THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NO. 496/95

In the appeal between

APPELLAN

T ROBIN CONSOLIDATED INDUSTRIES LIMITED

and

COMMISSIONER FOR INLAND REVENUE RESPONDENT

BEFORE: MAHOMED CJ, HEFER, HOWIE, SCHUTZ and

SCOTT JJA

HEARD: 28 FEBRUARY 1997

DELIVERED: 14 MARCH 1997

SCHUTZ JA

J U D G M E N T

SCHUTZ JA:

The appellant company ("Robin") asserts that the Transvaal Income Tax Special Court erred in upholding the contention of the respondent ("the Commissioner") that Robin did not carry on trade during the 1988 tax year. The significance of that rinding is that, as s 20 (1) of the Income Tax Act 58 of 1962 ("the Act") has been interpreted to date, Robin will not be able to set off assessed losses accumulated prior to that year against the income of succeeding years. In other words, the Commissioner's stand is that a tax year of mercantile abstinence by a company entails the loss forever of that usually valuable asset, an assessed loss.

Robin disputes this contention and maintains that on the facts it did carry on trade in 1988, basing its case on two transactions of sale during that year. That is the one ground of appeal. The other could not be advanced before the Special Court, because it runs counter to a series of decisions in this Court, which have construed s 20 (1) and its predecessor as meaning that if there is no income or loss from trading in a given year the machinery for setting off an assessed loss cannot operate, with the result that the assessed loss disappears. That other ground of appeal is, then, that those decisions are clearly wrong and should not be followed: Robin is entitled to carry forward the assessed loss even though there was no trading income during 1988 against which it could be set off - so

Robin contends.

The relevant part of s 20 (1) reads:

> "For the purpose of determining the taxable income derived by any person from carrying on any trade within the Republic, there shall be set off against the income so derived by such person
>
> (a) any balance of assessed loss incurred by the taxpayer in any previous year which has been carried forward from the preceding year of assessment: Provided that
>
> (i) . . ."

Background

Robin was a manufacturer, wholesaler and retailer of stationery and associated products operating shops throughout the country through subsidiary companies. By 1986 it had become insolvent and was running at a loss. On 16 September 1986 provisional liquidation followed.

Three officers of a firm of liquidators, Westrust, were appointed joint provisional liquidators. Their powers included that of carrying on business in so far as it might be necessary for beneficial winding up, this in terms of s 386 (4) (f) of the Companies Act 61 of 1973. (For the sake of brevity I shall call the provisional liquidators simply liquidators and the provisional liquidation or winding up simply the liquidation or winding up. Nothing in this case turns on the distinction).

The creditors were of the opinion that it would be most beneficial for them if the business were to be sold as a going concern. In order to make this possible the liquidators continued to trade as before from the date of liquidation (16 September, 1986) to 30 September 1986, which was the day before the effective date of the sale of the business, to be described below. These trading sales realised R168 897,95 and they were later to be reflected in the liquidation accounts as "trading income" under the main heading "Realisations". Robin's activities until 30 September 1986, before and after liquidation, resulted in its having had a trading income for the 1987 tax year. It is the 1988 year that is in issue.

The sale of the business already referred to took place on 3 October 1986, to Sassari Investments (Pty) Ltd, which was a subsidiary of a major trade competitor known as Waltons. The Master's approval was obtained. It was a lock stock and barrel sale, although certain assets were excluded. Of particular relevance is that although stock on hand was included in the sale, stock in transit or in a bonded or state warehouse at 1 October 1986 was to remain Robin's property. The liquidators were left with these and some other remnants, but the business had passed into new hands.

