

112/85

Case No 206/84

WHN

THE COMMISSIONER FOR INLAND REVENUE Appellant

and

ABRAHAM JOHANNES PRETORIUS Respondent

JOUBERT JA.

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

THE COMMISSIONER FOR INLAND REVENUE Appellant

and

ABRAHAM JOHANNES PRETORIUS Respondent

Coram: CORBETT, JOUBERT, GROSSKOPF JJA et
GALGUT, NICHOLAS AJJA

Heard: 9 September 1985

Delivered: 25 September 1985

J U D G M E N T

JOUBERT JA:

/Sec

Sec 9(4)(b) of the Transfer Duty Act 40 of 1949 (the "Act"), as amended, provides the following:

"No duty shall be payable -

(b) where trust property is transferred by the administrator of a trust to the persons entitled thereto under the will or other written instrument in pursuance of which such administrator was appointed." (My underlining).

The respondent ("Pretorius") applied in the Transvaal Provincial Division for a declaratory order against the appellant (the "Commissioner") that he was in terms of the said section exempt from transfer duty in respect of the acquisition by or transfer to him from Orchid Trust of flat 201, Orchid Flats, as well as garage 12 thereof. The Commissioner opposed the application on the ground

/that

that the flat and garage had been transferred as a sectional title unit to Pretorius not as a beneficiary under a trust deed, but as a purchaser pursuant to a separate agreement with the trustees of Orchid Trust.

According to the Commissioner such agreement constituted a "transaction" for purposes of the Act which was subject to transfer duty. The issue was therefore whether or not Pretorius was entitled to exemption from transfer duty in terms of sec 9(4)(b) of the Act. LE ROUX J granted the declaratory order with costs. With leave of the Court a quo the Commissioner appeals to this Court against the whole of the judgment and order. The judgment

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appealed against is fully reported in 1984(2)SA 619 (T).

It is necessary to deal briefly with the factual background of the dispute between the parties.

As from 1 April 1964 Pretorius has ^{been} the tenant of a flat in a block of flats known as Orchid Flats which comprised 36 flats and some garages. Orchid Properties (Pty) Ltd (the "owner") was the owner of Orchid Flats. During September 1980 a certain L.A. Stuart, managing director of J de Moor (Pty) Ltd, a company doing business as estate and rental agents which also administered many blocks of flats in Pretoria informed Pretorius "that his company intended attempting

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a co-ordinated offer by the tenants of Orchid Flats
to purchase the building and thereafter obtain sectional
title registration in respect of the building, which
sectional title was to lead to each of the tenants
obtaining ownership of his or her individual flat. This
would obviate the possibility of a speculator purchasing
the building and thereafter selling the individual flats
at the highest price which the market would bear". The
owner of Orchid Flats was not interested ^{applying for the} in opening of a
sectional title register in terms of Act 66 of 1971
which would enable the tenants to obtain ownership of
their flats as sectional title units. Stuart also
/explained

explained to Pretorius "that it would be necessary for each of the tenants to contribute towards payment of the purchase price of the Orchid Flats as well as towards the other expenses necessary for the completion of the project". Subsequently, at a meeting of tenants Stuart elaborated on his proposed project. He suggested the formation of a trust as the appropriate device for the implementation of his project. The trust would purchase Orchid Flats from its owner for the benefit of the tenants who participated in the project by becoming beneficiaries under the trust. They would, however, have to contribute towards the trust capital to enable the trust to achieve

/its

its objects. Having bought the property the trust would apply ^{for the opening of} a sectional title register. It would then allocate and transfer the individual flats as sectional title units to each of the tenants who were trust beneficiaries. According to Stuart no transfer duty would be payable in respect of the transfer of a flat from the trust to a tenant as a trust beneficiary. In the event of any flat not being acquired by a tenant such flat would be sold by the trust to a member of the public. It would seem that some of the tenants, including Pretorius, were in favour of accepting Stuart's proposals.

/To

To give effect to his proposals Stuart as donor entered into a deed of donation in trust (the "trust deed") on 17 October 1980 with the two initial trustees (of whom he himself was one), in terms of which he as settlor created the Orchid Trust with an initial trust capital of R100 in favour of the beneficiaries. The latter comprised three categories of persons in the following order of preference viz:

- (i) tenants who occupied flats in the Orchid Flats on 1 October 1980;
- (ii) registered shareholders of the owner as at the date of the acceptance of the offer by the trustees

/to

to purchase Orchid Flats; and

(iii) such other persons as may be nominated by the
trustees.

