IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

CASE NO: 23/2003

In the matter between :

ESTATE R F WELCH **Appellant**

and

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE **Respondent**

Coram: **MARAIS, ZULMAN, NUGENT, CONRADIE *et* CLOETE JJA**

Heard: **11 MARCH 2004**

Delivered: **21 MAY 2004**

Donations Tax – Whether exigible on value of assets settled upon trust primarily to enable trustees to discharge settlor's maintenance obligations in terms of an order for divorce incorporating a consent paper which provided for the establishment of such trust. Order to be found in para [73].

J U D G M E N T

MARAIS JA/

MARAIS JA:

[1] The issue in this appeal is whether, in the particular circumstances of the case, the disposal of assets to a trust amounted to a donation upon which donations tax is payable. The Special Income Tax Court presided over by Foxcroft J held that it was not. A full court of the Cape High Court (Davis J with Selikowitz and Van Reenen JJ concurring) reversed the finding but granted leave to appeal to this court. The decision is reported at 2003 (1) SA 257 (C).

[2] <u>The facts</u>:

Mr R F Welch married twice. There was a child born of each marriage. His second marriage was dissolved by a decree of divorce granted to him on 25 October 1996. The action was unopposed because the parties, each represented by attorneys, had negotiated at arm's length an agreement ('the consent paper') which governed such matters as property rights, maintenance for Mrs Welch and maintenance for the minor child, T., born of the second marriage. The consent paper entailed the setting up by Mr Welch of a trust and the transfer to it of assets to enable the trustees to fulfil the obligations to be undertaken by them. The primary obligation of the trustees was to ensure that the provisions of the consent paper which had been made an order of court were implemented. The terms upon which the trust was to be established were set out in an annexure to

the consent paper.

[3] It is not necessary to do more than to summarise the import of the consent paper and the trust deed. The consent paper 'recognises (Mr Welch's) legal obligation to pay rehabilitative maintenance to defendant (Mrs Welch) as well as to contribute towards the maintenance of the parties' minor child, T.'. It provided that '(i)n discharge thereof' Mr Welch would settle certain assets upon a trust to be created 'with the specific intention of providing income' for the purposes thereafter set out in the consent paper. Mrs Welch was to be paid R4 500,00 per month for 60 months or until her death or remarriage whichever should occur first. The cost of a hospital plan to be taken out for her benefit for as long as maintenance was payable to her was to be deducted from the amount of R4 500,00. The maintenance payable was to increase each year by a percentage equal to the percentage increase in the urban weighted average of the consumer price index.

[4] The minor child, T., was to receive a contribution towards his maintenance until he reached the age of 21 years or became self-supporting, whichever occurred first. The amount was R1 000,00 per month (to be paid to his mother) and was to be increased annually in the same manner as his mother's maintenance was to be increased. In addition all school fees, school uniforms,

school books, extramural activities, stationery and equipment had to be paid for. So did all medical, dental, pharmaceutical, ophthalmologic and related medical expenses. If the child showed an aptitude for tertiary education he was to be maintained until he had completed his tertiary study notwithstanding that he might have attained the age of 21 years.

[5] In the event of the trust being unable to meet these obligations, 'or any portion thereof', to Mrs Welch or the minor child, T., the obligations were to revert to Mr Welch. His obligations under the consent paper were declared to be binding upon his estate.

[6] Mrs Welch was to retain a property situate at Bergvliet, its contents, and a Toyota Corolla motor car all of which assets were recorded to have been financed exclusively by Mr Welch. As consideration 'for the assets and maintenance settled upon her' in terms of the consent paper, Mrs Welch waived in favour of the minor child, T., her right to any income or benefit which might have accrued or might in the future accrue to her from another trust, the R F Welch Family Trust. Mr Welch was also bound to repay to the P F Hofmeyer Trust a loan of R30 000,00 made by it to him to assist him in acquiring the Bergvliet property for Mrs Welch.

[7] The trust deed was signed on 19 November 1996. It recorded that Mr

Welch was obliged in terms of the consent paper and order of court 'to make a settlement for the purposes and on the terms and conditions recorded in this Trust Deed'. It created 'The Carom Trust' and vested in the trust all of Mr Welch's shares in NO Welch Engineering (Pty) Ltd, his half-share of two erven at Ottery in the Cape and his one-third share in another erf at Ottery. The value of the assets was R3 216 760,00. Mr Welch undertook to transfer the assets to the trust 'subject to the terms, conditions and provisions of this Trust Deed'. The trust was empowered to accept additional amounts in the future 'on the same terms and conditions and for the purposes set forth in this Trust Deed'.

[8] A complicating factor is that the trust deed went further than simply providing for fulfilment by the trustees of the obligation to pay maintenance for Mrs Welch and the minor child, T.. It created income beneficiaries and capital beneficiaries some of whom were not persons to whom maintenance obligations were owed in terms of the consent paper. While both Mr and Mrs Welch and the children born of Mr Welch were beneficiaries, their rights were not similar in all respects.

[9] As far as income was concerned, Mrs Welch and the minor child, T., were entitled to have the 'amounts due in terms of the consent paper' paid before any distribution of income to them or to Mr Welch and his other children. It seems

reasonably clear from this that there could be further distributions of income over and above that distributed to meet the obligations spelt out in the consent paper. Those further distributions might be made to one or more or all of the named beneficiaries. The trustees were empowered to pay to beneficiaries from the trust's income amounts for, inter alia, 'such purposes as may, in the sole and absolute discretion of the trustees be for the benefit or in the interest of the Beneficiary concerned'.

[10] However, the trustees were also empowered to accumulate, until the vesting date when capital became payable to the capital beneficiaries, the income of the trust without paying it or any part of it to the income beneficiaries. That did not mean that they did not have to settle the maintenance obligations due in terms of the consent paper to Mrs Welch and T.; it simply meant that they were not obliged to distribute any further income to them or to any other income beneficiaries in their capacity as beneficiaries.

[11] Any income so accumulated had to be held 'as part of the capital of the Trust for all the purposes' of the trust but the trustees were empowered to apply 'the whole or any part or parts of the said accumulations as if the same were income arising in the then current year'.

[12] The capital (which could of course have grown or have been diminished

by the vesting date) was to be distributed to the capital beneficiaries on the vesting date stipulated in the trust deed. The capital beneficiaries were Mr Welch's children. That date was either the date upon which the youngest of any children born to Mr Welch attained the age of 30 years or such date as might be elected by the unanimous decision of the trustees. If at the date elected by the trustees any capital beneficiary was not yet 30 years of age the capital payable to him or her had to continue to be held in trust until that age was attained. That notwithstanding, the trustees were empowered to make premature payments of capital and/or income to such a beneficiary 'for such reasons and for such purposes as the trustees in their sole and entire discretion shall determine'.

