75/1959

G.P.-S.134917–1953–6–1,000. U.D.J. 219.

75/1959

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

{ APPELLATE [redacted] Division.)
Afdeling).

Appeal in Civil Case.
Appèl in Siviele Saak.

COMMISSIONER FOR INLAND REVENUE & ANO., *Appellant,*

versus

IDA ISAACS & ORS., N.O. *Respondent.*

Appellant's Attorney / *Prokureur vir Appellant* Naude & Nauda
Respondent's Attorney / *Prokureur vir Respondent* Goldrick & F. ✓

Appellant's Advocate / *Advokaat vir Appellant* Mr. Frankel A.C. mc Ewan
Respondent's Advocate / *Advokaat vir Respondent* Mr. W. Pollak Q.C. Mr. R.S. Welsh

(WLD)

Set down for hearing on / *Op die rol geplaas vir verhoor op* Tuesday, 3rd November, 1959

(A)

12 ; ~~11~~ & 11.

9.45 a.m. — 5 p.m.

C.A.V.

U. d. Preez
— Reg.

Postea: Monday 16th November, 1959.

Appeal dismissed with costs.

Coram: Steyn C.J.
Schreiner J.A.
De Beer J.A.
Botha A.J.A.
Holmes A.J.A.

U. d. Preez
— Reg.

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

THE COMMISSIONER FOR INLAND REVENUE First Appellant

and THE MASTER OF THE SUPREME COURT, TRANSVAAL PROVINCIAL DIVISION. Second Appellant

and

IDA ISAACS (Born Mendelsohn) N.O.

THE SOUTH AFRICAN ASSOCIATION N.O.

and MAURICE SCHAEFFER, N.O. Respondents

Coram:Steyn C.J.,Schreiner,de Beer JJ.A.,Botha Et Holmes A.JJ.A.

Heard: 3rd November, 1959. Delivered: 16-11-1959

J U D G M E N T

SCHREINER J.A. :- I agree that this appeal should be dismissed and have nothing to add to what the Chief Justice has said in relation to section 3 (3) (a).

On the question whether what was owed by the company to the deceased at his death was "a debt "recoverable.....in the courts of the Union" within the meaning of section 3 (2) (f), I prefer to base the decision on the reasoning adopted in Estate Brownstein v. Commissioner for Inland Revenue (1957 (3) S.A.512 at pages 523 and 524). It was contended on behalf of the respondents that that reasoning was an essential

part/.....

part of the ratio decidendi or one of the rationes decidendi, but I do not think that this is so. It is clear from the judgment that the result would have been the same even if the conclusion on this point had been the opposite of what it was, so that the reasoning was not necessary for the decision(Pretoria City Council v. Levinson,1949(3)S.A.305 at page 317). Nevertheless I think that what was said in Brownstein's case was right and should be applied in this case. It proceeded on the view that by section 3 (2) (g) Parliament brought within the tax net any debt (the same applies to rights of action, not being debts) which has a certain characteristic, namely, that it is recoverable in the courts of the Union. Parliament selected recoverability in the Union courts as a test of which debts were to be property in relation to an estate and which were not. It was thought by this Court in Brownstein's case that "recoverable" was related to the ordinary principles of jurisdiction which are based on ~~factors relating the debt itself to the Union such as~~ the residence or domicile of the debtor within the Union, the fact that the transaction was entered into there and the fact that it was to be carried out there. By contrast jurisdiction which rests on attachment ad fundandam jurisdictionem is not related to the normal features of the debt but

to/.....

to the chances of the situation at a particular time, in this case at the time of the death. At that time it will in fact be possible to recover in the Union courts a debt which has no connection itself with the Union if then the creditor is an incola and the debtor a peregrinus and either the debtor himself or any part of his property is within the land boundaries or territorial waters of the Union. It is difficult to suppose that Parliament intended the attachment kind of jurisdiction to be included in the provision. Supposing that two peregrini "A" and "B" enter into a transaction in Europe which is to be carried out in Europe and as a result "A" owes "B" money. It would be surprising ~~thereafter~~ if, "B" having thereafter become an incola of the Union and having died, the debt should be part of "B"'s estate if, but only if, it could be shown that at the date of the death there was some property of "A"'s, possibly in transit, within the boundaries limiting the jurisdiction of the Union's courts.

