IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the appeal of :

BLUE CIRCLE CEMENT LIMITED ..... appellant

and

THE COMMISSIONER FOR INLAND REVENUE.. respondent

Coram: CORBETT, MILLER et NICHOLAS, JJA, GALGUT et HOWARD, AJJA.

Date of hearing: 5 March 1984

Date of judgment: 16 March 1984

J U D G M E N T

CORBETT JA

This appeal concerns a claim by appellant, a public company, to be entitled to a machinery initial allowance, in terms of s 12(1) of the Income Tax Act

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58 of 1962 ("the Act"), and a machinery investment allowance, in terms of s 12(2) of the Act, in respect of the cost incurred by it in the construction of a railway line. Appellant claimed these allowances, together with a wear and tear allowance under s 11(e) of the Act, as deductions in the computation of its taxable income for the 1975 year of assessment. In determining appellant's liability to normal tax for that year, the respondent, the Commissioner for Inland Revenue, disallowed these deductions and assessed appellant accordingly. An objection to the assessment on the ground of the disallowance of these deductions having been rejected by respondent, appellant appealed to the Special Court. The appeal was

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heard by the Transvaal Income Tax Special Court, which dismissed appellant's appeal and confirmed the assessment. The present appeal is against that decision, in so far as it relates to the allowances provided for in ss 12(1) and 12(2) of the Act. (Appellant does not persist in the claim for a wear and tear allowance.) The appeal comes directly to this Court in terms of s 86A(2)(b) of the Act, the requisite leave having been granted by the President of the Special Court.

The facts are not in dispute and may be stated quite briefly. The appellant manufactures cement. Its factory is situated at Lichtenburg in the Western Transvaal. The basic raw material used in the manufacture of cement is limestone. Prior to 1975 appellant obtained the

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required limestone from a deposit in the Lovedale area, close to the factory at Lichtenburg. In order to transport the quarried and crushed limestone to the factory appellant had constructed a railway line from the quarry area at Lovedale to the factory. During the 1975 tax year appellant completed and brought into use an extension of this railway line beyond Lovedale to an area known as Springbokpan. The length of this extension was some 41 km. The purpose of this extension was to provide a railway link between the factory and a new limestone quarry and crushing plant which appellant had established at Springbokpan. It is the cost of this railway line of 41 km, stated to amount in all to R2 047 699, which constitutes

the basis of appellant's claim for an initial allowance of 25 per cent of the cost, viz. R511 924, and for an investment allowance of 30 per cent of the cost, viz. R614 309, in respect of the 1975 tax year.

The evidence indicates that the concession area at Springbokpan over which appellant holds the rights to the limestone is very large and has proven and estimated reserves totalling some 120 million tons. Appellant intends to quarry and consume in the process of manufacture about 3 million tons per annum from this area. At this rate of extraction these limestone deposits have a "life" of about 40 years.

The extraction process as described to the

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Special Court, is the following. The first task is to remove by means of a scraperloader the overburden, which varies from 150 mm to about a metre in depth. This exposes the underlying limestone deposit, which is about 8 metres deep. Limestone is broken away from this rock deposit by blasting. The blasting operation, which is designed to break loose from the quarry face sufficient limestone for one day's processing, produces material varying in size from fine powder to large boulders. Boulders which are too large for the crushing plant are then broken up into manageable pieces on the quarry floor by a process termed "secondary blasting". The reduced material is then loaded into large dumper trucks, and

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transported to the crusher plant, situated a short distance (evidently a few hundred metres) away.

At the crusher plant the limestone is further reduced and screened. During the blasting operations and also at the crushing stage samples of the material are taken and tested in order to ensure that what is being processed is not excessively silicious in content. If it is, then it cannot be used for the manufacture of cement and it is treated as waste material. From the screening building one conveyor belt carries such waste material to a waste dump and another conveyor belt takes the fine crushed limestone suitable for processing to a stockpile, from where it is loaded onto railway trucks for conveyance to the factory.

