94/56

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.

Durban North Traders Ltd Appellant,

versus

C. I. R. Respondent.

Appellant's Attorney / Prokureur vir Appellant Niddalie Coates
Respondent's Attorney / Prokureur vir Respondent Hande ??

Appellant's Advocate / Advokaat vir Appellant E. Spiro
Respondent's Advocate / Advokaat vir Respondent H.G. Trollip (+ A.K. Trollip)

Set down for hearing on / Op die rol geplaas vir verhoor op Thursday, 6th Sept, 1956

(Vol 8 P.I.C.)

9.45 — 12.50,
2.15 — 4.45)

1,2,6,10,11

C.A.V.

— Appeal dismissed, w. costs.

[signature]
Regr. 28/9/56

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between :

DURBAN NORTH TRADERS LIMITED Appellant

&

COMMISSIONER FOR INLAND REVENUE Respondent

CORAM :- Centlivres C.J., Schreiner, Steyn, Beyers JJ.A. et Hall A.J.A.

Heard : 6th Sep. 1956. Delivered : 28.9.56.

J U D G M E N T

CENTLIVRES C.J. :- I agree with the conclusion arrived at by my brother Schreiner. I also agree with his view that snippets from the evidence given before the Special Court should not have been included in the stated case. At the end of the stated case it is said that the appellants were dissatisfied with the decision of the Special Court on the ground "that there was evid-"ence from which it could reasonably be concluded that the pro-"fits derived from the realisation of the Northway and Broadway "properties did not constitute income subject to income tax but were of a capital nature." This ground invites this Court to examine the evidence and to come to a conclusion of fact different from the conclusion reached by the Special Court :

in other words the appellant is attempting to appeal to this Court on a question of fact in spite of Sec. 81 of the Act which says that "there shall be no right of appeal against any decision "of the Special Court on a question of fact." Had the appellant complaint been that there was no evidence from which the primary facts referred to by my brother Schreiner could be found, the inclusion of the evidence in the stated case may have been justified. I use the word "may" deliberately because I do not think that it is necessary for the purposes of this case to give a definite decision on the point.

Where there is no evidence on which a Special Court could reasonably have found the primary facts its determination may possibly be "erroneous in law" within the meaning of Sec. 81 of the Act. If it is, then certain consequences follow. To adapt the language used by Innes C.J. in R. v Shein (1925 A.D. 6 at p. 9) to illustrate what I mean, this Court would set aside the determination not as deciding the facts itself, but because the Special Court had not in its opinion duly discharged the judicial duty cast upon it. If on the other hand, there is evidence on which the Special Court could reasonably have found the primary facts, it would refuse to interfere, not because it would have come to the same conclusions itself, but because no

ground existed for interference with the discharge of a duty which the law has entrusted to the Special Court alone.

I refrain from expressing a definite opinion on the point I have discussed not only because I consider that it is unnecessary to decide it in this case but also because the matter has not been fully argued. I would, for instance, have liked to hear argument on the question whether this Court was correct in suggesting in Morrison v Commissioner for Inland Revenue (1950 (2) S.A. 449 at p. 457) that findings of fact are "assailable in a superior court if there was no evidence on "which the findings could be properly reached ;" and in Commissioner of Taxes v Levy (1952 (2) S.A. 413 at p. 421) that a finding of fact could be challenged in this Court "by showing "that it was a finding at which no reasonable person could "arrive."

Steyn JA
Hall AJA } concur

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

DURBAN NORTH TRADERS LIMITED Appellant

and

THE COMMISSIONER FOR INLAND REVENUE Respondent

Coram: Centlivres C.J.,Schreiner,Steyn,Beyers JJ.A. et Hall, A.J.A.