If Parliament had intended by "recoverable" to include not only any debt having ~~in itself~~ features which would ordinarily make it recoverable within the Union, but also any debt which, however unrelated to the Union in its normal features, could by the merest chance be sued upon on the date of death of the creditor - and possibly never

before/.....

before and never after that date - it is fair to suppose that clear language would have been used to bring about this result. In this connection reference may be made to the precise language of section 3 (2) (b) where "property" is made to include "any movable propeerty physically situated in the Union at "the date of the death of the deceased....."

In regard to the third point, paragraph (i) of section 3 (2) was introduced by section 1 of Act 60 of 1951 which, like the principal Act, was signed in English. If there is a difference in meaning between "withdrawable" and "terugbetaalbaar", although use might be made of the latter for the purposes of suggesting interpretations of the former, it would, in my view, be the word "withdrawable" to which effect must primarily be given. If, for instance, "withdrawable" covers the case of money paid into a bank by A to the credit of B, while "terugbetaalbaar" does not, it would be the meaning of the word "withdrawable" which, I apprehend, must govern. It would be the wider word, but would certainly be more appropriate, since there is no apparent reason why the amounts referred to in section 3 (2) (i) should be limited to those withdrawable by the party who paid them in. This case would then illustrate the difficulty, referred to in Regina v. Vilbro (1957(3)S.A.223 and Regina v. Silinga (i.d.354), of employing the highest common factor of the two texts as a guide. For the purposes of the present case, however, I do not find any significant difference between the meanings of the words. Neither is appropriate to the case of a

debt/.....

debt arising out of a transaction of sale, without any provision that the purchase price should be held by the buyer on the basis of its being a loan to the seller. The inference to be drawn from the use of the word "withdrawable" is strengthened by the phrase "standing to the credit of the deceased person" and by the application, here apparently proper, of the ejusdem generis rule to the expression "any bank, building society of other institution". The word "institution" in this context seems to be limited to a loan institution like a bank or building society. That conclusion would not be effected by the fact that in the Second Schedule to Act 29 of 1922 there has always been a rate of succession duty for cases where the successor is "otherwise "related to the predecessor or is a stranger in blood or is an "institution." Here apparently "institution" covers any corporation or association, the word perhaps being used because it is the ordinary word to use in connection with those corporations and associations which receive testamentary benefits and are, subject to certain conditions, exempt from succession duty (cf. section 15 (b) of the Act). It seems to be clear that section 3 (2) (i) does not apply to the debt in question in this case.

De BEER J.A. Concurs.

14.11.59

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION.)

In the matter between

THE COMMISSIONER FOR INLAND REVENUE .....First Appellant,

and

THE MASTER OF THE SUPREME COURT OF SOUTH AFRICA, TRANSVAAL PROV. DIV. .....Second Appellant

and

IDA ISAACS (BORN MENDELSOHN) N.O.
THE SOUTH AFRICAN ASSOCIATION N.O.
AND MAURICE SCHAEFFER, N.O. .....Respondents.

Coram: Steyn C.J., Schreiner, de Beer JJ. A., Botha et Holmes A.JJ.A.

Heard: 3rd November, 1959. Delivered: 16 — 11 — 1959

JUDGMENT

STEYN C.J.:

This is an appeal direct to this Court by consent of the parties against a judgment by Claasens J. on a stated case, declaring that no estate or succession duty is payable either in respect of certain shares transferred by the late George Isaacs shortly before his death to a private investment holding company or in respect of the unpaid portion of the purchase price of the shares. Counsel informed the Court that

no ruling was sought...../2

no ruling was sought as to the liability for succession duty, and I shall deal with the matter on that basis.

The salient facts are the following: In anticipation of his death, which occurred on 29th May, 1954, and in order to avoid the payment of estate and succession duties, the deceased, who was domiciled and resident in Johannesburg, formed a private company, the Ginoc Investment Holding Company (Private) Limited, which was duly registered in Southern Rhodesia on 14th May, 1954. He was to hold 98 of the 100 shares in the company. The two remaining shares were allotted to his/two nominees. Two members of the firm of attorneys acting for him in Southern Rhodesia were his co-directors, holding office at his instance until his death. They had no other interest in the company. To this company he sold shares held by him in Union companies for £51,480-5-6, the the sale being effected on the day after the registration of the company. The purchase price was to be satisfied, as to £98, by the issue to him of 98 fully paid up shares in the company, and as to the balance, by the purchaser acknowledging its indebtedness to the vendor for that amount and promising to pay it to the vendor in Bulawayo, free of exchange on demand. Clause 5 of the agreement of purchase and sale reads as follows:

