IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No A720/05

In the matter between:

THE COMMISSIONER FOR
THE SOUTH AFRICAN REVENUE SERVICE Appellant

and

R M S MARX NO Respondent

JUDGMENT: 09 MARCH 2006

VAN ZYL J:

INTRODUCTION

[1] This is an appeal against a judgment delivered in the Cape Income Tax Special Court on 13 October 2004. In terms thereof Traverso DJP upheld an appeal against the decision of the appellant to levy donations tax on four donations of five million rand each made by one M W Rush ("the donor") to his four children as beneficiaries ("the donees"). The learned judge set aside the appellant's assessment and ordered him to issue a revised assessment.

[2] Mr R F van Rooyen SC appeared for the appellant and Mr T S Emslie SC for the respondent. The court expresses its appreciation for their helpful contributions on behalf of the respective parties.

BACKGROUND

[3] During 2001 the donor and donees concluded a written deed of donation which provided as follows:

1. Donation
   The donor donates (irrevocably) to the donees, as a donation *inter vivos*, the sum of R5 000 000 (Five Million Rand) to each of the donees.
2. Delivery
   The donees shall be entitled on signature of this deed to a vested right in the aforementioned asset but shall not receive any benefit until the death of the donor.

3. Acceptance
   The donees gratefully accept the donation.

[4] The donor died on 3 June 2002 and the respondent was appointed as executor of his deceased estate. The appellant subsequently levied donations tax on the said donations, applying a value calculated in accordance with the provisions of section 62(1)(*c*) and (2) of the *Income Tax Act* 58 of 1962, as amended ("the Act"). This was determined with reference to an alleged "usufructuary interest" which was deducted from the amount donated for purposes of establishing a so-called "bare *dominium*" value.

[5] The respondent objected to the donations tax assessment on the ground that the donations were exempt from donations tax in terms of section 56(1)(*d*) of the Act, which provides:

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.

[6] The respondent's objection was disallowed, but his appeal to the court *a quo* succeeded on the basis that the donations were indeed exempt from tax in terms of section 56(1)(*d*) of the Act. Traverso DJP held in this regard that the donations were "executory donations" in the sense that the delivery of the subject matter of the donations was to take place at a future date. Inasmuch as they had been embodied in a written document signed by the donor and donees, they were

valid in terms of section 5 of the *General Law Amendment Act* 50 of 1956.

[7] In her judgment Traverso DJP referred to a judgment of the Income Tax Court[1] and held:[2]

As a matter of law the donees did not on the conclusion of the agreement acquire a vested right to the subject matter of the donation. The only vested right which they received was the right to claim payment of the sum of R5 000 000,00 each on the death of the donor. It is however important to bear in mind that the donor did not donate to them the right to claim the R5 000 000,00. He in fact donated the money to them. The donees' rights to claim payment on the death of the donor arose from their acceptance of the donation of R5 000 000,00. Whatever right the donees acquired was not immediately enforceable. They were obliged to wait until the death of the donor before their claims became enforceable.

[8] Traverso DJP held further[3] that the acquisition by the donees of a "vested right" in their respective donations meant no more than that they had a vested right to claim payment thereof upon the death of the donor. If these words were to be excised from the deed of donation its legal effect would be no different. The donations hence fell squarely within the provisions of section 56(1)(*d*) of the Act.

[9] The learned judge then observed in conclusion:[4]

It is also important to remember that what was donated was money and that as a matter of law the donees cannot acquire ownership of the money donated to them before it was paid to them. Accordingly they acquired no ownership at the time of conclusion of the agreement, and for this reason alone it is jurisprudentially impossible for the donees to have acquired the so-called *bare dominium* of the money that was the subject matter of the donation. I am therefore satisfied that the appeal on the merits must succeed.

MAIN SUBMISSIONS ON BEHALF OF THE APPELLANT

[10] Mr Van Rooyen submitted that this was not a case in which the donor had contractually agreed to make an irrevocable donation to a donee in terms of which its "whole operation" would be suspended until the donor's death or thereafter.

1 ITC 1192 (1965) 35 SATC 213 at 219.
2 In par [10] of her judgment.
3 In par [11] of her judgment.
4 In par [12] of her judgment.

There was, he suggested, no suspension of the donation in the sense that “no delivery or transfer of the property or of any pecuniary advantage, profit or gain” would take place before then. Traverso DJP had thus erred by not reading the words “vested right” with the words “in the aforementioned asset” in clause 2 of the said deed.