Heard: 6th. September, 1956. Delivered: 18-9-56

J U D G M E N T

SCHREINER J.A. :- The appellant company, which I shall refer to as "the company", appealed to a Special Court for hearing income tax appeals against an additional assessment in respect of taxable income and income subject to super tax for the year ended 30th June 1949 and against a revised assessment in respect of the same forms of income for the year ended 30th June 1950. The Special Court disallowed the company's appeals and it now appeals to this Court upon a stated case under the provisions of section 31(1)(b) of Act 31 of 1941. The matter in issue is whether certain profits were made by the company on

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the sale of land owned by it were capital accretions or income.

The company was registered as a private company in July 1929 with a capital of £500 in £1 shares, of which 50 were issued, the great majority being held by the Durban North Estates Limited, which I shall call "the Estates company", and which was the township owner of and carried on the business of selling plots in the township of Durban North, which was formed about the year 1925. In September 1945 the entire shareholding in the company was bought by a public company named Industrial and Commercial Holdings Group Limited, which I shall call "I.C.H."; under the then existing law the company thereby ceased to be a private company. In March 1946 its capital was increased to £501 and in December 1946 to £15,001.

The Durban North Township was formed for residential purposes and the great majority of its plots could only be used for such purposes. Only 56 plots could be used for either residential or trading purposes at the owners' option.

On the 1st February 1930 the company bought one plot (No. 1552) carrying trading

rights/.....

rights from the Estates company for £2400 and immediately erected shops thereon at a cost of £5,600; in 1938 it made additions to the shops at a cost of £983; further shops were added in 1948 at a cost of £10,470. The cost of the original buildings and the additions was defrayed out of moneys raised on bond and out of the increase of capital. The plot with its shops I shall refer to as "the Northway Property." From this plot the company derived a rent income which after the final additions reached £3000, gross, per annum. The property was sold in 1948 at a profit of £16,533. It is this profit which is the subject of the additional assessment for the year ended 30th June 1949.

The company acquired no land other than the Northway property until February 1948 but it laid the foundations for its acquisitions from that time onwards in September and October 1944 when it obtained two options which gave it the right during the period of the war and two years thereafter, not exceeding 9 years and 11 months in all, to acquire the remaining 55 plots in the township which carried trading rights. It paid the Estates company £2500 for the option to purchase 51 of the plots and it acquired, for what consideration is not

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stated, the right to acquire the other 4 plots from Durban North Construction Limited, another subsidiary of the Estates company. Two of the lastmentioned plots had old business premises on them but the other two and all the 51 covered by the option granted by the Estates company were vacant. During the war the development of the township was held up by building control regulations but these were relaxed towards the end of the war and by September 1945 building had increased considerably. There was a spurt in the sale of plots towards the end of the war and the two options constituted a valuable right, on account of which I.C.H. paid a heavy premium for the company's capital.

The building control regulations were further relaxed in the year 1948 and on the 3rd February of that year the company exercised its option to acquire from the Estates company three plots at a price of £450 each; it immediately resold one plot to each of two banks at the price of £2000 per plot and one to an organisation called the M.O.T.H.'s at the price of £750, the difference between the buying and the selling prices totalling £3400. The nett profit was £2,265 - 12 - 3 which the company returned as income for the year ended

30th/.....

30th June 1948 and on which it paid tax without objection.

On the 8th June 1949 the company exercised its option to purchase plots 2399, 2400 and 2401 with the intention of erecting shops thereon. These three plots together constitute what I shall call "the Broadway property". Building operations were begun forthwith and leases were entered into which would bring in over £3000, gross. The total cost to the company of the Broadway property as improved was £19,399. 11. 6. The buildings were not complete when the company received an offer of £29,500 for the property, which it accepted on the 15th February 1950, thereby making a profit of £9, 347. This profit is the subject of the revised assessment for the year ended 30th June 1950.

From November 1950 until June 1951 the company sold some 16 other plots at prices much higher than it paid for them. In respect of some of these the option to acquire them was exercised months or even years before the resale but in respect of more than half the purchase and resale took place on the same day.