"This agreement shall be governed in all respects by the
"laws of the Colony of Southern Rhodesia, and the Vendor,

"his executors,...../3

"his executors, his estate and his assigns shall be "entitled to enforce his/their/its rights under this "agreement against the Purchaser exclusively in the High "Court of Southern Rhodesia to the jurisdiction whereof "the Vendor and the Purchaser hereby irrevocably submit, "and the Vendor, his executors, his estate and his assigns "shall not be entitled to enforce his/their/its rights "hereunder against the Purchaser in any Court of the Union "of South Africa."

Shares to the value of £41,725 were in fact transferred to the company before the vendor's death, leaving shares to the value of £9,755-5-6 still his property. At his death the purchase price of the shares so transferred had not been paid, neither had the 98 shares in the Génoc company been allotted to him. They were subsequently allotted to the executors in his estate.

For liability in respect of estate duty, the Commissioner relies upon Section 3(3)(a) of the Death Duties Act 1922, in the alternative upon Section 3(2)(f), and as a further alternative upon Section 3(2)(i) of the Act.

In terms of Section 3(1), a person's estate for the purposes of estate duty consists of all his property which passes, and of all property which, in accordance with that section, is deemed to pass on his death. Sec. 3(2) defines "property" and Sec. 3(3)(a) then provides:

"Any such property shall be deemed to be property passing "on the death of any person if such person, notwithstanding

"that at the date...../4

"that at the date of his death such property may have been "held by or registered in the name of some other person, "(whether in the name of an individual or a body corporate "or incorporate) directly or indirectly and for his own "benefit had the control, order or disposition of the "property, or of the profits derivable therefrom."

The Genoc company is a one-man company. The deceased had complete control of it. It may be said, therefor, with some reason, that he had the control and disposition of its property as well as the income derived from its property, for his own benefit, within the meaning of this provision. That was the proposition advanced in relation to another one-man company in COMMISSIONER FOR INLAND REVENUE vs. ESTATE KOHLER 1940 T.P.D. 134. In rejecting it Millin J. remarked: "The meaning is quite plain. It is simply that substance is to be looked to rather than form, and that, for the purpose of estate duty property is to be deemed to reside not in nominees or agents for the holding of the property but in those for whose benefit they hold and whose orders they have to take in dealing with the property and its profits." It is not quite clear that Millin J. in this passage, read with the rest of his judgment, held in effect that this provision applies only in the case of property held by a nominee or agent. If that is what he meant to convey, I would have some difficulty in describing that as the plain meaning of this provision. It is, to mention one consideration,

at least arguable...../5

at least arguable that the disjunctive reference to the property or the profits derivable therefrom, presupposes a kind of case in which the deceased does not have the control or disposition of the property as such, and in which there would therefore be no holding of the property by a nominee or agent, but in which he does have the control and disposition for his own benefit, of the profits derivable from the property. It may be that closer investigation will show that no such case within ~~in~~ the the terms of Sec. 3(3)(a) can arise, but as presently informed I am not prepared to express that view; nor is it necessary for the purposes of this appeal to come to any conclusion in that regard.

In ESTATE PHILLIPS vs. COMMISSIONER FOR INLAND REVENUE 1942 A.D. 35 at p. 55, the construction placed upon Sec. 3(3)(a) in Kohler's case, was accepted as "substantially correct". Although only the passage referred to above was quoted (in a fuller context), I understand this decision to mean that it was substantially correct to hold that the sub-section deals with property held by a nominee or agent and therefore not with property held by a one-man company for itself and not as the nominee or agent of the controlling ~~company~~ shareholder. There is no indication at all of any reservation as to the correctness

of the view which...../6

of the view which Millin J. had taken in regard to a one-man company. Tindall J.A. went on to say : "So far as immovable property is concerned, sub-section (3) presupposes a case where the registered owner of such property holds not for himself but for the deceased...." As to the nature of the holding of the property, it is difficult to find a basis in the language of the sub-section for any distinction in this regard between immovable and movable property. (Cf. Estate Watkins-Pitchford & Others vs. C.I.R. 1955(2) S.A. 437 at p. 461.)