[13] The net effect of these provisions was this. The trustees were obliged in law to fulfil the maintenance obligations to Mrs Welch and the minor child, T., which Mr Welch had undertaken in terms of the consent paper. The consequence of that was that for so long as they did so, they would be discharging Mr Welch's obligations to Mrs Welch and T. under the consent paper.

[14] Mr Welch was to transfer assets to the value of R3 216 760,00 to the trust. He did not agree to do so because he intended to make a gift of those assets to the trustees to be used as they saw fit. He agreed to do so for two purposes. The primary and dominant purpose was to enable the trustees to fulfil the

maintenance obligations which he had undertaken in terms of the consent paper. He was obliged to set up a trust for that purpose. Pragmatically, the secondary purpose was necessitated by the first. It was inherent in the situation that there might be more income generated in the trust than was required to achieve the primary purpose and that there might be capital remaining after the obligations arising from the consent paper had been discharged. Some provision would have had to be made to cater for that contingency. The ultimate destination of those funds could not have been left in the air.

[15] What Mr Welch did to cater for those contingencies was to empower the trustees to use income for the benefit of himself and Mrs Welch and his children. In the case of Mrs Welch and T. the exercise of such a power would mean of course that they would receive income over and above that which they were entitled to receive in fulfilment of the obligations arising from the consent paper.

[16] As to capital, Mr Welch could of course legitimately have stipulated that any capital remaining after the primary purpose had been achieved should revert to him. Instead, he stipulated that it should go to his children. Herein lies the complication which tends to cloud the analysis of what was intended and what was done. Such an analysis is essential in order to determine whether the transfer of assets to the trust was a donation attracting liability for donations tax.

[17] Unfortunately, before transfer of the assets had taken place, Mr Welch died on 16 December 1996. His executors regarded the obligations undertaken by him in terms of the consent paper to be binding upon his estate ('the estate') and they caused assets to be transferred to the trust in the manner contemplated in the consent paper.

[18] The respondent sought initially to tax the estate upon the value of the assets settled upon the trust upon the premise that estate duty was payable. Correspondence between the estate and the respondent ensued and it led to a change in stance by the respondent. His contention then became that the entire settlement was a donation to the trust within the meaning of s 54 of the Income Tax Act 58 of 1962 ('the Act') and that donations tax on the whole of the value of the assets (R3 216 760,00) was payable by the trust. The Special Income Tax Court rejected the contention.

[19] The basis on which the full court reversed the judgment of the Special Income Tax Court was, in my opinion, wrong. It interpreted the definition of 'donation' in s 55 (1) of the Act as requiring an identifiable *quid pro quo* or consideration to be given by the trustees for the assets settled upon the trust if the transfer of the assets was to escape being labelled a donation. It considered that there was none given by the trustees and consequently that a donation as

defined to the trustees had taken place. It concluded that donations tax was therefore payable upon the value of the assets transferred to the trust.

[20] The charging provision is s 54 of the Act. It reads: 'Subject to the provisions of section 56, there shall be paid for the benefit of the National Revenue Fund a tax (in this Act referred to as donations tax) on the value of any property disposed of (whether directly or indirectly and whether in trust or not) under any donation by any resident (in this Part referred to as the donor).'

[21] The word 'donation' is defined in s 55 (1). It 'means any gratuitous disposal of property including any gratuitous waiver or renunciation of a right'. The word 'donee' is also defined. It 'means any beneficiary under a donation and includes, where property has been disposed of under a donation to any trustee to be administered by him for the benefit of any beneficiary, such trustee: Provided that any donations tax paid or payable by any trustee in his capacity as such may, notwithstanding anything to the contrary contained in the trust deed concerned, be recovered by him from the assets of the trust'. The word 'property' is defined in s 55 as meaning 'any right in or to property movable or immovable, corporeal or incorporeal, wheresoever situated'.

[22] Some preliminary observations are appropriate. The test to be applied at

common law to determine whether the disposition of an asset amounts to a donation properly so called (as opposed to a remuneratory donation) is so well-settled that it hardly needs repetition. The test is of course that the disposition must have been motivated by 'pure liberality' or 'disinterested benevolence'.[1] As it was put in *De Jager v Grunder*,[2] 'Was die dryfveer iets anders as suiwer vrygewigheid en welwillendheid jeens die eiser, was dit geen skenking nie.' Furthermore, there is a presumption against donations in our law.[3]

[23] It is a question to what extent the definition of 'donation' in s 55 (1) of the Act differs in any material respect from the common law concept of a donation. It is also a question whether the definition of 'donee' in the same section is to play any role in the interpretation of the definition of 'donation'. There is no reference in either the charging section (s 54) or the definition of 'donation' (s 55 (1)) to the word 'donee'.

[24] It seems to me that the relevance of the definition of the word 'donee' arises only after it has been determined that there has been a donation within the meaning of s 54 read with the definition of the word 'donation' in s 55 (1). To do otherwise would be to put the cart before the horse. The definition of

1 *Avis v Verseput* 1943 AD 331 at 345; 377.
2 1964 (1) SA 463 (AD) at 463D-E.
3 *Timoney v King* 1920 AD 133 at 139.

‘donee’ would become relevant then only to determine who is to be regarded as the donee in cases where a trustee has been interposed between the donor and the intended beneficial recipient of the donation. In such a case the effect of the definition of ‘donee’ is to deem the trustee rather than the beneficiary to have benefited from the donation, even although the trustee obviously has not, and to render the trustee jointly and severally liable with the donor for the donations tax payable if the donor has not paid it within the prescribed period of three months from the date upon which the donation takes effect.[4]

[25] Consistently with the effect of the latter provision (deeming the trustee to be the donee) s 56 (1) (e) of the Act exempts from donations tax property disposed of under a donation ‘if such property is disposed of under and in pursuance of any trust’. The obvious purpose of this provision is to avoid donations tax being levied twice upon what was in essence one donation by the donor.

[26] *CIR v Estate Hulett*[5] is authority for the proposition that the definition of ‘donation’ in s 55 (1) is not synonymous with the common law concept of a donation. In that case Friedman AJA said: ‘The word “donation” has acquired under our law the meaning of a gratuitous disposal of property prompted by

4 S 59.

5 1990 (2) SA 786 (A) at 797H-J.

motives of sheer liberality or disinterested benevolence …. .' I cite this passage because of the concatenation of the words 'gratuitous disposal' and 'sheer liberality or disinterested benevolence'. It suggests to me that the latter words are intended to be elucidatory of the word gratuitous and not antithetical to it. In his work on income tax[6] Meyerowitz has suggested that 'It can be said that because of the definition of donations in the Income Tax Act, the aspect of pure liberality or disinterested benevolence is not required' and that the decision in *Hulett's* case provides support for that view.

[27] I do not agree with either the proposition or the suggestion that the decision in *Hulett* supports it. In the passage[7] cited by Meyerowitz the learned judge was not purporting to decide any such point. He was simply rejecting an argument that the definition of the word 'donation' in one Act could be applied in a different Act where it was undefined. In what particular respect or respects the word as defined differed from the undefined word he did not purport to decide. He merely said that the common law meaning of the word had a meaning 'differing substantially from the statutory definition sought, by the argument, to be attributed to it'.