The acceptance in writing on 28 October 1980 by some
of the tenants (including Pretorius) as beneficiaries
of the benefits stipulated in their favour in the deed
of trust rendered the Orchid Trust, in the circumstances
of this case, irrevocable as a trust inter vivos.

See Crookes N.O. & Another v Watson & Others, 1956(1)

SA 277 (AD) at pp. 288A, 306 H. For the purpose
of this judgment I shall assume, without deciding, that
the Orchid Trust is a valid trust. I also expressly

/refrain

refrain from deciding upon the validity of the wide power which the deed of trust purported to confer on the trustees to select the third category of beneficiaries from the public at large.

In terms of a deed of sale dated 20 October 1980 the Orchid Trust bought Orchid Flats from its owner for the sum of R1 475 000-00. A deposit of R100 000-00 was payable on the signing of the deed of sale while the balance of the purchase price was payable against transfer of Orchid Flats to Orchid Trust. The latter duly acquired transfer of Orchid Flats. On 22 February 1982 Orchid Trust succeeded in having a sectional title register

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opened in respect of Orchid Flats. As I have already indicated, Pretorius received transfer of flat 201 and garage 12 as a sectional title unit from Orchid Trust. The first question is whether Pretorius became transferee thereof as a trust beneficiary pursuant to the deed of trust or in consequence of a separate contractual arrangement between him and the trustees of Orchid Trust.

It is obvious from a perusal of the trust deed as a whole that it sought to implement Stuart's project, as described supra. The purpose of Orchid Trust was to enable trust beneficiaries in accordance with their order of preference to acquire ownership of flats as

sectional

sectional title units. In terms of clause 18 of the trust deed Orchid Trust will terminate when all sectional title units have been transferred to them. On 30 October 1980, Pretorius, who qualified as a trust beneficiary of the first group of beneficiaries, completed an application form in the prescribed form for the allocation to him of flat 201 and garage 12 "for the purchase sum of R43 000". 30% of the "purchase price" was payable within 7 days of signing his application while the balance thereof was payable in cash against registration of a sectional title unit in his name (Clause 1).

On signing the application form Pretorius became "entitled

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to take occupation of the flat hereby purchased as and from which date all benefits and risk shall pass on to the applicant (i.e. Pretorius)" (Clause 3). Clause 7

of the application form records the following:

"This application constitutes a contractual relationship between applicant and the trustees for the time being of the Orchid Trust". On the same date the trustees of Orchid Trust accepted his application in writing "subject to the terms and conditions as fully set out in the said Trust Deed". The application and its acceptance are contained in the same document, bearing the title "Deed of Application and Allocation" (Annexure "E" to the Founding Affidavit). In paragraph 15

of his Founding Affidavit Pretorius claimed that he had to make a further contribution (presumably in excess of the "purchase sum of R43 000") towards the capital of Orchid Trust. It appears from the correspondence annexed to his Founding Affidavit that Pretorius as a trust beneficiary was responsible for his pro rata share of the total debt of Orchid Trust proportionate to the value of the sectional title unit allocated to him. While the agreement in Annexure "E" has indubitably many of the characteristics suggestive of a contract of purchase it is, for the purpose of this judgment, not necessary to place it in a particular

/juristic

juristic niche. Even if it were construed as an innominate contract the result would still be the same, viz. to confer on Pretorius a contractual right to claim from the trustees transfer in his name of flat 201 and garage 12 as a sectional title unit against payment of his contribution to Orchid Trust as a quid pro quo.

The agreement in Annexure "E" therefore constituted the causa of the transfer of flat 201 and garage 12 as a sectional title unit to him by the trustees.

The argument of Mr Goldstein on behalf of Pretorius that Orchid Trust was a growing trust since the beneficiaries also became new settlers who

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contributed towards the trust capital, cannot, in my opinion, be substantiated by the express wording of the trust deed. I can find no support in the latter for the proposition that persons who became beneficiaries intended to assume a dual function as beneficiaries and new settlers. He also relied on clause 7.3 of the trust deed for the contention that Annexure "E" had been incorporated in the trust deed and that Pretorius had accordingly in consequence of the trust deed acquired a contractual right to claim from the trustees transfer of flat 201 and garage 12 as a sectional title unit. Clause 7.3 of the trust deed provides as follows:

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"A Beneficiary must apply to the Trustees for the allocation of a flat and/or garage on the prescribed application form as per Appendix II and which application forms part of this trust deed. The trustees shall have the right to alter and amend the application form should they deem it necessary."