Although this sale became effective immediately, it was envisaged and indeed provided in the agreement that within 90 days Sassari would make an offer of compromise to the creditors under s 311 of the Companies Act, with a consideration consisting of the sale price of 3 October (R7 050 000) plus a further R500 000. If the compromise should be accepted by creditors and sanctioned by the Court, it was to supersede the original sale. The process of compromise made its tortuous way through the courts and it was sanctioned and the original sale superseded only on 15 March 1988, that is after the 1988 tax year had run its course. The substance of the compromise was that Sassari acquired the shares in Robin and then funded it so as to allow of a composition with creditors and its restoration to solvency. The effective date remained 1 October 1986, and trading during the interim period was deemed to be for Robin's account. At the same time the winding up, which had become final on 2 June 1987, was set aside.

It was while Robin was in a state of limbo between 1 October 1986 and 15 March 1988 that there occurred the two sales that Robin contends constituted trading during the 1988 tax year. Both were sales of goods which were in bond. It will be recalled that the stock in bond remained in the hands of the liquidators. The Erst sale was for R6 000, to Fine and Van Gelderen. It took place in April 1987. The second was for R3 000, to Fincord Stationers Ltd, in July 1987. In each instance the buyer had to pay all imposts and charges necessary to have the goods cleared from bond. These stocks had been offered to various stationers on these terms. The liquidators could have made the necessary payments, in which case they would have been free to deal with the goods. But they chose the course they did, because, if they had not, their disbursements may have exceeded the proceeds of sale. They were of the view that it was not for them to gamble, and possibly incur a loss. The other class of stock remaining under their control, the stock in transit, was also deflected from becoming stock on hand. Goods were either not accepted or were returned.

The proceeds of the sales of R6 000 and R3 000 were deposited in Robin's bank account on 23 October 1987. In the liquidation account these amounts were described as "sale of shipments" under the main heading "Realisations" (as already mentioned the sales between 16 and 30 September 1986 were described as "trading income" under the same main heading).

Mr Moses, who acted for Westrust in the liquidation, agreed under cross-examination that the creditors did not wish Robin to continue trading after the sale of the business on 3 October 1986 "because of the losses that would be incurred" if trading did continue. They kept the business going long enough for it to be sold as a going concern, which they regarded as the most advantageous mode of realisation. In the light of that, Moses was asked how the liquidators could continue to trade after the business had been sold. His response was that they could offer for sale goods over which they retained control and recover what they could. As far as stock was concerned it was " in the normal course of trading for a liquidator" to sell off stock in bulk. He agreed that the goods in bonded warehouses were not sold over the counter to the general public; also that the manner of effecting the sales in bond differed materially from Robin's method of operation in the past. He added, in re-examination, that in his experience it is not unusual for a trader in financial difficulties to sell goods in bulk to other suppliers, and a liquidator would do the same if it were opportune to do so.

In my opinion the course of the cross- and re-examination reveals the true nature of the factual issue between the parties. The

Commissioner contends that in effecting the two sales the liquidators were merely realising assets in the course of liquidation. Robin contends that the sales were effected in the course of their trading activities. Did Robin carry on trade in the 1988 year?

Although the submission that Robin did carry on trade in 1988 was advanced as an alternative one, I shall deal with it first.

Many of the arguments leading up to this submission may be accepted as sound in principle. I do not propose setting them out in detail, even less the authorities upon which they are correctly based, but will confine myself to indicating what they are. Reference is made to the wideness of the definition of the word "trade" in s 1 of the Act and the consequent recognition by the courts that it should be given a wide interpretation. Further, that it is possible for even a single transaction to constitute trade. Further yet, that it is possible in special circumstances for resale at a loss to constitute trading. So far so good.

Then it is contended, also with theoretical impeccability, that the activities of a taxpayer must be viewed in their context and not in isolation, and be characterised with reference to the taxpayer's scheme or venture as a whole, even if it straddles more than one tax year. This proposition leads on to the following example. In year one a retailer acquires premises, employs staff and buys stock, but does not open his doors until the beginning of year two. On the authority of Sub-Nigel Ltd v CIR 1948 (4) SA 580 (A) at 589-590 he would clearly be entitled to deduct the expenditure incurred in year one from revenue earned in year two. The retailer trades on and keeps his doors open until the last day of year nine. Starting at the beginning of year ten he commences to wind up the business and sell its assets, including stock. On those bare facts the proceeds of the stock sales would constitute gross income: C I R v Niko 1940 AD 416 at 427-429. But for the cost price of that stock (if incorporated in an assessed loss) to be deductible, it would be necessary that the sales be characterised as carrying on a trade. The submission is that that characterisation should be made, and on those simple hypothetical facts I would agree.