6 *Meyerowitz on Income Tax* 2000-2001 p 31.3.

7 *Hulett,* at 797H.

[28] Nor do I read the decisions in *CIR v Kohler Estate*[8] and *Estate Furman and Others v CIR*[9] as deciding that a gratuitous disposal of property can exist without an accompanying motive of sheer liberality or disinterested benevolence. Those decisions were concerned solely with the meaning of the word 'disposition' in the provisions under scrutiny in those cases.

[29] In ITC No 1545[10] the Cape Special Income Tax Court regarded it as so obvious that the word 'gratuitous' in the definition of the word 'donation' did not eliminate the need to enquire into the motive with which the disposal was made, that it did not regard it as necessary to provide any reasons for so thinking. I share that view and provide reasons only because the contrary was argued before us.

[30] In my opinion the legislature has not eliminated from the statutory definition the element which the common law regards as essential to a donation, namely, that the disposition be motivated by pure liberality or disinterested benevolence and not by self-interest or the expectation of a *quid pro quo* of some kind from whatever source it may come.

[31] If one were to scour the dictionaries to find a single word apt to convey

8 1953 (2) SA 584 (AD).
9 1962 (3) SA 517 (AD).
10 54 (1992) SATC 464 at 475-6

that the disposition should be motivated by pure liberality and not in expectation of any *quid pro quo* of whatever kind, one would not find a better or more appropriate word than 'gratuitous'. The shorter OED gives the following meaning to the word:

'1. Freely bestowed or obtained; granted without claim or merit; costing nothing to the recipient; free.

2. Done, made, adopted or assumed without any good ground or reason; uncalled for; unjustifiable.'

[32] The ordinary meaning of that word in the context of the making of a disposition includes, I suggest, 'without obligation'; 'for no return'; 'without any *quid pro quo* being given or expected'. None of those meanings is incompatible with the co-existence of a motive of pure liberality or disinterested benevolence. On the contrary, they are indicative of the co-existence of just such a motive. If the legislature wished to alter the meaning which the common law assigns to the word donation *in that particular respect* it could not have chosen more inappropriate language to achieve that objective.

[33] When the legislature intended to treat as if they were donations, disposals of property which were not when judged by common law standards, it expressed itself plainly. Thus s 58 of the Act deems to have been disposed under a donation

a disposal of property for a consideration, which, in the opinion of the Commissioner, is not an adequate consideration, provided that in determining the value of the property a reduction must be made by an amount equal to the value of the consideration.

[34] Here, unlike s 54 and the definition of 'donee' in s 55 (1), the words 'under a donation' do not qualify the words 'where any property has been disposed of' in s 58. It follows that the definition of 'donation' in s 55 (1) plays no role in interpreting or giving effect to the provision in s 58. It is thus clear, in applying this provision, that the motive for the disposal is irrelevant; it is simply a question of whether the consideration given for a disposal of property (whatever the motive) was, in the opinion of the Commissioner, adequate.

[35] There has been no such clarity of expression in the definition of 'donation' in s 55 (1). In my view, it is entirely consistent with a legislative intention not to depart from the common law conception of a donation *in that particular respect*. To the extent that the definition may be ambiguous (and I do not think it is) it would of course have to be interpreted *contra fiscum*.

[36] It may perhaps be suggested that abandonments and other possible modes of disposing of property may be gratuitous but that they are not necessarily accompanied by motives of pure liberality or disinterested benevolence and that

they would therefore be hit by the definition of donation. Where the abandonment takes the form of consignment to a rubbish bin I grant that an accompanying motive of pure liberality or disinterested benevolence is not easy to discern. (Possibly the raiders of rubbish bins may be the intended beneficiaries but that seems fanciful.) The true answer lies, I think, in the context of the definition read with the Act. It contemplates the existence of another person in whom the property disposed of is intended to vest or (in the case of waiver or renunciation of a right) a person whose obligations to the party waiving or renouncing a right will cease to exist. It is for that reason that abandoned property (*res derelictae*) does not fit into either the common law mould or the statutory mould of a donation.

[37] It may of course be different where the abandonment is more apparent than real. For example, an eccentric multi-millionaire who throws a diamond into a haystack with an accompanying public statement that he has done so and that whoever finds it first is welcome to it, may well be said to have donated it (in the common law sense of the word) to whoever finds it first or to have gratuitously disposed of it (as the statutory definition of donation puts it) to that person. But these and similar conundrums are really beside the point. They are just not potent enough to dispel the impact of the choice of the word 'gratuitous'

in the definition when read together with the antecedent existence of a well-known set of common law criteria which determine whether a disposal of property is a donation. As I have said, far from the use of the word signalling an intention to jettison these criteria, it signals the contrary.

[38] I am fortified in my belief that the definition does not eliminate the need to enquire whether the motive for the disposal was or was not pure liberality or disinterested benevolence by considering the startling consequences of a contrary conclusion. There is nothing in South African law which prohibits a citizen from establishing an *inter vivos* trust for any lawful reason. The motive with which a trust may be established can vary from, at one end of the scale, purely altruistic and benevolent to, at the other, the discharge of legally binding obligations. In neither case is there any intention to benefit the trustee and that is so despite the fact that in law the bare *dominium* of the property settled upon the trust vests in the trustee. In the first-mentioned case there is of course an intention to bestow a gratuitous benefit upon the named beneficiary and a donation has taken place in both the common law sense, and *a fortiori*, if one assumes it has a wider meaning, in the defined sense of the word. Where that is the motive, liability for donations tax cannot be avoided simply by interposing a trustee between the donor and the beneficial recipient of the asset transferred to

the trustee. In such a case the effect of the definition of 'donee' in s 55 (1) is that the trustee is deemed to have been the donee even although the trustee has to administer the donation for the benefit of the beneficiary.

[39] In the second case, there is no intention to make a donation in any sense of the word. The funds settled upon the trust are not intended to be given to anybody as a gift; they are intended to be used to settle legal obligations which burden the settlor. The trustee undertakes to fulfil the mandate given to him and in fulfilling it discharges the obligations of the settlor to the relevant third parties. If the mere fact that the trustee in his own right has not paid the settlor anything or given some *quid pro quo* (other than an undertaking to fulfil the mandate imposed by the trust deed) for the funds given to him for that purpose is to be the sole criterion for imposing a liability to pay donations tax, it is difficult to conceive of any case in which a trust can be established and assets transferred to the trust where a liability for donations tax would not arise.