In support of the view that the sub-section does not bring the property of a one-man company into the deceased estate of its controlling shareholder, counsel for the respondents pointed to the somewhat remarkable results which would otherwise follow. Even when the liabilities of the company exceed its assets, the assets would form part of the estate of the shareholder, without any deduction in respect of its liabilities. Sec. 4 of the Act provides for the deduction from the total value of property in an estate, of debts due by the deceased. There is no provision for the deduction of the debts due by any other person. The inclusion of such assets, also, would not take the shareholding of the deceased in the company, out of his estate. Tax would accordingly be leviable both on the assets

of the company..../7

of the company and of the value of the shares held in the company. These results seem to point to the correctness of the conclusion that the holding of property by a one-man company is not the kind of holding contemplated by the sub-section.

There is the further consideration that the legislature, when it amended the sub-section in 1944, i.e. after the decisions in the cases of Kohler and Phillips, by the addition of a new paragraph (b), sought to cover the ~~sort~~ kind of situation arising on the facts of Kohler's case, without any attempt to make it clear that a holding by a one-man company falls within the terms of Sec. 3(3)(a).

In the circumstances I am unable to hold that the conclusion arrived at in Kohler's case and approved by this Court to the extent indicated above in Phillip/s' case, was wrong. It follows that the appeal does not succeed on the first contention.

The next question to consider is whether the debt due by the company to the deceased was, in terms of Sec. 3(2)(f), a "debt recoverable or right of action enforceable in the Courts of the Union", so as to constitute property which passed on his death. The company is a peregrinus but admittedly had property in the Union which could be attached ad fundandam jurisdictionem, with the result, so counsel for the appellant

argued, .../8

argued, that the debt was recoverable in a Union Court. He submitted that the dictum to the contrary in Estate Brownstein vs. C.I.R. 1957(3) S.A. 512 at p. 524 was obiter and incorrect. On the view I take of the matter, it is unnecessary to enter upon that issue. By Clause 5 of the agreement of sale referred to above, the deceased submitted to the exclusive jurisdiction of the High Court of Southern Rhodesia and surrendered whatever right he may have had to proceed against the company under the agreement in any Court of the Union. If this clause is valid, the debt is in any case not recoverable in the Courts of the Union.

In regard to its validity, it is of some importance to bear in mind that the company, which would be the defendant in any action for the recovery of the purchase price, is a Southern Rhodesia company. In so far as it may be said to be domiciled or to reside anywhere, it is domiciled and resides in Southern Rhodesia and nowhere else. The action could, therefore, properly be brought before a Southern Rhodesian Court on a well-recognised basis of jurisdiction. The agreement would not, in fact, extend that jurisdiction. Also without this clause, it would have existed to the full extent required for such an action. What the clause does purport to effect, is an abandon-

ment by the deceased, .../9

ment by the deceased, who would be the plaintiff, of his right to sue the company, a peregrinus, in a Union Court after an attachment ad fundandum.

Counsel did not refer to any authority in our law dealing with the validity of the surrender of such a right. From such authorities as I have been able to find, it may be inferred that a contract by which such a right is surrendered, is binding. They deal more particularly with contracts of prorogation between subjects of the same State whereby the parties submit to the jurisdiction of a Court of that State, but in part at any rate their reasoning would seem to apply also to a contract whereby one party renounces his right to sue in a Court of his State and submits to the exclusive jurisdiction of the Court of another State also vested with jurisdiction.

Groenewegen, De Leg. Abr. ad Dig. 5,1,2 par.1 observes that there is nothing to prohibit any person from subjecting himself to the jurisdiction of another judge by private agreement without the consent of the ordinary judge. Vinnius, De Jurisdictione Cap. 10, 4 &5, points out that prorogation is something effected by the litigants and does not require the consent of either the judge whose jurisdiction is extended or the ordinary judge. He adds the qualification that the first-mentioned judge must not be without jurisdiction in relation (presumably) to a suit of ../10

(presumably) to a suit of a similar nature. In Cap. 10, 2 he expresses the view that there is no room for prorogation except between subjects of the same State, and mentions, by way of example, that if a subject of the French king should submit to the jurisdiction of a Belgian magistrate, the prorogation would be ineffective. That, however, would be a different kind of case. He does not say that a subject cannot effectively abandon his right to sue in his own Court, where that would leave the Court of another country already vested with full jurisdiction, as the only available Court. According to Noodt, De Jurisdictione et Imperio 2, 12 prorogation arises from the convenience of private parties, and a defendant may ~~object~~ except to proceedings before the ordinary Court if jurisdiction has by agreement been extended to another Court.