The question whether the profits made on the Northway and Broadway properties were income

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or capital profits must be answered in the light of the company's memorandum of association and in the light of its activities generally. The company's objects clause is of the type that details almost every conceivable human activity but we were referred, in particular, to paragraph (f) of the clause, which reads - " To build on, "improve, develop, let, lease or otherwise deal with any "land or buildings from time to time acquired or held by "the Company, and to dispose of the same in such manner "and on such terms as may seem expedient in the Company's "interests." Paragraph (l) of the clause authorises the company to purchase and paragraph (V) authorises it to sell inter alia immovable property; paragraph (g) also authorises the sale of the whole or any part of the assets. Some argument was addressed to us on the construction of paragraph (f) but it is clear that the company had all the powers it required to carry on what is commonly called land-jobbing i.e., buying and selling land to make a profit; it also had the power to improve and lease land and buildings. It was admitted before the special court that the company's activities were all performed pursuant to paragraph (f). The company was a land company empowered to hold land and obtain an income from letting it but also empowered to deal in land

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and obtain an income through selling it at a profit.

When one turns to the activities of the company, which disclose the policy which it was pursuing and the intention with which its transactions were carried out, it must be observed that the special case bristles with passages recording that "it was stated "in evidence that....." Such passages enabled counsel for the appellant to submit that the special court had found that what was stated in evidence was a fact. That submission is wholly untenable; there are instances, some of which relate to important issues, in which, though there is a passage in the special case reciting that something was stated in evidence, the judgment annexed to the special case shows that the very opposite was found by the special court. The special court in terms of section 81(1) has to "state a case setting forth the facts." The facts to be set forth are those facts, admitted or for other reasons found by the special court, which are considered by it to be relevant to the question of liability to tax. That something was stated in evidence may be important in the proof of facts before the special court, but it is not itself a fact that has any relevance on appeal. Where the legal error complained of by the

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dissatisfied party is that there was no evidence to support the findings of the special court this in my view means that on the primary facts found by the special court the factual inferences or conclusions could not reasonably be supported.

In the case of Commissioner of Taxes v. Levy (1952(2) S.A. 413), the relative statutory provisions envisaged a trial action in the High Court of Southern Rhodesia. Consequently where it was contended on appeal that a certain finding of fact was one that could not reasonably be arrived at, this Court had to consider the evidence itself. But that does not apply to an appeal based on a stated case. Such a procedure provides for ~~the~~ a statement of facts agreed to by the parties or, as here, found by a person or body entrusted with the duty of stating the facts, in order that the law may be applied to the facts so stated. (Cf. Stroud S.V. special case).

The proper form of a stated case under the 1914 Income Tax Act was explained by INNES C.J. in the Booysens case, 1918 A.D. 576 at page 599, as follows: "Section 25 authorises the submission of a question of "law for the decision of the Provincial Division. And it "follows that the facts, in connection with which the

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"question of law arises, are to be found and stated by "the special court. A number of facts were so stated, " but they were evidently considered insufficient, because "by consent of parties the proceedings before the special "court was annexed and incorporated in the case. That "proceeding was irregular, and should be avoided in future. "All the facts necessary for the determination of the legal "question, whether found by the Court or admitted by the "parties, should be set out but the evidence upon which " those facts, or any of them depended should not be "detailed." Though there have been changes in the appeal provisions since 1914 the essential nature of the procedure has remained the same.

So, dealing with a substantially identical procedure in England, the Commissioners taking the place of our special court, ROWLATT J., whose experience in income tax cases matters was unrivalled, said in Michael Faraday, Rogers and Eller v. Carter (11 T.C. 565 at page 572), "The Court cannot entertain an appeal "upon a question of fact and it cannot entertain what I "may call an original jurisdiction upon questions of fact; "that is to say, it is not within the power of the Commis-

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"-sioners to state the evidence for and against in the "form of a summing up and then ask the Court to step into "their place and decide what is the true conclusion of "fact..... when the Commissioners set out all the facts "it is in order that the Court may see whether there is "any evidence to support their findings of fact or, if it "is a question of a legal inference, whether the proper "legal inference has been drawn, or whether they have "gone wrong on any point of law; and very often it is a "very right thing for the Commissioners themselves to set "out the facts rather than come to a conclusion which may "be regarded as a conclusion of fact looked at in one way "but which may have embodied in it a conclusion of law "also. That is what was meant by LORD JUSTICE FARWELL "when" (in New Zealand Shipping Co. v. Stephens, 5 T.C. 553) "he deprecated stating people out of court in the "form of a finding of fact which was really a conclusion "of law."