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From where it leaves the concession area the railway line crosses privately-owned farms until it reaches the factory at Lichtenburg. Appellant obtained the necessary servitudes to enable it to build the railway line over these farms. According to the evidence, the railway line was constructed in accordance with specifications laid down by the South African Railways and called the "Main Lines Standard". In order to construct the line the route thereof had to be suitably "profiled" by building embankments or earthworks over depressions in the land and making "cuttings" through elevated areas. The "profile" had to be well consolidated and, where it consisted of an embankment, a good bond

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between the embankment and the natural ground had to be obtained. Concrete railway sleepers were then laid at suitable intervals along the profile and the rails laid on the sleepers and attached thereto by means of a specially designed rail assembly, which clamped the rail to the sleeper. After the rails were laid ballast of crushed stone was placed along the track, around and underneath the sleepers. The track was lifted for this purpose. The ballast was then compacted so that it would not move under load. That basically completed the construction process.

The evidence was further to the effect that the life of the railway line was determined by the life of the

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limestone deposit at Springbokpan. From time to time repair and maintenance would have to be done to the line. This might involve the replacement of sections of rail which were defective or had become worn.

Prior to deciding to build the railway line appellant considered alternative methods of conveying the crushed limestone from Springbokpan to the factory at Lichtenburg. These included conveyor belts, roadways and road transport, but the railway system was preferred because it was found to be the most economical.

That completes my recital of the relevant facts. The question whether appellant was entitled to the machinery initial allowance and the machinery investment allowance

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claimed by it depends upon the proper application to those facts of the provisions of s 12(1) and (2). The relevant portions of subsection (1) read as follows:

> "12(1) In respect of new or unused machinery or plant —
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> (a) which is brought into use by any taxpayer for the purposes of his trade.... and is used by him directly in a process of manufacture.....; or
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> .....
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> there shall be allowed to be dededucted from the income of such taxpayer for the year of assessment during which such machinery or plant is so brought into use an allowance, to be known as the machinery initial allowance."

The wording of the relevant portions of subsection (2) is virtually identical to that of subsection (1) and it need

not be quoted.

During the course of the hearing before the Special Court and while the evidence of appellant's only witness was being led by Mr Swersky, who appeared in the Special Court on appellant's behalf, the representative of the Commissioner made certain important concessions, which had the effect of considerably narrowing the issues in the case. After the mid-morning adjournment Mr Swersky informed the Court that the Commissioner's representative (Mr Van Breda) had made "certain concessions" and there then followed the following exchanges:

> "PRESIDENT: What do you want to admit, Mr Van Breda?
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> MR VAN BREDA: My lord, the Commissioner is not disputing the fact that the actual

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manufacturing process starts at the quarry and coupled with that of course that it is new machinery brought into use by the taxpayer for the purposes of the appellant's trade.

PRESIDENT: So, you will accept that the manufacturing process starts at a stage prior to loading the material onto the railway line?

MR VAN BREDA: Yes, my lord."

Certain discussions followed and then the following further exchange between the President and the legal representatives took place:

"MR SWERSKY: My lord, to clarify the issues, my learned friend was kind enough to say that the only issue between the parties, as far as he is concerned, is the question of whether the railway line falls within the compass of the phrase 'machinery or plant'.

PRESIDENT: Used in the process of manufacture?

MR SWERSKY: Machinery or plant, my lord, falls within the compass of the phrase

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machinery or plant within the meaning of those words in the section. My learned friend accepts for the purposes of this case that the railway line is brought into use by the taxpayer for the purposes of his trade which is other than mining or farming and is used by him. Here I am not quite clear. I would like clarification from my learned friend whether he agrees that the railway line is used directly in a process of manufacture.

MR VAN BREDA: Yes.

MR SWERSKY: My learned friend accepts that the railway line is used in a process of manufacture and this narrows the issues very considerably.

PRESIDENT: The railway line falls into the concept of machinery or plant?

MR SWERSKY: Yes, that is the issue in this case."

From this it is clear that the Commissioner's representative formally conceded:

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(1) That the railway line was new and unused;

(2) that it was brought into use by the appellant for the purposes of its trade;

(3) that the appellant's manufacturing process started at a stage prior to the loading of the material onto the railway trucks;

(4) that the railway line was used directly in a process of manufacture; and

(5) that the only issue in the case was whether the the railway line fell into the concept of machinery or plant.

These concessions having been recorded, the evidence proceeded, evidently on a more restricted basis than had

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originally been envisaged by appellant's counsel.