The example is then taken a step further. The winding up of the business in year ten is the result of a liquidation and a liquidator controls the sale of assets. Such a case, it is argued, is no different. In certain circumstances that may be: a good example being afforded by the sales in this case between 16 and 30 September 1986. The continuation of the business until it could be sold was necessary for a beneficial winding up. Trading continued.

The law reports afford further examples, two of which I shall mention. In both instances the taxpayer contended that he had ceased carrying on trade and that his revenues were not taxable. The first case is J & R O'Kane & Co v The Commissioner of Inland Revenue 12 TC 303 (HL). Until 1916 the appellants had carried on business at Belfast as wine and spirit merchants. During that year they decided to close their business. No attempt was made to dispose of it as a going concern. On the contrary they sent a circular to their customers offering their stock for sale. (The prices are worthy of note. Fresh sherry of 1914 vintage in hogsheads was offered at 10 s 9 d per gallon, and fresh brandy of the same year at 10 s 8 d per gallon). No new stock was acquired, save under certain existing supply contracts, which were allowed to run their course into 1917. The only alterations made to the business were that, whereas formerly the wooden casks were to be returned, they were now sold, under the condition that the customer was to retain them; and, further, the customer had himself to effect the liberation of the purchased parcel from bond at Cork, instead of taking direct delivery from the appellants. The first question addressed by the House of Lords (at 347) was whether, for purposes of Excess Profits Duty, the profits for the year 1917 had arisen from "any trade or business". The appellants contended that they did not, but arose in the process of realisation under an altered method of trading not consistent with a continuing concern. This contention was rejected, Lord Buckmaster saying (at 347):

> "... they were engaged in trading which, so far as the external world is concerned, was the ordinary method of carrying on trade modified only by arrangements which were merely part of the machinery of business dealing adopted to effect their intention to retire. It may well be accepted that they did so intend; yet the intention of a man cannot be considered as determining what it is that his acts amount to; and the real thing that has to be decided here is what were the acts that were done in connection with this business and whether they amount to a trading which would cause the profits that accrued to be profits arising from a trade or business?
>
> Now there are two extreme cases which are put in the matter. It is said on behalf of the Appellants that if, instead of selling in this way, the whole of the stock had been sold by auction on one occasion, it would be impossible in those circumstances to claim duty upon the profits that were made. On the other hand, they admit that the process of liquidation might be so prolonged, and might be so associated with further

replenishment of stock, that it would be impossible to say that the profits which were earned in the course of that liquidation were not profits to which the Statute applies. In other words, according to the Appellants' own contention the question must be a question of fact whether, in the particular circumstances of the case, the transactions on which the profit had arisen were transactions which can be found to be profits 'arising from any trade or business'."

The House of Lords, setting aside the decision of the Irish Court of Appeal, found that there was abundant evidence to support the Commissioners' finding that they did so arise.

This decision was applied in South Africa in Income Tax Case No 172 (1930) 5 SATC 171. At the liquidation of a real estate company, the principal business of which was the letting and selling of fixed property, it possessed land at Claremont which had been cut up into plots for realisation. The liquidator placed the sale of the land in the hands of an agent and the plots were disposed of gradually over a period of three years. The taxpayer contended that the sales constituted a sale of capital by the liquidator in the course of realisation of assets. The finding of the Special Court was (at 174):

> "Well, we find that in the circumstances of this case the gradual disposal of the assets over a number of years on the same terms and conditions as the company dealt with them and disposed of them prior to liquidation amounted really to a carrying on of its business, and under those circumstances the amount so received is part of the company's gross income ..."