The primary facts may, and sometimes should, be stated fully, but, however closely the statement of facts may follow the evidence, it is as a statement of facts and not as a recital of evidence that

it finds a proper place in a stated case. This view is, I think, inherent in what was said by VISCOUNT SIMON in Bomford v. Osborne (1942 A.C. 14 at page 22), "No doubt , "there are many cases in which commissioners, having had "proved or admitted before them a series of facts, may "deduce therefrom further conclusions of pure fact, but "in such cases the determination in point of law is that "the facts proved or admitted provide evidence to support "the Commissioners' conclusions. I think it would tend to "clearness.....if Commissioners in such cases as this "would state that the question of law is whether the facts "found or admitted can support their further conclusions "of fact."

In the present appeal the special case states that the company complains of an error of law "on the grounds that there was evidence from which "it could reasonably be concluded that the profits derived "from the realisation of the Northway and Broadway proper- "ties did not constitute income subject to income tax but "were of a capital nature." This statement of the company's complaint was obviously inadequate.

It is true that passages can be found in judgments dealing with income tax appeals in

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which expressions are used such as "the finding could not "reasonably be reached on the evidence." But, so far as I am aware, where the procedure is by stated case, "the evidence" means the facts stated to have been admitted or proved.

Good illustrations of this common usage are to be found in the speeches in Edwards v. Bairstow (1955 (3) A.E.R. 48). At page 53 VISCOUNT SIMONDS, after stating that, whatever language is used in describing the test to be applied, the appeal had to be allowed, proceeds, "For it is universally conceded that, though it is "a pure finding of fact, it may be set aside on grounds "which have been stated in various ways but are, I think, "fairly summarised by saying that the court should take "that course if it appears that the Commissioners have "acted without any evidence, or on a view of the facts "which could not reasonably be entertained. It is for this "reason that I thought it right to be set out the whole of "the facts as they were found by the Commissioners in this "case. For having set them out and having read and re-"read them with every desire to support the determination "if it can reasonably be supported, I find myself quite "unable to do so. The primary facts as they are some-

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"-times called do not, in ~~xxxxxx~~ my opinion, justify the "inference or conclusion which the Commissioners have "drawn; not only do they not justify it but they lead "irresistibly to the opposite inference or conclusion. "

And at page 57 LORD RADCLIFFE says, "But, without any such "misconception appearing ex facie, it may be that the "facts found are such that no person acting judicially and "properly instructed as to the relevent law could have come "to the determination under appeal. ....I do not think "that it much matters whether this state of affairs is described as one in which there is no evidence to support "the determination or as one in which the evidence is in- "consistent with, and contradictory of, the determination, "or as one in which the true and only reasonable con- "clusion contradicts the determination." (My italics).

After this perhaps unduly lengthy discussion of the matter, it suffices to say that the quotations from the evidence to which I have referred should not have appeared in the special/.....

special case and must be disregarded.

What the special court found in regard to the activities of the company generally appears from the following extract from the judgment:-" The "business of the company was to acquire land and in some "cases to improve it and let it, in other cases to improve "it and sell it, and in other cases to sell it as vacant "land. The company performed all these operations from "time to time and made profits or derived income from the "same. It was never the business of the company solely to "acquire land in order to improve it and to let it for an "income." The judgment then analyses the various purchases and sales of lots which I have already mentioned and deals with the Northway and Broadway properties on the lines that it is not possible to separate them out from the series of transactions which show that the company was trading in land as its stock in trade." In this "case," the judgment proceeds," the appellant company had "a double object in purchasing land. One was to improve "the land and to let it. The other was to sell the land "either improved or unimproved. At one time it may have "had the object of deriving an income by letting the two

"properties/.....