[40] Trustees do not ordinarily pay or give consideration in return for benefits which third parties are to receive. Nor do they do so in return for the bare *dominium* of the assets which are vested in them. It would follow that all such trusts, whatever their purpose, are liable for donations tax unless exempt under one or other of the provisions of s 56 of the Act. A person who has sufficient

insight into his own habitual financial profligacy to sequester enough money in the hands of a trustee to ensure that his future provisional tax and income tax obligations will be met, will have to accept that 25% of the funds that he makes available to his trustee to ensure his tax obligations to the Commissioner are met on due date, will have to be paid to the selfsame Commissioner. That is a consequence which can, I think, rightly be described as absurd.

[41] The example I have given is of course specifically designed to evoke derision from which it is but a short step to the attachment of the label 'absurd' to it. However, many more examples of absurdity can be given which are not so rarely encountered that they may be discounted as purely hypothetical and unlikely to arise in practice. A judge who orders a large damages award to an orphaned minor to be paid to a trust to be formed is not ordering the defendant to make a donation. The defendant is not making a donation in paying the ordered damages to the trustee. It is fulfilling an obligation imposed by law. The trustee is not the beneficiary of the trust and the beneficial interest in the award is vested in the orphan. The trustee has not given any *quid pro quo* to the defendant. Even the commitment by the trustee to administer the award for the benefit of the orphan is not really a *quid pro quo* given to the defendant. It is a commitment given to the court. Yet it is plain that by paying the sum ordered to

the trustee the defendant will be discharging its obligation to the orphan. If the trustee misappropriates the money that will not revive the defendant's liability. The defendant has certainly not made a donation motivated by sheer liberality nor has it gratuitously disposed of the money paid to the trustee. Yet, if the submissions of counsel for the Commissioner are correct, the defendant will be liable for donations tax together with the trustee.

[42] The examples can be multiplied. People who spend much of their lives in foreign climes but who still retain substantial links with South Africa and set up trusts which they endow with funds to enable the trustee to meet their recurring and ongoing financial obligations to their creditors in South Africa are not disposing of money by donating it in either the common law sense of the word or in the statutory sense (if it be different from the common law sense) of gratuitously disposing of it.

[43] It is so that logic, fairness and consistency are not essential attributes of taxing legislation and that that has to be borne in mind when interpreting such legislation. But that does not mean that in interpreting taxing provisions one should assume *a priori* that an interpretation which is illogical, unfair and inconsistent is probably what was intended. Nor does the fact that it is a taxing provision which is under consideration mean that where the language employed

is reasonably capable of two possible interpretations, one of which will yield absurd results, and another which will not, the former should be preferred.

[44] In the present case, the facts are such that whatever view one takes of the definition of 'donation' there has been no donation of R3 216 760,00. If one accepts that a motive of sheer liberality or disinterested benevolence remains an essential element in the inquiry and has not been excluded by the definition, it is clear that the assets were not settled upon the trustees with any such motive. The primary and dominant purpose was to enable them to satisfy the legal obligations which the consent paper which had been made an order of court imposed upon Mr Welch. I shall return in due course to the implications of the subsidiary motive of providing for excess income and remaining capital to go to persons to whom he was under no legal obligation.

[45] If one does not accept that those criteria (sheer liberality or disinterested benevolence) remain relevant, it is at least clear that if some realistic consideration is being received by the settlor, the disposal cannot be regarded as 'gratuitous'.[11] Here the consideration is obvious. Mr Welch was under a legal obligation to pay maintenance for Mrs Welch and T.. That was a debt due by him to them and it would not cease to exist upon his death.[12] The mechanism agreed

11 ITC Case No 1448 51 (1989) SATC 58 at 63. ITC Case No 1545 54 (1992) SATC 464 at 476.

12 *KBI v Steyn NO* 1992 (1) SA 110 (A) at 119-120B; 120D-E.

upon by Mr and Mrs Welch for ensuring that this obligation was discharged was the establishment of a trust which was to be provided with sufficient assets to enable the trustees to meet those obligations. If they did so (and they were obliged to do so in terms of the trust deed), Mr Welch's obligations would be *pro tanto* discharged.

[46] The fact that he could not entirely and permanently slough off his liability to Mrs Welch and T. by establishing the trust and that he would remain liable to them in the event of the trust being unable to fulfil the maintenance obligations does not derogate from the fact that he disposed of the assets for a substantial *quid pro quo*. That *quid pro quo* was a relinquishment by Mrs Welch of her right to claim the agreed maintenance for herself and T. from Mr Welch for so long as the trustees fulfilled their obligation to pay that maintenance and an undertaking by the trustees to fulfil that obligation.

[47] That consideration or *quid pro quo* was not illusory or insubstantial. Viewed in balance sheet terms Mr Welch transferred assets to the value of R3 216 760,00 to the trustees. He also had a liability to Mrs Welch and T. in terms of the consent paper and court order. As against that, he received from the trustees an asset in the form of an undertaking by them to discharge his liability to Mrs Welch and T.. That asset cannot be ignored in deciding whether

the transfer of the assets to the trustees was gratuitous. Its acquisition by Mr Welch was the consideration for the transfer. Without it Mr Welch obviously would not have been willing to transfer the assets.

[48] There was also of course a *quid pro quo* given by Mrs Welch. She waived her right to the income from the R F Welch Family Trust. She agreed to look to the trust and not to Mr Welch for the agreed maintenance payable to herself and T. for as long as the trustees were able to discharge those obligations by utilising the assets which had been settled upon the trust. To suggest that Mr Welch transferred the assets to the trustees in return for nothing of any value would be to place a wholly unrealistic and erroneous interpretation upon the transaction.

[49] It remains to deal with the complications arising from the secondary purpose (set out in para [8]) for which the trust was created. It may well be that in so far as income or capital might be paid to the beneficiaries (over and above the maintenance payable to Mrs Welch and T.) a donation would have been made. But the beneficiaries' expectation of receiving any such payments would be no more than a *spes*. It might or might not happen. The problems associated with attempting to assess the probability or improbability of that *spes* maturing into an actual receipt of income or capital are legion. Imponderable or relatively imponderable factors such as future inflation rates, investment returns,

investment expertise, the prospect of remarriage, the possibility of serious permanently disabling injury or illness occurring, and the possibility of early death of one or more of the beneficiaries bedevil reliable prognostication. Yet the effort may sometimes have to be made. Indeed, in invoking s 58 the Commissioner has to assess as best he can what the value is of the consideration that has been received for the disposal of the property. In the present case (in which s 58 was not invoked by the Commissioner) that would have involved assessing what the value to Mr Welch was of Mrs Welch's renunciation of her right to income from the R F Welch Family Trust in favour of T.. I say this bearing in mind that maintenance to be paid to a minor child is always subject to variation on good cause shown and consequently that income paid to T. which is separate and distinct from income paid to him through his mother by the Carom Trust by way of maintenance would be relevant to an assessment of the extent to which he could call upon the trustees of the Carom Trust or Mr Welch to maintain him.[13] Any assessment of the value of the consideration received by Mr Welch would also involve assessing the value to him of transferring (even if only conditionally and subject to reversion to him) to the trustees the obligation to fulfil the obligations undertaken by him in the consent paper and court order.