In his judgment, the President discussed the meaning of the words "machinery or plant" in the context of s 12, but appears to have left undecided the question as to whether the railway line constituted machinery or plant. The judgment concludes:

> "The railway line, in my view, cannot even remotely be considered as directly being used in the manufacturing process. A true interpretation is that the railway line is merely a connecting link between the two plants, one being at Springbokpan and the other 41 kilometers plus away at Lichtenburg.
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> .....
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> As a matter of interpretation and law I hold that the railway line is not used directly in the manufacturing process in

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> either of the two subsections and that neither the 'machinery initial allowance' nor the 'machinery investment allowance' is claimable as a deduction."

It is thus clear that the Special Court decided the appeal on the finding that the railway line was not used directly in a process of manufacture. This finding flies in the face of the formal concessions made by the Commissioner's representative. On appeal before us counsel for the respondent conceded that in so deciding the case the Special Court erred, and that the only issue to be decided on appeal was whether or not the railway line constituted "machinery or plant" in the context of s 12(1) and (2). Before turning to this issue, I might just add that on the evidence placed

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before the Special Court I am satisfied that the concessions of the Commissioner's representative in the Special Court were correctly made.

Before us appellant's counsel conceded (rightly in my view) that it could not be contended that the rail-way line constituted machinery. His submission, however, was that it did constitute plant. Respondent's counsel argued to the contrary.

The word "plant" is not defined in the Act and, so far as I am aware, its meaning in the context of s 12 of the Act, has never been dealt with by our courts. Certainly no relevant South African case was quoted to us; and I have not been able to find any such case. We were

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referred by counsel to various dictionary meanings. I do not find it necessary to repeat all the references cited to us. Three of them will suffice. "Plant", as a noun, has a wide variety of meanings, ranging from the botanical concept of "a young tree, shrub or herb newly planted" to a slang expression denoting a "spy" or "detective" (see Oxford English Dictionary, sub "plant"). Obviously in s 12 one is concerned with plant used directly in a process of manufacture, ie industrial plant. In this context the following relevant meanings are of assistance:

> "The fixtures, implements, machinery, and apparatus used in carrying on any industrial process".
> (Oxford English Dictionary.)
>
> "The equipment, including machinery,
> / tools.....

> tools, instruments and fixtures, and the buildings containing them, necessary for any industrial or manufacturing operation".
> (The American Heritage Dictionary of the English Language.)
>
> "The land, buildings, machinery, apparatus and fixtures employed in carrying on a trade or a mechanical or other industrial business".
> (Webster's Third New International Dictionary.)

Having regard to the context of s 12, it seems to me that the first of these definitions is the most helpful. Although it is not necessary to decide these points — and I do not do so — I doubt whether "plant" in s 12 would include a building which merely housed or contained industrial equipment, etc. used in an industrial operation (cf the Heritage Dictionary definition; and see in this regard

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the English decisions referred to below) or the land upon which an industrial undertaking was carried on (cf the Webster's Dictionary definition). The enquiry is thus whether the items alleged to be "plant" constituted fixtures, implements, machinery or apparatus used in carrying on any industrial process. Before proceeding to apply this definition to the facts of the present case, I wish to refer to certain English authorities cited by counsel for the appellant.

In recent years there have been a number of decisions by the English courts concerning the meaning of the word "plant", as it occurs in certain successive statutory provisions in English fiscal legislation (viz. ss 279 and 280 of the Income Tax Act 1952, ss 18 and 19 of the

Capital Allowances Act 1968 and ss 41 and 44 of the Finance Act 1971). These statutory provisions all employ the same verbal formula authorising capital allowances, from the taxation point of view, in respect of capital expenditure incurred by a person carrying on a trade "on the provision of machinery or plant for the purpose of the trade" (see Benson v Yard Arm Club Ltd, [1979] 2 All ER 336, at p 338 h). Most, if not all, of the relevant decisions are referred to in Benson's case (supra), a decision of the Court of Appeal, in Inland Revenue Commissioners v Scottish and Newcastle Breweries Ltd, [1982] 2 All ER 230, a decision of the House of Lords, and in Leeds Permanent Building Society v Procter, [1982] 3 All ER 925, a decision given in the

Chancery Division.

