could only be made when certain of the Commissioner's officials returned to duty in the following January. The official initially concerned only returned from leave on January 23rd, 1956, and he completed his report on February 8th, 1956. The papers had then to be referred to other officials viz: in turn the Chief Revenue Officer (Legal), the Chief Revenue Officer, the Deputy Commissioner for Inland Revenue and the Commissioner who was at the time in Cape Town on parliamentary duties. The Commissioner was only in a position on March 27th, 1956, to notify his attorney that the appeal should be prosecuted. The matter had to be dealt with by all the officials along with many other important and urgent matters.

(2) The Commissioner and his officals assumed that all steps had been taken by his attorney to protect his rights and were not aware of any urgency.

(3) On March 12th, 1956 the Commissioner's attorney wrote to him asking for instructions as to whether the appeal should be prosecuted further. The Commissioner was not advised that the time for lodging the record had already expired.

The Commissioner submitted in his petition that "the "said misunderstanding came about without negligence on the "part of your petitioner or his officials. If it was the duty "of your Petitioner's attorney to draw the attention of your "Petitioner to the necessity for making a decision as to "whether to prosecute the appeal or not in sufficient time "to allow the record to be lodged within the time allowed by "the Rules, your Petitioner humbly submits that he should not "be prejudiced by this failure or omission on the part of his "attorney."

The Court refused the application with costs including any wasted costs resulting from the setting down of the application and the appeal for the same day and intimated that reasons would be filed later. The following are the reasons.

Under Rule 12 the Court may, for sufficient cause shown, excuse the parties from compliance with any of the rules.

In Cairns' Executors v Gaarn (1912 A.D. 181 at p. 186) Innes J. said :

" With regard to the expression "sufficient cause", I do not think it can be properly taken to mean merely sufficient cause for the delay. It seems to me to be used in a wider sense, as covering any cause sufficient to justify the Court in granting relief from the operation of the earlier rule. Cases might conceivably arise so special in their circumstances that, in spite of abnormal delay, the Court would feel bound to assist the applicant. But on the other hand the length of the delay and its cause must always be important (in many cases the most important) elements to be considered in arriving at a conclusion. It would be quite impossible to frame an exhaustive definition of what would constitute sufficient cause to justify the grant of indulgence. Any attempt to do so would merely hamper the exercise of a discretion which the rules have purposely made very extensive, and which it is highly desirable not to abridge. All that can be said is that the applicant must show, in the words of Cotton, L.J. (In re Manchester Economic Society, 24 Ch. D., at p. 498) , 'something which entitles him to ask for the indulgence of 'the Court.' What that something is must be decided upon the circumstances of each particular application. "

It is clear from the above case that it is impossible to lay down a hard and fast rule for the purpose of determining what is sufficient cause. Each case must depend on its own facts. There are cases, as Innes C.J. remarked in Freemantle & Co. v Morum Bros (1918 A.D. 425 at p. 426), in which the rules should have been observed, if they are to be obsefved at all. And the present case

is in our opinion one of those cases.

There are several unsatisfactory features about this matter. The Commissioner alleges in his petition that he and his officials were not aware of any urgency but there is no allegation that he or his officials were unaware of the rule which requires the record to be lodged within three months after the date of the judgment. In the respondent's replying affidavit it is submitted that the Commissioner and his officials know or should know the rule. The only asnwer to this in the Commissioner's answering affidavit it that compliance with the rules is a matter attended to by his attorneys and that unless the attorneys notify the Commissioner that a final decision must be made expeditiously, the matter is dealt with in the normal course. This answer can sacrcely be regarded as denying that the Commissioner and his officials knew the rule. But in any event the Commissioner, who is one of the most frequent litigants in this Court, could hardly have believed that there was no time limit for the prosecution of appeals. There seems to be no reason why he and his officials should have regarded the question of prosecuting the appeal as a matter to be dealt with in the "normal course" and not as a matter of urgency.

The "misunderstanding" between the Commissioner and his attorney has not been satisfactorily explained. There is no

express allegation that the attorney was to blame for the delay which took place and in the absence of an affidavit from the attorney we cannot assume that he is in any way to blame. He acted expeditiously in noting an appeal timeously and thereafter he naturally awaited instructions whether to proceed with the appeal or not. He must have known that he was dealing with an experienced litigant who could not have been under the impression that there is no prescribed time within to prosecute appeals.