13 Cf *KBI v Steyn NO* 1992 (1) SA 110 (A) at 120C-J.

[50] The short point is this. However difficult the assessment may have been, it may have been open to the Commissioner to invoke s 58 in order to recover donations tax on such part of the sum of R3 216 760,00 for which, in his opinion, no adequate consideration was given. But he did not do so. Instead he opted to regard the entire sum as a gratuitous disposal. In that, he was wrong. I might add that even if it were to be held that there was a donation to the trustees it would be obvious that they received no more than the bare *dominium* of the assets. It is that which would have to be valued and it is difficult to see how it could be assigned any value.[14] And if what fell to be valued was the mere *spes* of the beneficiaries that they might receive income or capital after the maintenance obligations of the trust had been met, the difficulties alluded to in para [49] would arise. On any view of the matter an assessment of donations tax based on the premise that the value of the donation was R3 216 760,00 was not permissible. It follows that the assessment for donations tax cannot be allowed to stand.

[51] The decision in *Ogus v Secretary of Inland Revenue*[15] may appear at first blush to run counter to the conclusions I have reached and to contain *dicta* in conflict with some of the observations I have made. But if account is taken of

14 Cf *CIR v Estate Crewe & Another* 1943 AD 656 at 686 and 696.
15 1978 (3) SA 69 (T).

the unique nature of the obligation which the settlor in that case imposed upon the trustees, namely, to pay or indemnify him for the donations tax payable on the sum of money which he settled upon the trust, and in particular of an observation by the court to which I shall return, I do not think there is any clash.

[52] The key to an understanding of the decision in that case that donations tax was payable upon the whole of the sum of money settled upon the trust and not upon that sum less the donations tax payable upon it, lies in the circuity of reasoning which is inherent in the argument of the settlor as to the interpretation of the term in the trust deed imposing the obligation to pay or indemnify the settlor for the donations tax payable. Although this was not articulated by the court I think that it was this circuity of reasoning which consciously or sub-consciously underlay its decision.

[53] There is a world of difference between, on the one hand, the nature of the obligations undertaken by the trustees in the hypothetical examples I have postulated in paras [40], [41] and [42] of this judgment and the obligations undertaken by the trustees in this case, and, on the other, the obligation undertaken by the trustee in *Ogus's* case. In the former class of case the *corpus* (or part of it) is plainly given to the trustee to be used to discharge legal obligations which the settlor would have had to discharge himself and which are

clearly identifiable as obligations which have an existence independent of the existence of the trust. It is therefore notionally possible to say that, to the extent that the settlor settled funds upon the trustee to enable him to discharge the settlor's independently existing legal obligations (whether present or future), there has been no donation or gratuitous disposal of those funds because he has received a *quid pro quo* of equivalent value.

[54] *Ogus's* case differs *toto caelo*. Donations tax liability cannot exist absent a donation which spawns it. And the *quantum* of the tax is dependent on the value of the donation. Unless the value of the donation is known or can be assessed, it will be impossible to quantify the donations tax liability. Where, as in *Ogus's* case, a settlor imposes an obligation upon a trustee to pay or indemnify him for donations tax, he cannot be said to have received a consideration in that amount and therefore to have donated less than the full amount he settled upon the trustee. Even if he had subjectively intended to bring about that result, he would not have been able to achieve his purpose in law. The reason is this.

[55] Postulate a settlor who settles R1 000 000,00 upon a trustee for the benefit of a named beneficiary but stipulates that donations tax must be paid by the trustee (or that he, the settlor, must be indemnified for paying it himself). If the

donation is taken to be R1 000 000,00 and the rate of tax is say 20%, the tax will be (ignoring exemptions) R200 000,00. But, argues the settlor, 'I should not be taken to have donated R1 000 000,00; I should be taken to have donated only R800 000,00 because payment by the trustee of the tax of R200 000,00 on the amount of R1 000 000,00 was the consideration I received for settling an equivalent amount upon the trustee.'

[56] The problem with this argument is that it is irremediably circuitous and involves fictions. If it is indeed so that the settlor must be taken to have donated only R800 000,00 then the donations tax would be 20% of R800 000,00 and not 20% of R1 000 000,00. The tax would then be R160 000,00 as opposed to R200 000,00. But the trustee would then have a balance of R840 000,00 and not R800 000,00 at his disposal for the benefit of the beneficiary. The difference is R40 000,00. That sum will have escaped the levying of donations tax upon it.

[57] In effect, the argument results in using the *fictional* incidence of donations tax upon the entire sum of R1 000 000,00 to reduce the amount upon which the duty *actually* payable is to be calculated. The process entails not one but two calculations of donations tax. The first is a purely notional and fictional one which yields an amount of tax which is not intended to be actually paid and

which, when fictionally deducted from the sum of R1 000 000,00, leaves a fictional balance of R800 000,00 for the beneficiary. The second is a calculation of the tax which is intended to be actually paid. The base for this calculation is the fictionally arrived at balance of R800 000.00. It reduces the tax payable to R160 000,00.

[58] There can be no justification for reducing, before calculating the tax actually payable, the sum of R1 000 000,00 by deducting from it a purely hypothetical sum of R200 00,00 said to represent donations tax payable, when it has not actually been paid and there is no intention of actually paying it. If that was what was intended by the settlor it was not a result attainable in law. In the example I have given donations tax must be calculated on the full amount of R1 000 000,00 because, if it is not, there will be no other way in which it can be calculated so as to give effect to the term requiring the trustee to pay the donations tax or indemnify the settlor for having paid it. *Lex non cogit ad impossibilia.*

[59] The choice then is between interpreting the term imposing the obligation as being impossible of performance and, subject to possible arguments relating to severability, putting the validity of the entire settlement at risk, or interpreting it as premised upon the entire sum of R1 000 000,00 being and remaining the

intended donation, but subject to the proviso that if the settlor has to pay the tax the trustee will have to reimburse him using the funds donated. Faced with such choices, the law favours the interpretation which will give effect to what has been agreed rather than one which will render futile what has been agreed.[16]

[60] The above, with respect, appears to me to be the inarticulate major premise of the judgment in *Ogus's* case and the *dicta* to be found in it should be confined to the special nature of the obligation undertaken by the trustee in that case. An observation by Boshoff AJP appears to bear this out. He said: 'There was no question of a handing over of an amount of money with an instruction or direction that it should be applied for the purposes of tax.'[17] I read that as indicating that the position will be different in cases such as I have postulated in paras [40], [41 and [42].

[61] Although ITC Case No 1192[18] was not referred to by either counsel or the two courts through which this case has passed, it is unfortunately necessary to consider its implications for this case before ending this judgment. With much of what was said by Trollip J in that case I respectfully agree but some of the court's conclusions may, in my opinion, be unsound. The court was dealing with

16 'Deeds . . . shall be so construed as to operate according to the intention of the parties, if by law they may; and if they cannot in one form, they shall operate in that by which the law will effectuate the intention.' *Broom's Legal Maxims*, p 363. This is of course the effect of the maxim *ut res magis valeat quam pereat*.