The starting point of these decisions has, almost without exception, been a dictum of LINDLEY LJ in Yarmouth v France (1887) 19 QBD 647, a case concerned with the meaning of the word "plant", as it occurred in certain non-fiscal legislation, viz. the Employers' Liability Act 1880. In this connection LINDLEY LJ stated (at p 658) —

> "There is no definition of plant in the Act: but, in its ordinary sense, it includes whatever apparatus is used by a business man for carrying on his business, - not his stock-in-trade which he buys or makes for sale; but all goods and chattels, fixed or movable, live or dead, which he keeps for permanent employment in his business."

In the subsequent cases, dealing with fiscal legislation

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providing for capital allowances similar to those contained in s 12 of the Act, the English courts have placed emphasis upon the use which was made of the item alleged to be plant and in this connection have evolved what is termed the functional test. This test has been of particular value in applying the distinction which the courts have been constrained to draw between the "setting" in which a business is carried on and the apparatus with which a business is carried on. The general approach has been described by BUCKLEY LJ in a judgment subsequently described by Lord HAILSHAM LC as "expository" (see Cole Bros Ltd v Phillips, [1982] 2 All ER 247, at p 254 b) as follows:

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"In all these cases the court had regard to the use which was made of the subject-matter under consideration. To an extent this was necessitated by the statutes, for to qualify for capital allowances the subject-matter must have been provided 'for the purposes of the trade'. This, however, is not the end of the matter, for stock-in-trade is provided for the purposes of the trade but is admittedly not 'plant'. The building in which a business is carried on may accurately be described as 'provided for the purposes of the business', but again admittedly is not for that reason alone to be held to be plant. A structure attached to the soil may be plant. The dry dock in Inland Revenue Comrs v Barclay Curle & Co ([1969] 1 All ER 732) was such, as also were the pools in Cooke (Inspector of Taxes) v Beach Station Caravans Ltd ([1974] 3 All ER 159). On the other hand, a structure of the nature of a building which was not attached to the soil was held not to be plant in St John's School (Mountford and Knibbs) v Ward (Inspector of Taxes) ([1974] STC 69).

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The distinction, I think, is that in the one case the structure is something by means of which the business activities are in part carried on; in the other case the structure plays no part in the carrying on of those activities, but is merely the place within which they are carried on. So, in the case at any rate of a subject-matter which is a building or some other kind of structure, regard must be paid to the way in which it is used to discover whether it can or cannot be properly described as plant. This is what has been referred to as the functional test. Indeed I think that this test is applicable to every kind of subject-matter. In some cases the effect of the functional test may be so immediately apparent that the character of the subject-matter as plant goes without saying and the test need not be consciously applied. But in cases nearer the line, in my opinion, the functional test provides the criterion to be applied. Is the subject-matter the apparatus, or part of the apparatus, employed in carrying on the activities of the business? If it is, it is no matter that it consists of some structure attached to the soil. If it is not part of the apparatus so employed, it is not plant, whatever its characteristics may be."

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(See Benson's case, supra, at pp 342 g - 343 d.) In addition, it has been held that the word "plant" connotes some degree of durability and would not include articles which are quickly consumed or worn out in the course of a few operations (see Hinton v Maden & Ireland, Ltd, [1959] 3 All ER 356.

I think that this general approach and in particular the functional test can be fruitfully applied in the interpretation of the word "plant" as it occurs in s 12 of the Act. Of course, ultimately each case must be decided by a careful consideration of its own particular facts and by a common sense approach to what subject-matter can, and what subject-matter cannot properly be classified

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as "plant". As it was put by Lord WILBERFORCE in Inland Revenue Commissioners v Scottish and Newcastle Breweries Ltd, supra, at p 233 e —

> "In the end each case must be resolved, in my opinion, by considering carefully the nature of the particular trade being carried on, and the relation of the expenditure to the promotion of the trade".

The distinction alluded to in the English authorities between a building or structure by means of which the taxpayer's business activities are carried on and one which is merely the place within which they are carried on has no particular relevance in the present case. Nevertheless, the functional test, which poses the general question as to how the subject-matter of the enquiry is used and whether it is employed to carry on or promote the

taxpayer's business activities, is a relevant and useful yardstick to be applied to the issue in this appeal.

