IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

CASE NO 665/92

In the matter between

COMMISSIONER FOR INLAND REVENUE Appellant

versus

SOUTHERN LIFE ASSOCIATION LIMITED Respondent

CORAM: HOEXTER, BOTHA, EKSTEEN, NIENABER JJA et

NICHOLAS AJA.

DATE HEARD: 6 MAY 1994

DATE DELIVERED: 27 MAY 1994

J U D G M E N T

HOEXTER JA:

The appellant is the Commissioner for Inland Revenue. The respondent company, which has its registered office at Rondebosch in the Cape Province, carries on within the Republic of South Africa the business of life insurance. In order to canvass life and other forms of insurance the respondent appoints persons as its agents ("Consultants"). The basic remuneration of a Consultant is a commission on the premiums paid to the respondent for those of its contracts effected through

the Consultant. The terms of a Consultant's employment are contained in a standard printed form of contract ("the agency agreement") signed by the parties. Clause 6 of the agency agreement provides that it may be terminated at any time by either party on written notice of twenty-four hours; and that it terminates automatically on the Consultant's death whilst in service or on pension.

By means of a further standard printed form of contract ("the lease agreement"), signed by the parties thereto, the respondent leases to an individual Consultant a motor car described in the lease agreement which motor car the respondent has earlier purchased with a view to such lease. In terms of clause 2 of the lease agreement the period of the lease is twelve months, subject to the proviso that unless the lessee gives notice in writing to the contrary at least one month before the expiry of the period, the lease continues on

the same terms until terminated by either party upon notice in writing of one month. Clause 4 of the lease agreement further provides for automatic termination of the lease in case the lessee ceases to be in the respondent's full-time employ or its full-time representative; or in the event of the lessee's failure either to pay the monthly rental within fourteen days of due date, or to carry out any other term or condition thereof.

Initially the respondent accounted for sales tax on the basis that the lease agreements constituted rental agreements in terms of the Sales Tax Act, No 103 of 1978 as amended ("the Act"). During or about May 1986 discussions were held in Cape Town between representatives of the respondent and officials of the appellant in the course whereof a difference of opinion arose as to whether the lease agreements constituted

rental agreements or should be dealt with under the Act as financial leases.

According to sec 1 of the Act a "financial lease" means an agreement which is in terms of paragraph 1 of Schedule 4 thereof deemed to be a financial lease. In six sub-paragraphs, respectively lettered (a) to (f), paragraph 1 of Schedule 4 lists six separate requirements which have to be satisfied for an agreement to be deemed a financial lease. It is common ground that the lease agreements satisfy each of the four prerequisites respectively set forth in sub-paragraphs (a), (c), (e) and (f) . What is in dispute between the parties, and what is the issue in this appeal, is whether or not the lease agreements satisfy the requirements prescribed in sub-paragraphs (b) and (d) of paragraph 1 of Schedule 4. I quote the last mentioned two sub-paragraphs hereunder:-

"1. For the purposes of this Act, an agreement shall be deemed to be a financial lease, if -(a) ......

(b) the lessor under such agreement is - (i) a banker or financier carrying on a business in the ordinary course of which agreements conforming to the requirements of this paragraph are concluded; or (ii) a dealer in goods, machinery or plant of the kind let under the said agreement, and the agreement is concluded in the ordinary course of the business of such banker, financier or dealer carried on in the Republic;

(c) ...

(d) the lessee is entitled to the possession, use or enjoyment of the leased property for a period of at least of at least twelve months;"

Subsequent to the aforementioned discussions between the parties during May 1986 the appellant

concluded that the lease agreements constituted financial leases; and in terms of sec 19(5) of the Act he caused to be sent to the respondent written notice of his intention to raise assessments (and penalties) accordingly. Being dissatisfied with such action by the appellant, the respondent requested in terms of sec 20(1) of the Act that the matter be referred to a sales tax advisory committee ("the committee"). Before the committee, and in support of its contention that the lease agreements did not constitute financial leases, the respondent -

(1) submitted that it was neither a "banker" nor a "financier" within the meaning of paragraph 1(b);

(2) submitted that in terms of the lease agreement the lessee is not entitled to the possession, use or enjoyment of the leased motor car for a period of not less than twelve months.