"properties known as Northway and Broadway, but at another "date it decided to bring these properties into stock with "its other properties which it was purchasing for resale at "a profit and it did so..... In view of the very large "number of transactions of purchase which the appellant "entered into it is manifestly impossible for the appellant "company to contend that in respect of some of the proper- "ties it had a single object, to let for rent only, whereas "in respect of the others it had a double object, or the "object of selling at a profit. "

It was contended on behalf of the company that the special court had no right, in deciding whether the Northway and Broadway profits were taxable, to have regard to the transactions of the company from November 1950 to June 1951. Reliance was placed upon a passage in the judgment of CENTLIVRES C.J. in Commissioner for Inland Revenue v. Paul (1956(3)S.A.335), at p.340 where short shrift was given to an argument advanced for the Commissioner that the intention of the taxpayer in buying land which he subsequently sold could be guaged from the fact that five years later he entered into a speculative land venture with other persons. But the question of the admissibility of the evidence

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of the subsequent transaction was not considered; the evidence was disregarded because it was wholly lacking in cogency. We were also referred to decisions on the admissibility in other branches of the law of evidence of similar but unconnected facts. It is unnecessary for present purposes to decide how far the special court would be obliged to observe such a rule of evidence; it is sufficient to say that all the activities of the company that were considered by the special court were relevant to the question what the company's policy was in acquiring and disposing of the Northway and Broadway properties and were rightly taken into account.

I read the passages in the judgment of the special court which I have quoted as amounting to findings of fact that, although buildings were erected on the Northway property and profitably let for a number of years and although the practice of letting had begun to be put into operation in respect of the new buildings on the Broadway property, the policy throughout in respect of both properties was twofold - to let while that was the most profitable course and to sell when circumstances pointed to that as the best method of making a profit. They were alternative ways of carrying on the company's business which was a single business of turning land to account. Counsel for

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the appellant did not challenge the view that the special court had found that the policy of the company included selling the Northway and Broadway properties, should that appear to be, commercially, the best course, but he contended that this finding was bad in law because, in the language of LORD RADCLIFFE in Edwards v. Bairstow, supra, at page 57, "the true and only reasonable conclusion" was that the two properties were acquired and held for letting, and only happened to be sold because, without special solicitation on the company's part, very tempting offers were made to it which it would have been absurd not to accept. Counsel for the Commissioner pointed out that there is no finding, because it seems there was no evidence, regarding the particular reasons why the Northway property was purchased. It was, he argued, not a case of investing surplus funds, for the company had none, and it was not a case of erecting a building to serve as the company's headquarters. There was a long lapse of time before the sale took place but that, he contended, might be explainable by the circumstances that the township took a long time to get into its stride as a profit-making enterprise and that wartime restrictions supervened. In

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the case of the Broadway prorerty it was pointed out that there was no appreciable lapse of time to support the argument that it was acquired for holding and letting and not for resale. This transaction was therefore, so it was argued, even more obviously than in the case of the North ~~Broad~~-way property, merely an example of a profitable deal in the course of turning land to account.

It is not necessary to weigh in nice scales these arguments as to the proper inferences to be drawn from what the company did with the properties. It is sufficient to say that the inferences depended on matters of degree and that the special court's conclusions could reasonably be arrived at upon the primary facts found by it. It is accordingly unnecessary in my view to express any opinion upon the detailed analysis of certain recent decisions of this Court which was presented to us by counsel for the appellant.

The appeal is dismissed with costs.

~~Centlivres, C.J.~~.

~~Steyn, J.A.~~

Beyers, J.A. Concurs

~~Hall, A.J.A.~~.

W. Schreiner

27.9.56