17 At 73C-D.

18 35 (1973) SATC 213.

three trusts set up by the settlor for the benefit of members of his family. The beneficiaries were to obtain no benefit from the trusts until after his death. In the meantime the *corpus* of the trusts was vested in the trustees and the income derived from it was to be paid to the settlor. The Commissioner levied donations tax on the value of the *corpus* in each of the trusts while the settlor was alive.

[62] The settlor objected and relied upon the exemption from donations tax in s 56 (1) (d) of the Act. It read: 'Donations tax shall not be payable in respect of the value of any property which is disposed of under a donation – (d) in terms of which the donee will not obtain any benefit thereunder until the death of the donor.' The court held that the beneficiaries had no more than a *spes* of benefiting and that they would not obtain or acquire any pecuniary advantage, profit or gain before the donor's death. Their interest was said to have 'no present inherent value' and because they would receive no benefit from the beneficial interest in the *corpus* of each trust until after the donor's death, no donations tax was payable on those benefits. With that I have no quarrel. (Estate duty is another matter.)

[63] However, the court proceeded to hold that although the trustees had received only the bare *dominium* of the *corpus* of the trusts, '(i)n the hands of a beneficiary that would have a value, capable of being determined

under s 62 (1) (c), and it would constitute a pecuniary advantage, profit or gain; consequently, as the trustees received it for the benefit of the ultimate beneficiaries, whoever they may be, they must be regarded as having received that benefit in their representative capacity as "donees" within the meaning of s 56 (1) (d)'.[19] That benefit, so it concluded, was not exempt under s 56 (1) (d) because it was a benefit obtained before the donor's death. Donations tax was therefore chargeable but only on the value of the bare *dominium* of the assets delivered to the trustees under each of the donations.

[64] Faced with a contention that such an interpretation of s 56 (1) (d) would render redundant and otiose the exemption in s 56 (1) (l) ('if such property is disposed of under and in pursuance of a trust'), the court's only answer was that the provision 'was probably inserted *ex abundante cautela* to make it crystal clear that property disposed of under and in pursuance of a trust was not a *gratuitous* disposal of property'.[20]

[65] It is these conclusions in paras [63] and [64] which seem to me to be suspect. It is implicit in them that even although the donor under an *inter vivos* trust intends to donate say R1 million to a nephew when he attains the age of 30 years and settles that sum upon the trustee to be held until that occurs, no

19 At 220.
20 At 216.

donations tax can be levied upon the amount of R1 million when the nephew receives it because it is not a 'gratuitous' disposal by the trustee. The only donations tax recoverable is that levied upon the value of the bare *dominium* vested in the trustee when the trust was established. The net result is that what was plainly a donation of R1 million to the nephew will escape donations tax but the initial vesting of the bare *dominium* of that sum in the trustee will attract liability for donations tax. But its value then is zero. So no tax is payable. It is to be doubted whether that could ever have been the intention of the legislature.

[66] Moreover, the learned judge's relegation of the provisions of s 56 (1) (l) to the category of a provision enacted *ex abundante cautela* only to make clear that property which passes from a trustee to a beneficiary is not a gratuitous disposal appears to me to probably be unjustified. First, one does not lightly conclude that self-standing statutory provisions are simply repetitive of what has already been clearly enacted. Secondly, there seems to be a self-contradiction inherent in the proposition. The provision appears in that section of the Act which exempts certain donations from liability for donations tax. If a disposal is not a donation as defined in s 54 there can be no talk of it being exempted from liability for donations tax. No tax is payable because it is not a donation; not because it is a donation but exempt under s 56.

[67] Herein lies, so it seems to me, the possible fallacy in the approach of Trollip J. The manifest purpose of s 56 (1) (l) (and all the other sub-paragraphs of s 56) is not to tell one what are and are not donations, but to tell one what donations will not attract liability for donations tax. To use the provision to determine whether a donation has taken place, is to fail to understand that it has no application at all unless a donation has taken place and that whether a donation has taken place is governed entirely by other provisions of the Act.

[68] Thirdly, the learned judge's emasculation of the provision results in one being hard pressed to find some possible field of application for the exemption. After all, if, as the learned judge thought, no disposition by a trustee to a beneficiary could rank as a donation because it would not be gratuitous, how could liability for donations tax ever arise? Why exempt from liability a donation which *ex hypothesi*, could never exist?

[69] Fourthly, the interpretation accorded s 56 (1) (l) appears to negate its obvious purpose. The scheme of the donations tax provisions in the Act is plain. Disposals of property which are not donations do not attract liability for donations tax. Those which are donations do. Because trusts are frequently employed to confer benefits which are in fact donations, special provision is made to cater for that. The provision made is primarily in s 54 which levies the

tax upon property disposed of under a donation by a resident donor whether or not it has been disposed of directly, indirectly, or via a trust. The donee in a donation is defined in s 55 (1) as the 'beneficiary under a donation' and the definition also artificially includes a trustee if 'property disposed of under a donation [is] to be administered by him for the benefit of any beneficiary'. Section 59 renders the donor liable to pay the tax but if he fails to pay it timeously the trustee is to be jointly and severally liable for the tax. The proviso to the definition of 'donee' enables the trustee, if he has paid or is liable to pay the tax, to look to the assets of the trust for reimbursement. In terms of s 60 (1) the tax becomes payable within three months (or such longer period as may be allowed by the Commissioner) from the date upon which the donation takes effect. Section 55 (3) provides that 'a donation shall be deemed to take effect upon the date upon which all the legal formalities for a valid donation have been complied with'.

[70] The import of all this is that the interposition of a trustee between the donor and the beneficiary will not enable the donor to avoid liability for donations tax if the disposal of the *corpus* of the trust is a donation as defined. Where it is, and despite the trustee having no beneficial interest in the *corpus* while it is vested in him, he is regarded as if he were the donee under the

donation and the donation is 'deemed' to have taken effect at latest upon his receipt of the *corpus*. The donor becomes liable immediately to pay donations tax upon the full value of the *dominium plenum* of the *corpus* (less any amount excluded by virtue of s 56 (2)) and not merely upon the value of the bare *dominium*. Failure by the donor to pay within the time allowed for payment renders the trustee liable to pay the tax. If either of them does so liability for donations tax on the donor's donation will have been discharged. (And even if it has not, they remain liable for the tax, despite the fact that the beneficiary may have already received the *corpus*.) Section 56 (1) (l) seems to be intended to protect the donor and the trustee from the levying yet again of donations tax upon the ultimate disposal by the trustee of the *corpus* to the beneficiary who gives nothing in return for it. Its apparent purpose is simply to avoid taxing twice what is in reality one donation traceable to the initial act of the donor in settling assets upon the trust.