The circumstances in which the stock in bond was sold in the present case differ markedly from those in which the stock in either of these cases was sold and from the circumstances in which the post-liquidation sales in September 1986 took place.

The creditors had decided to bring an end to trading as soon as this could be advantageously done. They accepted an offer to purchase from which was excluded the stock in bond, which would cost money to reduce into possession. Thereafter no new trading venture was commenced - certainly no trading venture in any ordinary sense. A decision was taken by the creditors' representatives, the liquidators, not to incur any expense in order to take delivery of the stock in bond. There was a reason for that. It might lead to a loss. There was no venture into trading in the ordinary way - by the acquisition and holding of stock in the hope of reselling it at a profit - whilst accepting the risk of loss. On the contrary, the stock in bond was kept at a distance, and the opportunity was offered to others to make a profit and risk a loss. It seems to me that the only possible escape from the conclusion that these activities did not constitute trade is that proposed by Moses in his evidence: that it is in the normal course of trading for a liquidator to sell off assets in bulk. Moses is really equating trade and realisation, which are normally viewed as different, sometimes even opposed concepts. That was also the view in the two cases mentioned. An indicium, it is no more, of trading is the replenishment of stock. There was none of that here. Rather, positive steps were taken to see that Robin did not receive stocks already destined for it, the stocks in transit and in bond. The disposal of the stock in bond was, it seems to me, designed to allow others to trade in that stock and release Robin from the risks entailed in doing so itself.

My conclusion is that the Court a quo was correct in concluding that the two transactions did not constitute the carrying on of trade. Should the rule in SA Bazaars v C I R be departed from?

Robin argues, in the alternative, that it is entitled to carry forward its assessed loss to later years even though it neither traded nor earned an income from trade during the 1988 year. This argument entails a frontal assault on the rule in SA Bazaars (Pty) Ltd v C I R 1952 (4) SA 505 (A).

The case was concerned with a predecessor to s 20 (1) which was, however differently constructed, for all practical purposes identical. Concerning its interpretation Centlivres CJ said (at 510 F - 511 A):

> "Under [s 11 (3)] the balance of assessed loss incurred in any previous year can only be set off when it has been carried forward from the preceding year of assessment.. . . Under that sub-section [s 11 (1)] a deduction or set-off is

> admissible only against income derived from carrying on a trade. As the appellant carried on no trade during the year under consideration it was not competent for it to set-off in its income tax return for that year the balance of assessed loss incurred by it in previous years. It is not necessary for the purpose of this case to decide whether the appellant would have been entitled to set-off that balance in respect of the year ending on 30th June, 1944, if during that year it had carried on a trade but earned no income. Cf. Sub-Nigel Ltd v Commissioner for Inland Revenue 1948 (4) SA 580 at pp 589 and 590 (AD).
>
> As in my view the appellant was not entitled in respect of the year ending on 30th June, 1944, to set-off the sum £7,623 in its income tax return, it follows that it was not entitled, in view of the provisions of sec 11 (3), to set-off that sum in respect of any succeeding year."

Two propositions appear from this passage: set-off is admissible only (a) against income derived from trade; and (b) where the balance of assessed loss has been carried forward from the preceding year.

The case was explained in New Urban Properties Ltd v S I R 1966

(1) SA 217 (A) at 224 C - F (per Beyers JA) in the following terms:

> "... [s 11 (3)] envisages a continuity in setting off an assessed loss in every year succeeding the year in which it was originally incurred, so that in each succeeding year a balance can be struck to the satisfaction of the secretary which can then be carried forward from year to year until it is exhausted; if, for any reason, the assessed loss cannot be so set off and balanced in any particular year, there is then no 'balance of assessed loss' for that year which (viewed from that year of assessment) can be carried forward to the succeeding year, or (viewed from the succeeding year of assessment) there is no 'balance of assessed loss which has been carried forward from the preceding year of assessment'; in other words, the essential continuity has been fatally interrupted."