[11] Under the rubric “Delivery”, Mr van Rooyen continued, the parties had envisaged that each donee would, upon signature of the deed of donation, acquire an immediate “vested right” in the amount of the respective donations. This, he said, demonstrated an intention to pass ownership in the donation with immediate effect, in the sense that vesting implied the transfer of ownership (*dominium*).

[12] Transfer of ownership, he argued further, was effected by way of constructive or symbolic delivery (*constitutum possessorium*) at the time the donees appended their respective signatures to the deed of donation. The effect thereof, he submitted, was that a tacit or implied contract of loan (*mutuum*) came into existence between them, the donees being the lenders and the donor the borrower. This was subject thereto that the loan would be interest-free and would be repaid when the donor died. In terms of the loan the donor would then be free to use or consume the amount constituting the donations and retained by him, provided it be "returned" to the donees on his death.

[13] The reason why the loan to the donor would be interest-free, Mr Van Rooyen submitted, was that the deed of donation had specified that the donees would not receive "any benefit" until the death of the donor. Upon signature of the deed by the donees, however, they did receive an asset with "inherent value" which could be "ceded or taken by creditors in insolvency". This constituted an

"immediate benefit" which qualified as "any benefit" in terms of section 56(1)(*d*) of the Act. This accorded with the intention of the legislature in introducing donations tax.

[14] In any event, Mr Van Rooyen argued, if there should be any doubt as to the correct meaning of the words used in the deed of donation, the respondent had failed to discharge the *onus* resting upon him in terms of section 82 of the Act.

MAIN SUBMISSIONS ON BEHALF OF THE RESPONDENT

[15] At the outset Mr Emslie made it clear that there was no reference in either the statement of the grounds of assessment or the statement of the grounds of appeal to the appellant's contention relating to *constitutum possessorium*. At no stage was it raised as an issue and Traverso DJP hence did not deal with it in her judgment. It was in fact raised for the first time in Mr Van Rooyen's heads of argument. This could clearly not be done, since it prejudiced the respondent, who could have adduced evidence to refute it. In these circumstances, Mr Emslie submitted, it could not be considered as an issue before this court.

[16] Even if it were a properly raised and competent issue, Mr Emslie continued, there was no merit in it. There was no indication in the deed of donation of any intention that the donations would vest in the donees with immediate effect, after which they would lend it to the donor by way of an interest-free loan, repayable by the donor on his death. Nor could any such intention be implied from the relevant facts or the surrounding circumstances.

[17] In this regard Mr Emslie emphasised that *constitutum possessorium* could not be presumed, particularly in view of the appellant's failure to allege or rely on it. The donated money was never transferred to the donees and ownership therein

never passed to them. They were hence not empowered to dispose of it, by way of a loan or otherwise. The appellant had, therefore, erred in assessing it as a "usufructuary interest" entitling it to levy donations tax on the "bare *dominium*" of the money donated.

[18] It followed, Mr Emslie submitted, that the donees had not received "any benefit" from the donation. Their "vested right" to the donation entitled them only to claim payment thereof on the death of the donor. This was incompatible with a notional transfer of ownership of the donation followed by a notional interest-free loan thereof by the donees to the donor. The legal effect of the donation, he suggested, was that it was "a particular kind of executory donation" in terms of which performance was postponed until the death of the donor. This brought it under the aegis of section 56(1)(*d*) of the Act inasmuch as it did not confer any benefit on the donees.

[19] Traverso DJP, Mr Emslie submitted, was quite correct in holding that the donor had not donated the right to claim the donations, but had in fact donated the specified amount of the donation (R5 million each) to them. Their "vested right" in the amount donated was qualified in that they were not to receive "any benefit" until the donor's death. The use of the words "vested right" was, he suggested, a "jurisprudentially clumsy" way of emphasising the fact that their right to the money donated was not subject to any contractual contingency. In any event, although they would have the right to claim the money on the donor's death, they could not acquire ownership thereof until it was paid out to them. The suggestion by the appellant that the "bare *dominium*" value of the donation was a benefit and hence taxable was, Mr Emslie submitted, based on a false premise that the

acceptance of the donation by the donees constituted a taxable benefit.