[71] The implications of these aspects of the judgment of Trollip J (if correct) for the case before us are these. What the beneficiaries may receive from the trustees (whether they be payments to discharge the maintenance obligations or simply payments of excess income and capital) cannot be classified as donations because payments emanating from the trustees are not gratuitous. If what the

trustees receive from Mr Welch by way of assets exceeds in value what is needed to satisfy the maintenance obligations there is *pro tanto* a disposal of property under a donation to the trustees to be administered by them for the benefit of the beneficiaries. The trustees are thus donees by definition and are potentially liable to pay donations tax on the value of the assets settled upon them. But in valuing the property disposed of to the trustees it is only the value of the bare *dominium* of that excess which is relevant because that is all they have received under the donation. The value according to the decision in *CIR v Estate Crewe & Another*[21] is zero. The net result is that no donations tax is payable at all.

[72] It seems therefore that whether the aspects of ITC Case No 1192 which I have questioned were rightly or wrongly decided does not affect the outcome of this case which would be the same in either event. It is therefore not necessary, despite my criticisms, to decide finally whether it should be overruled as erroneous. Nor would it be advisable to do so in the absence of any argument concerning it at the hearing.

[73] It is ordered that the appeal be allowed with costs including the costs of two counsel and that the assessment of the Commissioner that the appellant is

21 1943 AD 656 at 686 and 696.

liable for donations tax upon the sum of R3 216 760,00 is set aside. The costs are to include the costs of the application for leave to appeal.

R M MARAIS
JUDGE OF APPEAL

ZULMAN JA)
CLOETE JA) CONCUR

CONRADIE JA:

[74] I regret that I am unable to agree with my brother Marais that the appeal should succeed. Estate planners have for many years known that a person who wants to transfer his or her assets to a trust and avoid paying donations tax cannot simply give them to the trust: the trust must buy them. The purchase price is usually left owing bearing a rate of interest that is not so low as to alarm the Revenue. When the settlor dies his estate owns the claim to the depreciated purchase price and the trust owns the assets which with any luck have grown in value. There is no donation. The trust has given a *quid pro quo.*

[75] The facts in *Ogus v Secretary for Inland Revenue* 1978 (3) SA 67 (T)

resemble those set out in the judgment of my brother Marais. In *Ogus* the taxpayer provided that it was 'an express condition' of the donation that the trust should be liable for and indemnify him against liability for donations tax in respect of the donation made in terms of the deed. It was argued that the taxpayer had instructed the trustees to discharge his liability for donations tax and that it

> '…was as much paid by the appellant when it was paid directly by virtue of his direction under the trust, as if it had been paid by his own cheque. The appellant put a fund in the hands of the trustees for the purpose of paying the tax and the trustees applied that fund in paying the tax, acting on the mandate of the appellant and not on the mandate of any of the beneficiaries. This in short means that the amount of the donations tax was not a donation at all but was meant to be the means of procuring the payment of a legal obligation of the appellant and consequently did not form part of the cumulative taxable value of property disposed of under a donation by the appellant.'

[76] This was essentially the appellant's argument here: Mr Welch put a fund in the hands of the trustees for the purpose of paying his present and future, contingent, debts and if, acting on his mandate, they applied that fund to discharging his liabilities there was no donation of that part of the capital transferred to the trust to discharge the appellant's obligations. In each case, therefore, the benefit to the settlor was the discharge by the trust of a liability.

[77] Boshoff AJP who gave the judgment for the full court in *Ogus*, dealt with the argument in that case as follows (at 79E – G) :

‘ I have some difficulty in following the argument that, because clause 20 constitutes the fisc an *adjectus solutionis gracia*, mutual obligations came into being between the appellant and the trustees and, because of the obligation of the trustees to pay the fisc and relieve the appellant of a liability for tax, the appellant receives a consideration for the donation made to the trustees, and, because he receives a consideration, s 58 applies and the value of the donation must be reduced by the value of the consideration.

As has already been indicated, clause 20 is merely a term in the deed of trust dealing with the liability for the donations tax. It is in its context no more than a circumstance under which the trust was created by the appellant. It is certainly not in the nature of a reciprocal obligation. A reciprocal obligation is found in a synallagmatic contract, that is a contract which contains mutual reciprocal engagements by each of the two parties towards the other to perform his portion of the contract, and this performance must take place *pari passu*; see *Maserowitz v Little* 1911 TPD 1061 at 1063. In the context of s 58 the word “consideration” is used in the sense of a “*quid pro quo*,” compensation or reward having some value. Otherwise no reduction can be made in respect thereof. There is nothing in the deed of trust that warrants the view that the appellant disposed of the R100 000 to the trustees for a consideration of the kind contemplated in s 58, and least of all, for a reciprocal obligation.’

[78] In this case, also, the provision for the payment of ‘maintenance’ in the trust deed was a term of the trust contract. It was not a term of the disposal

contract. It is important to appreciate that in a transaction such as this there are two contracts. The first is the trust agreement. It is concluded between the settlor and the trustees and establishes the trust, usually setting out in detail the mechanics of its governance. It may or may not in the same document record an undertaking by the settlor to sell or donate something to the trust. Whether or not it does, the disposal is a separate contract. It is concluded between the disposer and the trustees on behalf of the trust once the trust has been established.

[79] In the present case the disposal contract transferred R3.2 m in assets from the disposer's estate to the trust. Nothing was promised by the trust in return. That makes the disposition, in the ordinary meaning of the term, gratuitous. It is a disposition without value. And whether one declines to stipulate for anything in return from a noble motive like disinterested benevolence or an ignoble one seems to me to be irrelevant to the purposes sought to be achieved by the income tax legislation. It is the depletion of the disposer's estate, not the goodness of his heart, that interests the Revenue. One of the factors of production that produces wealth is capital. The fiscus relies for much of his revenue on imposts on income produced by capital. It is a matter of concern to him, therefore, that taxpayers deplete their asset bases by distributing their capital resources to others without anything to replace them. (*Ovenstone v*

Secretary for Inland Revenue 1980 (2) SA 721 (A) at 736C–E) *Ogus* (at 74C–D) puts it well:

> '….the donations tax was introduced to make up for loss of revenue by way of income tax and estate duty when certain types of donations are made. The mischief aimed at was the practice by taxpayers of reducing their assets by making donations and thereby reducing their income on which income tax is payable, reducing their assets on which estate duty would be payable at their death, and spreading the assets and the income derived therefrom over several taxpayers. The tax is consequently in terms levied in respect of the gratuitous disposal of property.'

[80] The trustees of the Carom trust did not in terms of the trust deed undertake any obligations to Welch. Their only obligations were to the beneficiaries whom they were, within the constraints of the trust deed and prudent fiduciary management of the estate, free to benefit to any extent they thought appropriate. They were not bound to perform the obligations of the Carom trust in discharge of any promise made by the trust to Welch. As trustees their only duty was to the trust and the beneficiaries.