Vromans, De Foro Competenti 1, 5n.25 explains that submission to another jurisdiction is the surrender of a privilege, and that the surrender is effective where the privilege has been granted "tot begunstiging van dengenen, die afstand doet but not "indien voornoemde voorregt voornamentlyk is gegeven tot voortreffelykheit ende begunstiging van den regter; want in dat geval kan niemand de Jurisdiktie van sodanigen regter desselfs prejuditie prorogeren." Voet, Commentarius, 2,1,15 is to the same effect. .../11

is to the same effect. Where, for instance, the judge of the ordinary forum has a jurisdictio patrimonialis, i.e. a jurisdiction forming part of an estate (as to which see 2,1,45 and Vinnius O.C. Cap. 10,3) his consent would be required, but not where he has no right which would be affected. In a later passage (2,1,26) he states that agreements not to except to jurisdiction are binding. "The reason is that everyone properly renounces a right which has been established in his interest, and that concluded agreements, not made contrary to law nor in bad faith, ought every way to be kept." (Gane's translation) Van der Linden, Supplementum 2,1,14 points out that because jurisdiction pertains to the status publicus, private pacts were not in past times allowed to derogate from it, but that ultimately this rule was relaxed, and that the very just cause of the relaxation is the advantage to private persons in being able to agree to an easier and more convenient way of settling their rights.

In regard to arrests to confirm jurisdiction, Voet 2,4,22 states that it proceeds ex utilitate sola , the object being "to give creditors greater ease in suing their debtors living under another judge, and to enable them to litigate in the place of their own domicile with less expense and annoyance". (Gane's translation) This reason applies equally, I think, in the

case of an attachment of .../12

case of an attachment of the property of a peregrinus for the purpose of founding jurisdiction. It is likewise a procedure designed to serve the interests of creditors rather than to protect the public interest in the proper administration of justice. Our Courts, moreover, do not exercise any jurisdiction of the patrimonial nature referred to by Voet and Vinnius. Judicial officers have no comparable rights or interest in having cases within their jurisdiction brought to them for decision. This does not, of course, mean that effect will always or even generally be given to agreements of submission to the jurisdiction of a Court of another country or that contracts of abandonment of the right to institute proceedings in a Court of this country will always be enforced. The authorities recognise that in criminal cases, for instance, and in cases in which the representative of another State is concerned, there are other considerations to be taken into account. There may be other cases. But where, as here, an action against a peregrinus may, quite apart from the submission to jurisdiction, properly be brought in the Court of his country, and the right to sue him in the Union by way of attachment of property, is surrendered, I can find no reason in principle why the party who would be the plaintiff in

the Union...../13

the Union, should not be held to his contract. There is nothing in the surrounding circumstances which could serve as an adequate ground for denying the peregrinus the right stipulated in his favour. In coming to this conclusion I have not lost sight of the fact that the peregrinus was a one-man company controlled by the deceased and the contract an integral part of an arrangement by which the deceased sought to avoid the payment of estate duty. If the contract is otherwise valid, it is not rendered unenforceable by the mere fact that it was entered into with the object of reducing or avoiding altogether a tax which would otherwise become payable.

The last contention advanced by the Commissioner is that the debt due by the company to the deceased falls within the definition of "property" by reason of Sec.3(2)(i), which refers to "any amount withdrawable on demand or at notice or on a fixed date "which was standing to the credit of the deceased person at the "date of his death with any bank,building society or other institu- "tion ~~in the Union~~....." In regard to this contention,it is sufficient to point out that the word "withdrawable" is rendered as "terugbetaalbaar" in the Dutch text,which serves to emphasize that, in this context, it relates to an amount received from a deceased person or at least made available to him in some way amounting to a deposit, and standing to his credit with a bank,building society or other institution.The debt here in question is in no

way/.....

~~No~~ way connected with any amount so received.

The appeal is dismissed with costs.

L cost

~~SCHREINER J.A.~~

DE BEER J.A.

BOTHA A.J.A.

HOLMES A.J.A.

} Concur