Having heard the contentions of both parties the committee gave its opinion, in terms of sec 20(7) of the

Act, that the assessments intended by the appellant were not correct. In its reasons the committee stated that it was not disposed to accept the first submission advanced on behalf of the respondent. In this regard it stated: -

"Given the wide scope of the definition of a financier, the Committee finds that there is very little merit in Mr Meyerowitz's proposition that the applicant [the present respondent] should not properly be regarded as a financier." On the other hand the committee accepted the correctness

of the second submission put forward by the respondent,

and it therefore concluded "that the intended assessments ... are in our opinion incorrect." The line of reasoning adopted by the committee in upholding the respondent's second submission appears sufficiently from the following paragraph in its opinion: -

> "A lessee of the applicant [the respondent] who fulfils all the obligations in terms of both the employment contract and lease agreement may nevertheless find himself without the use or

> enjoyment of the leased article whenever his employment contract is terminated by the employer. He has no direct control over these circumstances. When the lease agreement is concluded, the duration thereof can legally be determined by the lessor who can unilaterally terminate the employment contract which will, as a natural contractual condition, ipso facto terminate the lease agreement. The very nature of the lease in the given circumstances is therefore such that it cannot be said that the lessee is entitled to the possession, use or enjoyment of the leased property for a period of at least twelve months."

The appellant disagreed with the committee's opinion. He gave notice to the respondent in terms of sec 20(10) of the Act, and thereafter he proceeded to make assessments as contemplated in sec 19(3). To all of the aforementioned assessments the respondent lodged an objection on the basis that in terms of the Act the lease agreements were rental agreements and not financial

leases. The appellant disallowed the objection, whereupon the respondent lodged an appeal against such disallowance to the Income Tax Special Court ("the special court").

The special court upheld the respondent's appeal. It set aside the assessments in question; and in addition it ordered the appellant to pay the respondent's costs of the appeal.

While not abandoning the submission that it was not a "financier", counsel for the respondent in his argument to the special court did not press this submission; and he relied primarily on the contention that under the lease agreement the lessee was not entitled to the possession, use or enjoyment of the leased motor car for a period of at least twelve months. Having regard to the fact that the lease agreement terminates automatically when the lessee's employment with the respondent ends, the special court in its

judgment considered as decisive in the appeal the feature that the agency agreement empowered the respondent at any time, and for whatever reason, to end the lessee's employment upon notice of 24 hours. In these circumstances, so reasoned the special court, it could hardly be said that the lessee had "an enforceable right, or a rightful claim" to possession, use or enjoyment of the leased motor car for a period of at least twelve months. While stating that its aforesaid conclusion rendered it unnecessary to deal with the respondent's alternative submission to the committee, in its judgment the special court went on to say that whatever the respondent's status as a "financier" might be, it was very doubtful whether in the ordinary sense of the word "business" the respondent could be said to "carry on business" with its employees. In this connection the special court remarked: -

> "the word 'business' is one of wide connotation, embracing anything which occupies the time and attention of a person or company for the purpose of profit."

Inasmuch as it was not satisfied that the leasing of motor cars to its employees was an activity undertaken by the respondent for the purpose of profit it did not appear to the special court that the respondent -

> "is a financier as contemplated in paragraph 1 of Schedule 4 and it accordingly follows that on this ground too the leases in question do not qualify as (or can be deemed to be) 'financial leases'."

Sec 83(17) of the Income Tax Act (made applicable in terms of sec 22(4) of the Act to any appeal to the special court referred to in sec 22(1) of the Act) provides that no order as to costs shall be made unless the claim of the Commissioner is held to be unreasonable

or the grounds of appeal therefrom to be frivolous. In its judgment the special court expressed the view that it was unreasonable for the appellant to claim that the lease agreements satisfied all the statutory criteria for deeming them to be "financial leases"; and that in its opinion the said claim was "quite incapable of being sustained."