(My underlining).

It is clear from the context in which the words "which application" are employed in clause 7.3 that they refer to "the prescribed form as per Appendix II" i.e. to the prescribed blank application form. The latter was obviously incorporated in the trust deed to serve as an obligatory model. Clause 7.3 in its present form never purported to incorporate in the trust deed application forms which

/were

were completed after the execution of the trust deed.

Had that been the intention then one would have expected the relevant part of the sentence in question to have been worded as follows: "and which application form upon completion thereof by a beneficiary will form part of this trust deed". In the last sentence of Clause 7.3 the expression "application form" likewise refers to "the prescribed form as per Appendix II". Had it been the intention to confer on the trustees an express power to alter or amend unilaterally an application form already completed by a beneficiary the last sentence of clause 7.3 could have been worded appropriately to express that unequivocally. In its present form clause 7.3, in my

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opinion, does not support the contention advanced
by Mr. Goldstein.

I accordingly agree with Mr Joffe's
submission on behalf of the Commissioner that the
acquisition by Pretorius of flat 201 and garage 12
and the transfer thereof to him as a sectional title
unit did not arise from the trust deed but from the
agreement in Annexure "E". This conclusion that
Pretorius became transferee of flat 201 and garage 12
as a sectional title unit pursuant to the agreement in
Annexure "E" and not in consequence of the trust deed,
is the answer to the first question raised supra.

/The

The relevant provisions of sec 2(1) of
the Act are as follows:

"Subject to the provisions of section 9,
there shall be levied - - - a transfer
duty - - - on the value of any property
- - - acquired by any person - - - by
way of a transaction or in any other
manner - - - "

Section 1 of the Act defines the word "transaction" very
widely as :

"an agreement whereby one party thereto
agrees to sell, grant, donate, cede,
exchange, lease or otherwise dispose
of property to another, or any act
whereby any person renounces any interest
in or restriction in his favour upon the
use or disposal of property."

/Pretorius

Pretorius acquired flat 201 and garage 12 as a sectional title unit by way of the agreement in Annexure "E" which falls within the Act's definition of a "transaction".

Pretorius is therefore liable to pay transfer duty as transferee of flat 201 and garage 12 as a sectional title unit unless he is in terms of sec 9(4)(b) of the Act exempted from paying transfer duty. The second question is accordingly whether he qualified for the said exemption from transfer duty. Sec 9(4)(b) clearly envisages the situation where a trustee transferred trust property to a person "entitled thereto" under a will or a trust deed. What does "entitled thereto" mean ? The

Oxford

Oxford English Dictionary s.v. "entitle" ascribes
the following meanings to "entitle", viz :

"I From TITLE = superscription, designation.

1. - - - - -

2. - - - - -

3. - - - - -

II From TITLE = 'right to possession'.

4. To furnish (a person) with a 'title'
to an estate. Hence gen. to give (a
person or thing) a rightful claim to a
possession, privilege, designation, mode
of treatment etc."

According to its ordinary sense the expression "entitled

thereto" as used in the context of sec 9(4)(b) means

"having a rightful claim thereto". The exemption from

transfer duty is according to sec 9(4)(b) applicable

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where trust property is transferred by a trustee to persons who have a rightful claim thereto (i.e. a right to claim transfer of such property from the trustee) under the trust instrument. I have already in answer to the first question found that Pretorius had a right to claim from the trustees transfer of flat 201 and garage 12 as a sectional title unit not in consequence of the trust deed but pursuant to the agreement in Annexure "E". The answer to the second question is therefore that Pretorius does not qualify for the exemption from transfer duty in terms of sec 9(4)(b). The

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appeal must therefore be upheld.

In the result -

1. The appeal is upheld with costs. Such costs are

to include the costs incurred by the employment of

two counsel by the appellant.

2. The order of the Court a quo is altered to read

as follows :

"The application is dismissed with costs."

JOUBERT JA

CORBETT, JA

GROSSKOPF, JA

GALGUT, AJA

NICHOLAS, AJA

Concur.