[81] That, it seems to me, was the stand eventually taken by the Commissioner. Having at first taken the view that the benefit anticipated by Welch from the manner in which the trustees might be expected to perform their duties in terms of the trust agreement amounted to 'consideration' in terms of s 58 of the

Income Tax Act 58 of 1962 (the Act) the Commissioner offered to deduct the estimated capitalized value of the maintenance obligations from the disposition and to tax only the amount over and above that as a deemed donation. The Commissioner in terms of that section may deem a disposal to be a donation if in his opinion adequate consideration for the property has not been given. He then changed his mind, taking the view which I think is the correct one, that whatever benefit to Welch flowed from the performance of their duties by the trustees could in law not amount to consideration for the disposition to the trust.

[82] By establishing the Carom trust Welch certainly intended to receive some benefits from the performance by the trustees of the trust contract. Since he was one of the trustees he would presumably share in their remuneration. He was also an income beneficiary so that once the trust's obligations to the prime beneficiaries had been discharged, he might hope to share in the trust income. But, it is said, the greatest benefit he might hope to receive was that the trustees would faithfully carry out their duties to the prime beneficiaries. All that seems to me to be irrelevant: Whatever collateral benefit Welch might have hoped to receive from the performance of another contract - not the contract of donation but the trust agreement - would not qualify as consideration for the disposition. Had it been the intention of the legislature in s 58 of the Act to permit as a

deduction from the value of a donation any advantage derived by a donor from the administration of a trust it would undoubtedly have employed a word of wider meaning than 'consideration'. However, even the use of a term like 'benefit' (a term which is used in s 56 dealing with exemptions from donations tax) might not have helped Welch. In ITC 1192 35 SATC 213 the Income Tax Special Court dealt with a claim for an exemption under s 56(1)(d) of the Act. The subsection then as now provides that donations tax is not payable in respect of the value of any property which is disposed of under a donation in terms of which the donee will not obtain any benefit until the death of the donor. The question arose whether the remunerated appointment of the trustees could be characterized as a 'benefit' under the subsection. If it could be, the exemption would not be claimable. The special court was clearly alive to the distinction between the donation and the trust agreement. At p 218 Trollip J said:

'But the appointment as trustees here is not the kind of 'benefit' envisaged by s 56(1)(*d*); as pointed out above that benefit must flow not from the contract but from the gratuitous disposal of the property itself, the intention being to tax a donation and not, eg a contract for the letting and hiring of services or work, however lucrative that might be; and, in any event, as the trustees here receive no remuneration until after the donor's death, they receive no pecuniary advantage, profit or gain prior thereto. It clearly follows, too, that the exemption from having to provide security is equally not a 'benefit' as was also contended for by Mr

Barnard'.

[83] The effect of the scheme incorporated in the divorce settlement was that the wife renounced her claim for maintenance against Welch or his estate in return for a claim against the trust, the property of which would ultimately go to the two children. A child's maintenance claim being predicated upon need, the parties' son, T., had no claim for maintenance against his father to the extent that his father had, through the medium of the trust, made him financially independent. The reality is that both the two prime income beneficiaries were to be maintained by the trust at the expense of the discretionary beneficiaries and the ultimate capital beneficiaries. The benefit to Welch was not only collateral, it was also indirect and remote; it came about because by the terms of the trust agreement, Welch had persuaded his wife to look elsewhere for her rehabilitative maintenance and made his son financially independent. I am not persuaded that this happy consequence flowing from the terms of the trust agreement in any way determined the character of the disposition by Welch to the trust.

[84] In my view the decision of the court *a quo* is not open to criticism. I would dismiss the appeal with costs.

J H CONRADIE

JUDGE OF APPEAL

NUGENT JA) Concurs

ZULMAN JA:

[85] I have read the judgments of my brothers Marais and Conradie JJA. I agree with the former but regret that I am unable to agree with the latter. It is of course so that more often than not the *corpus* of a trust is provided by way of a loan from the settlor or acquired by way of credit granted by the settlor. But the reason for that is obvious. Money lent or an asset purchased by the trust from the settlor is not a donation at common law or within the meaning of the definition of donation in the Income Tax Act 58 of 1962 (the Act). In those instances where the *corpus* is lent or purchased rather than given there is usually no pre-existing *causa* for the transaction which would rescue it from being classified in law as a donation if the *corpus* were to be given rather than lent or purchased. But where there is a pre-existing *causa*, such as a legal obligation owed to the intended beneficiary, the need to lend rather than simply provide the means by which the obligation is to be discharged, is entirely absent. The question which falls to be answered in this particular case cannot be solved by adopting *a priori* a point of departure which purports to answer in advance the very question which remains

to be considered. That point of departure is that all disposals of property to a trust are donations unless they are loans to the trust or pursuant to purchases by the trust.

[86] In my view the point that requires special emphasis in this case is that this trust is not typical of the many *inter vivos* trusts which exist in South Africa. Typically, the latter trusts give expression to a unilateral desire by the settlor to sequester funds for the benefit of named beneficiaries to whom no legal obligation to do so is owing. Here the position is quite different.

[87] The creation of this trust had its genesis in arms' length negotiations in a litigatory setting. Its creation was part of a compromise reached between the parties and was made mandatory by the court order. In so far as it is suggested that two contracts were entered into, one between the settlor and the trust and the other between the trust and the beneficiaries, I believe that the two contracts were so closely interrelated and interdependent that no useful purpose is served by seeking to isolate them from one another.

[88] To equate this trust with trusts created in circumstances where no antecedent obligations are owed by the settlor to the named beneficiaries is neither possible nor appropriate.

[89] I do not believe that it is correct to generalise about the intended reach of

revenue legislation. Its reach must be determined by the language which the legislature has chosen to express its will. We are dealing here with a particular class of tax, namely, donations tax. One is not taxed because one spends one's money in the settlement of legal obligations. Nor is one taxed (value added tax aside) if one chooses to dissipate one's money or assets by profligate spending on luxurious living, however much that may deprive the *fiscus* of potential tax, be it estate duty, donations tax, or income tax. One is taxed only if one gratuitously disposes of money or assets in the sense of either the common law or the definition of donation in the Act. That is not what happened here.

[90] Money expended *stante matrimonio* by Mr Welch to maintain his wife and minor child could obviously not be characterised as donations attracting liability for donations tax. I see no justification for saying that funds provided by him (or his estate) to enable those obligations to be met after dissolution of the marriage mutate into donations attracting liability.

[91] I share the view of Marais JA that the true explanation for the decision reached in the case of *Ogus* is that set out in para [52] of his judgment. To the extent that there are *dicta* in the judgment that are incompatible with what Marais JA or I have said, I consider them, with respect, to be unsound.

R H ZULMAN

JUDGE OF

APPEAL

MARAIS JA)

CLOETE JA) CONCUR