This passage makes explicit that a balance can be carried forward from any year only if a balance has been struck in that year, which clearly means: if an assessment has been issued for that year reflecting the balance of assessed loss at the end of it.

Robin's submission is that these decisions, as also the remarks of E M Grosskopf JA in Conshu (Pty) Ltd vC I R 1994(4) SA 603 (A) at 617 E - F, are clearly wrong and should not be followed.

The principal attack on the construction placed on the subsection in the two cases (expressly in the New Urban Properties case and impliedly in the SA Bazaars case) is that it imports a step that is not to be found in the words of the section: that step being that the phrase "which has been carried forward from the preceding year of assessment" implies that past assessed losses may only be carried forward to the current year if a new balance of assessed loss was stuck in the immediately preceding year. There is nothing in the language, so it is argued, which suggests that a new balance has to be struck every year:

and there is no exclusion of the same balance simply being carried forward from year to year. I do not agree. The generality of the words "incurred by the taxpayer in any previous year "(phrase one) is to be compared with the specific and sharply contrasting phrase "which has been carried forward from the preceding year of assessment": (phrase two). Both phrases qualify the expression "any balance of assessed loss." But whereas phrase one refers to all previous years, phrase two is limited to a particular year, and that year is the preceding one, which clearly means the one immediately preceding. For any balance to have been brought forward from that year it must have been assessed for that year, as only assessed losses can be carried forward. Accordingly it seems indeed to be necessary to the operation of s 20 (1) that a new balance be struck in that year. Robin's construction involves altering the preceding year to any preceding year.

Also, Robin's construction may be faulted as rendering phrase two tautologous. If Robin be correct, s 20 (1) (a) should read simply ". . . there shall be set off . . . any balance of assessed loss incurred by the taxpayer in any previous year . . .". Robin's counsel suggests that the purpose of phrase two is to make it clear that there may be set off only so much of the assessed losses of the past as remains, and has not been depleted by set-off in previous years, up to and including the immediately preceding year. This argument, to my mind, involves replacing one tautology with another, as the phrase "any balance of assessed loss" already makes it clear that such depletions have to be taken into account.

Involving as it does the altering of plain words, the attribution of excessive tautology to the legislature and a failure to read the words as they are, this part of Robin's argument falls short of demonstrating that the construction adopted in the two cases is wrong: even less, clearly wrong. In fact I think that it is correct. This disposes of the argument that the second proposition in the SA Bazaars case is wrong as not being based on the subsection.

I have reached this conclusion without reference to s 20 (2 A) (b), introduced in 1973, the effect of which is that in the case of a taxpayer other than a company, he may carry forward an assessed loss even though he has not derived any income from trade during a particular year. If this subsection may be taken into account in construing subsection (1) it can only make Robin's burden of persuasion more difficult.

Having concluded that the decision in the two cases is clearly right, it is unnecessary to deal with the consequences had there been an opposite conclusion. However, I should state again, that for good reason this Court is reluctant to depart from its own decisions (Harris & Others v Minister of the Interior and Another 1952 (2) SA 428 (A) at 454 A) and that once the meaning of the words of a section in an Act of Parliament have been authoritatively determined by this Court, that meaning must be given to them, even by this Court, unless it is clear to it that it has erred (Collett v Priest 1931 AD 290 at 297). Particularly is it important to observe stare decisis when a decision has been acted on for a number of years in such a manner that rights have grown up under it (Harris's case, above, at 454 A - B and Horowitz v Brock and Others 1988 (2) SA 160 (A) at 186 H - 187 B). For 45 years businessmen and the revenue have been ordering their affairs on the assumption that the SA Bazaars case laid down the law. There has been no material change in the context in which the rule in that case operates, so that this would have been a case in which this Court would have been especially slow to depart from its earlier decision.