Making due allowance for the fact that the action of Government officials is often, although, perhaps, unnecessarily delayed by departmental routine, and that part of the delay, though unjustified, may not have been inexcusable (vide Cape Town Municipality v Paine - 1922 A.D. 568 at p. 569) the present case seemed to us to be a case where the delay, taken as a whole, was so protracted as to be inexcusable. It appears from Paine's case that the appellant Municipality sought condonation from the Court as soon as it discovered that it had not noted its appeal timeously. In the present case there is no explanation whatsoever of the long delay which took place after the Commissioner received the letter from the respondent's attorneys refusing to agree to an extension of time. Those attorneys wrote to the Commissioner on April 11th and the petition for condonation was not lodged until May 25th - a delay of some six weeks. Whenever an appellant realises that he

has not complied with a rule of court he should, without delay, apply for condonation. Cf. Croeser v Standard Bank (1934 A.D. 77 at p. 79), R. v Mkize (1940 A.D. 211 at p. 213) and Reeders v Jacobz (1942 A.D. 395 at p. 397). The petition in the present case consists of only 8 pages with 2 pages of annexures and there is no reason why such a petition should not have been lodged at least a month before it was actually lodged.

Such being the facts in the present case, we refused the application with costs and on application made from the Bar by Mr. Welsh on behalf of the respondent we ordered that those costs should include any wasted costs resulting from the setting down of the application and the appeal for the same day, as counsel for the respondent had to be prepared to argue the appeal in the event of the Court granting condonation.

IN THE SUPREME COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

Before the Honourable Mr. Justice De Wet.

Johannesburg, 9th December, 1955.

In the matter of :

JOHANNA BURGER APPLICANT

and

THE COMMISSIONER FOR INLAND REVENUE RESPONDENT

J U D G M E N T.

DE WET J.

Testator the late Bartholomew Gilbert died in August, 1950, and I quote the following provisions from his will:- 10.

"FIRST: I give and bequeath to Miss Johanna Burger my motor car and the whole of the livestock belonging to the Killarney Private Hotel at the time of my death. She is also to have sufficient furniture and equipment to enable her adequately to furnish the cottage hereinafter mentioned and this is to be supplied to her from the Killarney Private Hotel before the sale of the hotel takes place in terms of the provisions hereinafter contained.

"SECOND: Miss Burger is also to have the usufruct during 20
the rest of her lifetime of my property, Erf No. 2221, situate in Primrose Township, with the two cottages erected thereon. Accordingly my Administrators shall, as soon as it can be conveniently arranged after my death, place her in possession of the said property and discharge, the said Erf from the mortgage bond thereon and any other liability. I suggest that she should live in the cottage and let the big house so that she may have the net revenue derived therefrom as a contribution towards her living expenses. I make this

- gift -

gift as a token of appreciation of the long and faithful service she has rendered to me and of her great kindness in taking care of me. I desire that my Administrators shall see to her welfare and comfort and shall, in so far as they according to their discretion may deem it desirable, provide her with an income or allowance such as will enable her to live in comfort for the rest of her days. For that purpose they shall set aside an adequate amount from the funds of my estate and invest and keep it invested."

The remainder of the will is not relevant for purposes of the present proceedings. It is sufficient to say that provision is made for the devolution of the property and of the trust fund after the death of Miss Johanna Burger who is the applicant in the present proceedings.

In pursuance of the provisions quoted the executors made over the property in Primrose to the Administrators and also made over the sum of £10,000 in order that they could, if necessary, provide the applicant with an income.

The said sum of £10,000 has been invested by the Administrators and since the 1st of May, 1951, the applicant has been paid an allowance of £40 per month but no undertaking of any sort has been given that this payment will continue or that any payment at all will at any time be made and it is alleged, and not denied, that the Administrators are at any time entitled to cease paying that allowance or to reduce it.

The sole question at issue in these proceedings is whether succession duty is payable because of the setting aside of the £10,000 or because of the income or allowance which is being paid to the applicant. The answer to this question will affect the question of the amount of the estate duty for which the estate as a whole is liable but the Court is not asked to express an opinion on the latter question.