CONSIDERATION OF THE ISSUE

[20] It is clear, as submitted by Mr Emslie, that the appellant is not, at this stage of the proceedings, entitled to rely on an argument relating to issues never before alleged, raised or canvassed by it, and never considered by the court *a quo*. The appellant's suggestion, that there was a symbolic transfer (*constitutum possessorium*) of the amount donated and an implied or tacit loan agreement (*mutuum*) between the donor and donees in respect thereof, raises a totally new issue. The respondent certainly did not have the opportunity to address it before the court *a quo* and was in fact made aware of it for the first time when the appellant's heads of argument in the present case were served on him. This must necessarily be regarded as severely prejudicial to the respondent.

[21] But even if the appellant were entitled to raise this new issue, I agree with Mr Emslie that there is not the slightest merit in it. Although clause 2 of the deed of donation stipulates that, on signing such deed, the donees acquired a "vested right" in the amount donated to each of them, this right was unequivocally qualified by the express condition that they would "not receive any benefit until the death of the donor". The effect of the word "vested" in this context, when read with the word "irrevocable" in clause 1 of the deed, was simply to give the donees the assurance that they would be entitled to claim payment of the amount donated on fulfilment of such condition. When they accepted the donation, a binding agreement came into existence between them and the donor, who undertook contractually not to revoke the donation at any time before his death.

[22] It would appear that the appellant read more into the words "a vested right

in the aforementioned asset", appearing in clause 2 of the deed, than the donor ever intended. I agree with Mr Emslie that the use of these words may probably be attributable to clumsy draftsmanship, inasmuch as the donor wished to emphasise that the donation was made seriously and deliberately, and that he regarded himself as contractually and legally bound by it. That this was his intention is confirmed by the provision, in clause 1 of the deed, that the donation is irrevocable, subject thereto that the donees would receive no benefit from it before the donor's death. I agree with Traverso DJP that, if the words relating to a vested right were to be excised from the deed, its legal effect would remain unimpaired.

[23] It must be borne in mind that a donation made during the lifetime of the donor (*donatio inter vivos*) becomes contractually and legally binding from the moment the donees accept the donation. It creates rights and obligations just like any other consensual contract, as appears from the following definition and elucidation in *LAWSA*:[5]

> A donation is an agreement which has been induced by pure (or disinterested) benevolence or sheer liberality, whereby a person under no legal obligation undertakes to give something … to another person, called the "donee', with the intention of enriching the donee, in return for which the donor receives no consideration nor expects any future advantage.

[24] The donor's intention to make a donation (*animus donandi*) must arise from generosity (*liberalitas*) or liberality (*munificentia*)[6] and be expressed as a promise (offer) to donate, which promise (offer) must be accepted by the donee before a binding contract of donation comes into existence. Once this happens the

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5 2nd ed 2005, vol 8 part 1, par 301 at 370. See also *Avis v Verseput* 1943 AD 331 at 347-352; *Potter and Another v Rand Townships Registrar* 1945 AD 277 at 290; *Commissioner for Inland Revenue v Estate Hulett*

6 See D 39.5.1 pr.: … *et propter nullam aliam causam facit, quam ut liberalitatem et munificentiam exerceat*.

donation is perfected and it may be revoked only under certain circumstances.[7] The resultant contract is not sufficient, however, for purposes of transferring the donated asset into the ownership (*dominium*) of the donee. Performance of the obligation arising from the donation, in the form of delivery (*traditio*) of the asset donated, first has to take place, as appears from the following *dictum* of Jansen JA in *Mankowitz v Loewenthal* :[8]

> At the outset it must be remembered that a contract of donation and the performance thereof, viz the delivery of the article donated, are two separate juristic acts: the one directed at creating an obligation and the other at transferring possession (and *dominium*).

[25] An executory donation is so called because it still requires to be effected or perfected, in the sense that something is required to be done before it can be regarded as completely performed.[9] In the present case Traverso DJP held that the donation was executory because delivery thereof would take place at some future time, namely when the donor died. As such it was valid and enforceable in terms of section 5 of the *General Law Amendment Act* 50 of 1956, the relevant portion of which reads:

> No donation concluded after the commencement of this Act shall be invalid merely by reason of the fact that it is not registered or notarially executed: provided that no executory contract of donation entered into after the commencement of this Act shall be valid unless the terms thereof are embodied in a written document signed by the donor …

[26] After suggesting, in his discussion of this section, that the first question is what qualifies or does not qualify as a donation, Christie continued:[10]