I am unable to share the view that the appellant's claim is indefensible. For the reasons which follow that claim appears to me, with respect, to be readily sustainable.

Before this court counsel for the respondent supported the reasoning of the special court. It was forcibly contended that unless it could be said that the lessee under the lease agreement was "absolutely" entitled to possession of the leased motor car for at least twelve months the requirements of paragraph 1(d) of Schedule 4 of the Act were not satisfied. There was not

any such absolute right, so counsel urged upon us, first because the period of the lease was linked to the period of the lessee's employment which was terminable at any time by the respondent on notice of 24 hours; and second since the period of the lease ended in the event of the death of the lessee which might supervene within the twelve month period, in which eventuality no rights of possession would pass to the lessee's estate.

The above arguments appear to me to be unsound. In order to determine the extent of the rights of possession accorded a lessee one must look to the contract of lease which defines them. Clause 2 of the lease agreement stipulates a period of possession for twelve months. That is the position de jure. Whether in fact a particular lessee will enjoy such possession must of necessity depend on many factors quite extrinsic to the contract of lease itself. One such factor is to be found in the respondent's power to terminate the term of

employment at any time on short notice. But many other, and no less obvious, factors, all external to the contractual provisions of the lease agreement, may likewise shorten the actual (as opposed to the contractual) period of the lessee's enjoyment of possession of the leased motor car. For example, the lessee may fall ill and be unable to pay the monthly rental within fourteen days after it has fallen due. Such are the daily vicissitudes of life that in advance it can never be known or certain that de facto the lessee will enjoy possession for the full period of twelve months to which he is contractually entitled. A moment's reflection will show that this is a plight common to lessees in general. For the purpose of applying paragraph 1(d) of Schedule 4 the lease agreement is autonomic. As a matter of fact there is a link between the lease agreement and the agency agreement; but legally the two contracts are not integrated so that the effect

of the respondent's power to terminate the term of employment of the lessee upon notice of 24 hours displaces and supersedes the explicit stipulation in the lease agreement that the period of the lease is twelve months. Each of the two agreements has an independent existence. If, for example, the respondent should wish to end a lease agreement without terminating the lessee's employment as a Consultant, it would be legally incompetent for it to do so within the period of twelve months prescribed in clause 2 of the lease agreement. It follows that the special court erred in concluding that the requirements of paragraph 1(d) of Schedule 4 had not been satisfied.

The alternative argument based on the requirements of paragraph 1(b)(1) may be dealt with quite shortly. In its ordinary acceptation the word "financier" is one of wide significance. The word connotes a person or institution occupied on a

substantial scale with financial operations. I find nothing in Schedule 4 to the Act to suggest that the ordinary meaning of the word should be cut down or restricted. It is clear, so I consider, that the respondent is a "financier". Whether the presence of the further requirements (reflected in the words following upon the word "financier") of paragraph 1(b)(i) was really in issue between the parties, seems to me to be a matter of considerable doubt. But for the sake of completeness I indicate my respectful disagreement with the observations made in passing by the special court on this part of the case to which attention has already been drawn. Paragraph 1(b)(i) requires that the lease agreements are concluded in the ordinary course of the financier's business. It does not require that such agreements should be concluded with the contemplation of pecuniary gain on the part of the financier.

In terms of sec 23 of the Act the respondent bore the burden of proving that the decision of the appellant was wrong. In my view it failed to discharge that onus. The appeal succeeds with costs, including the costs of employing two counsel. The order of the special court setting aside the assessments raised by the appellant and ordering the appellant to pay the costs of the appeal to the special court is set aside.

GG HOEXTER JUDGE
OF APPEAL

BOTHA JA) EKSTEEN JA)
NIENABER JA) CONCUR
NICHOLAS AJA)