- Mr. Welsh -

Mr. Welsh for the applicant contends that no succession duty is payable and relies on two decisions of English Courts. The relevant provisions of the English Act cited in re Millers Agreement (1947 Ch. D. 615 at page 624 is as follows:-

"Every past or future disposition of property by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person.... either immediately or after any interval, either certainly or contingently.....shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a 'succession'."

Our Act No. 29 of 1922 provides in section 10 that "a succession shall be deemed to have accrued whenever any person has become entitled to, or to any interest in, any property.....(a) By virtue of any disposition made by any predecessor who has died...." It is conceded that a succession accrues under our Act even if property does not pass at the time of the death of the predecessor but at a later date by virtue of the provisions of the "disposition." (See Commissioner for Inland Revenue vs. Estate Crewe 1943 A.D. 656 at pages 692 to 693). For the purposes of the present enquiry it seems to me that there is no material difference between our Act and the English Act. In the case of in Re Millers Agreement (supra) three daughters of the deceased man were in receipt, or might be in receipt, of annuities for their lives under covenants made by the deceased's partners with him. In deciding whether succession duty was exigible Wynn-Parry J. says at page 624: "The material question, as it seems to me, is whether the plaintiff's became "beneficially entitled" to such property on the death of Mr. Noad."

Nothing turns, to my mind, on the word "beneficially." If they become "entitled" to the annuities, they become entitled to them beneficially..... The word "entitled", as used in this section appears to me necessarily to carry the implication that for a person to be entitled to property under

- this -

this section it must be capable of being postulated of him that he has a right to sue for and recover such property."

This view of the meaning of the section was followed in a later decision where the facts were somewhat similar to the facts now under consideration. In re J. Bibby and Sons Limited 1952 (2) All England Law Reports 483, a widow of a deceased employee was awarded a pension by trustees of a fund created by the employer of her husband. No contributions had been made by the deceased workman and the pension award was in the uncontrolled discretion of the trustees. It was held that the widow had not become beneficially entitled to any property or the income thereof and that succession duty was not payable.

Mr. McEwan has sought to distinguish this decision and contends in the first place that when the amount of £10,000 was set aside by the executors and handed to the administrators, applicant obtained an interest in this fund and was entitled to an income. I cannot agree. It is true that the executors were obliged to set aside a capital amount of money for the purpose of providing an income for the applicant if the administrators decided to provide such an income. But the payment of an income to the applicant and the extent of such an income is a matter which the will leaves to the uncontrolled discretion of the administrators. It seems to me that the applicant was and is not entitled (in the legal sense) to such an income.

In the alternative Mr. McEwan invokes the analogy of a power of appointment exercised in favour of a beneficiary. It is in my opinion not a true analogy. Where such a power of appointment is exercised the beneficiary will usually become entitled to the property in the legal sense either at once, or in the case of a fidei commissary appointment when the fiduciary interest comes to an end. In the present case it seems to me that the beneficiary at no stage became entitled to an income, she merely received an income on the same footing as an ex gratia

payment. Nor did she receive an income "by virtue" of a disposition by the predecessor. She receives it because of the exercise of an independent discretion by the administrators, or in other words "by virtue" of the exercising of such discretion.

In my view the income received by the applicant is not accrual of a succession within the meaning of the Act.

An order will be granted declaring that the applicant is not liable for succession duty in relation 10.
to the amount of £10,000 made over to the administrators or in relation to the income received by her. The respondent must pay the costs of the application.

(sgd.) Q. de Wet
JUDGE OF THE SUPREME COURT.

IN THE SUPREME COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION).

At Johannesburg, Friday the 9th day of December, 1955.

Before Mr. Justice de Wet.

In the matter of:

JOHANNA BURGER

Applicant

and

THE COMMISSIONER FOR INLAND REVENUE.

Respondent.

Having on the 29th day of November, 1955, heard 10.
Mr. R. S. Welsh, Counsel for the Applicant and Mr. W. S. McEwan, Counsel for the Respondent, and having read the Petition and the other documents filed of record,

The Court reserved Judgment.

Thereafter on this day

IT IS ORDERED:

1. That an Order be and is hereby granted declaring that the Applicant is not liable for succession duty in relation to the amount of £10,000 made over to the Administrators or in relation to the income received 20.
by her.

2. That the Respondent pay the costs of this application.

By Order of the Court,

(SGD) M. TRIEGAARD

Registrar.