Adopting this general approach, I am of the view that the railway line constructed by appellant did constitute "plant" within the meaning of s 12. The trade being carried on by appellant is the manufacture of cement. As the facts show - and as is conceded by respondent - the process of manufacture commences at the appellant's works at Springbokpan, where the limestone is quarried, crushed and, after testing, separated into usable and non-usable material. The next stages of the manufacturing process are necessarily performed at appellant's factory in Lichtenburg, some forty odd kilometres away. Obviously this circumstance compels appellant to provide some form of

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conveyance for the crushed limestone from Springbokpan to Lichtenburg. The form chosen, as being the most economical alternative, is a railway line. The function performed by the railway line and the rolling stock used thereon in conveying the material is, in my opinion, part and parcel of appellant's industrial process and I can see no reason why the railway line should not be regarded as apparatus used in carrying on the industrial process of manufacturing cement. Had the appellant decided to effect the conveyance by means of an immensely long conveyor belt it could hardly be contended that this was not part of appellant's plant. The railway line, though needing periodic maintenance and repair, is durable and is intended to last the life of the limestone deposits at Springbokpan.

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In my opinion, it has all the characteristics of plant.

In his heads of argument respondent's counsel submitted that the word "plant" should be restrictively interpreted so as to mean machinery or something akin to machinery. There is, in my view, no warrant for such a restrictive interpretation, which would virtually render the word "plant" tautologous, and counsel wisely did not press this submission in oral argument. Nor did he pursue another contention which appeared to be made in his heads, viz. that plant did not include buildings and fixtures. In certain circumstances buildings and fixtures can clearly constitute plant.

In the end respondent's counsel fell back on the argument that the railway line could not be regarded as

plant because of its length and the distance separating the Springbokpan works and the factory at Lichtenburg. The length of the railway line, so it was argued, was inconsistent with the concept of plant and the distance separating Springbokpan and Lichtenburg had the effect of interrupting the process of manufacture. (The Special Court appears to have based its decision upon a similar line of argument.) This argument cannot prevail. The size of a piece of apparatus cannot per se prevent it constituting plant, if it otherwise possesses the characteristics of plant. Moreover, if counsel's argument were sound, it would be necessary to draw the line somewhere and decide at what point a railway line of this nature becomes too

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long to be plant. There is no basis in logic or principle upon which this could be done. Nor do common sense considerations compel me to do so. As to the point that the distance involved had the effect of interrupting the process of manufacture, this, as I understand it, amounts to a contention that the conveyance on the railway line is not part of the process of manufacture. This contention is in conflict with the concession made that the railway line is used directly in the process of manufacture; and, in any event, I cannot agree that the process of manufacture is interrupted, as suggested, or that the conveyance is not part of the process of manufacture.

To illustrate his argument, counsel posed the

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hypothetical analogy of a manufacturer who part-manufactures goods and then sends the half-finished goods some distance away, even overseas, to have them completed. In such a case, it was contended, the means of conveyance could hardly be classified as plant. I do not find the analogy helpful. Depending on all the facts and circumstances, the means of conveyance might constitute plant; but, in any event, one must consider the issue in relation to the actual facts of the present case. In appellant's case the works at Springbokpan and the factory are linked by a permanent railway line constructed and operated by appellant at its own expense. It is laid along a route to which appellant has servitutal rights. The line is used solely for the purpose

of conveying crushed limestone from Springbokpan to the factory. The line is like a very long conveyor belt leading from the crushing plant to the factory.

For these reasons I am of the view that, contrary to the finding of the Special Court, the railway line constructed by appellant did constitute "plant" within the meaning of that term in ss 12(1) and 12(2) and that, the other requisites of these subsections being satisfied, appellant was entitled to an initial allowance and an investment allowance on the cost to appellant of the railway line. No finding is made as to whether or not such cost includes all the items which go to make up the amount of R2 047 699 referred to in the dossier.

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The following order is made:

(1) The appeal is allowed with costs, including the costs of two counsel.

(2) The order of the Special Court is set aside and there is substituted an order allowing the appeal and remitting the case to the Commissioner to enable him to revise appellant's assessment for the 1975 tax year in accordance with the findings made in this judgment.

M M CORBETT

MILLER JA)
NICHOLAS JA)
GALGUT AJA) Concur
HOWARD AJA)