In order to succeed Robin has to overcome both propositions in the SA Bazaars case. The second I have dealt with. Robin must fail on that leg, with the consequence that the appeal must fail. Regarding (he first proposition (set-off only against income derived from trade) Mr Gaunlett, for Robin, concedes, and correctly so, that the proposition was properly derived from the section. In the light of the finding which I have made that Robin did not trade in the 1988 year, this requirement has also not been satisfied, which is an additional reason why the appeal must fail.

Further arguments addressed on behalf of Robin have not been overlooked. Among them are the following. There is said to be a lack of symmetry between the definition of "gross income", defined in s 1 to include income from whatever source, and what I shall call the deduction sections, 11 (a), 20 (1) and 23 (g), which introduce the notion of income derived from trade, which narrows the sphere of deductibility when compared with the sphere of income. This distinction may derive from differently designed English legislation of long ago, which has simply been copied here without sufficient reflection. This lack of symmetry may be a reflection on the legislation, but it is not something that allows us to depart from the wording of the Act. Nor has it been otherwise argued.

Then it is argued that we should construe the subsection so as to iron out the anomalies that may arise from the Act's artificial separation of a taxpayer's activities into discrete tax years. But the fact that this separation may work anomalously is not a reason for not giving effect to it, as is illustrated in C I R v Sunnyside(Pty) Ltd 1997 (1) SA 68 (A) at 73 D - E.

Further anomalies or arbitrarinesses were pointed out. For instance, what magic is there in selecting the twelve months of a tax year? A much longer break may pass unscathed, for instance where a taxpayer stops trading after the first month of year one and resumes after the eleventh month of year two - the total break being 22 months. Or, what of the trader who does trade in the year under enquiry, but on a small scale, possibly even to keep his assessed loss alive? The answer to these examples, and others, is that drawing lines does have random results and that you cannot have law without lines. <u>Appealability at this stage</u>

Some six weeks before the appeal was heard the appellant's attorneys addressed a rather poorly motivated letter to the Registrar enquiring whether this Court might raise the query it had raised in Rand Mines (Mines and Services) Ltd v C I R 1997 (1) SA 427 (A) at 433 B - C, namely whether the matter should not first be concluded in the Court a quo, as there were other grounds still undecided on which the appellant might obtain the relief sought in the appeal.

As a result of this letter the parties were requested to argue the question of piecemeal appealability. Additional heads were filed, and the point was argued, although not antagonistically. The parties had agreed in the Court below to deal with the points now before us first and the President adopted the agreement. Both parties wished the appeal to proceed.

That the issues before us are appealable before this Court is plain, as they involve a challenge to a "decision" of the Special Court, and special leave to appeal to this Court has been given in terms of s 86 A (5) of the Act. The only question is whether an appeal should be heard at this stage when there are other grounds outstanding on which the assessment has been challenged.

Counsel were agreed, and so do I, that although this is an appeal from an Income Tax Special Court the same approach should be followed as in an appeal from a division of the former Supreme Court, set out in Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration 1987 (4) SA 569 (A) at 585 G (per Corbett JA):

> "Where, however, the decision relates to a question of law or fact, which if decided in a particular way would be decisive of the case as a whole or a substantial portion of the relief claimed ... the advantages of expense and

> convenience may favour a final determination of the question on appeal, even though the proceedings in the Court a quo may not have been concluded."

This appeal posed two questions, one of mixed law and fact (was there trading in fact in 1988?) and one of law (was .SA Bazaars correctly decided?). Had either been answered in Robin's favour that would have been decisive of the case. Accordingly, bearing in mind the importance of the legal question involved, the fact that there was no question of the procedure being used oppressively, and the time that would have been saved if it should have succeeded, we heard the appeal. It must now be carried through to judgment even though in the result Robin has failed.

Conclusion

Robin had to apply for condonation of the late noting of the appeal. This application was not separately argued.

For the reasons given the appeal is dismissed with costs including the costs of two counsel where two were employed. The appellant is to pay the costs of the condonation application on the same basis.

W P SCHUTZ JUDGE
OF APPEAL

MAHOMED CJ)
HEFER JA)
HOWIE JA) CONCUR
SCOTT JA)