> The second question raised by the section is what is, and what is not, an executory

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7 See Inst 2.7.2: … *quae si fuerint perfectae, temere revocati non possunt*.
8 1982 (3) SA 758 (A) at 765A.
9 See *Nezar v Die Meester en Andere* 1982 (2) SA 430 (T) at 436E; *Savvides v Savvides and Others* 1986 (2) SA 430 (T) at 436E; *Stander v Commissioner for Inland Revenue* 1997 (3) SA 617 (C) at 622D-E.
10 R H Christie *The Law of Contract in South Africa* (4th ed 2001) 141.

contract of donation. The section obviously requires that a distinction should be drawn … between an accepted promise to donate, giving the promissee a personal right of action against the donor to compel him to fulfil his promise by delivery or the passing of transfer, and a donation completed by delivery or transfer, which gives the donee a right *in rem*. The latter, the completed donation, cannot be described as an "executory contract of donation" and therefore falls outside the section.

[27] If the donation takes the form of a cession of rights the donation is completed simultaneously with the cession and there is hence no question of an executory contract, as explained by Botha J in the *Weiner* case:[11]

I agree with counsel for the respondents that the family arrangement arrived at was an agreement whereby a cession was effected of the rights of Julius and the third respondent to their inheritances in Nathan's estate, in favour of Rose. They divested themselves of their rights and Rose acquired those rights from them. Counsel for the applicant did not attack the legality of an agreement of this nature, and I am unable to think of any reason for doubting its validity. Matters such as the liability for donations tax and transfer duty do not affect the validity of the agreement. No doubt the cession of rights constituted a donation by Julius and the third respondent to Rose, but since a transfer of rights takes place by the mere agreement of cession, this was not an executory donation requiring writing for its validity in terms of the proviso of sec. 5 of Act 50 of 1956; in any event, the actual delivery of the assets in Nathan's estate to Rose would have precluded any reliance being placed on the statutory provision mentioned.

[28] It is clear from these authorities that the contract of donation, which came into existence when the donees accepted the donation contained in the deed of donation, created personal rights in terms of which the donees could claim transfer of the donation when the donor died. Only when transfer had effectively taken place, would they acquire ownership in the respective amounts donated to each of them. The vesting of a personal right in a donee in circumstances such as the present cannot be equated with transfer of ownership of, or of any other right in, the donation. The deed makes it clear that such transfer cannot take place before the death of the donor. This accords, in my view, with the following extract from

11 *Weiner NO v The Master and Others NNO (1)* 1976 (2) SA 830 (T) at 842B-D.

the judgment of Trollip J in the matter referred to by Traverso DJP:[12]

It may be asked in what case then, other than donations *mortis causa* (for they are specially exempted under the preceding paragraph of s 56(1)), was it intended that the exemption should apply.

The kind of case to which it would apply seems to be those in which the donor contracts to donate irrevocably property to a beneficiary, or to a trustee for the benefit of a beneficiary, in terms of which its whole operation is suspended until his death or thereafter; that is, no delivery or transfer of the property or of any pecuniary advantage, profit or gain therefrom is to take place until then.

As stated above, the mere contractual right thereby vested in the 'donee' is not a 'benefit obtained by the donee thereunder' so as to preclude the exemption from operating, and the donation would not be a *donatio mortis causa*, because it would not be revocable, which are both essential characteristics of the latter kind of donation (*Meyer & others v Rudolph's Executors* 1918 AD 70 at 83, 88).

[29] There is hence no merit in Mr van Rooyen's argument that the reference in the deed of donation to a "vested right" in the donation evinced the intention of the immediate transfer of ownership. In certain circumstances this may be the case,[13] but not so in the present case. On my reading of the deed such transfer has been unequivocally postponed to the occurrence of a future event, namely the death of the donor.

[30] In this regard there is no question of transfer of ownership in the donation having been effected by constructive, symbolic or fictitious delivery in the form of *constitutum possessorium*, as argued by Mr van Rooyen.[14] There is nothing in the deed of donation, or in the surrounding circumstances, from which it may be

12 See note 1 above. The extract appears more fully in par [9] of Traverso DJP's judgment.
13 See *Jewish Colonial Trust, Ltd v Estate Nathan* 1940 AD 163 at 175-176; *Estate Dempers v Secretary for Inland Revenue* 1977 (3) SA 410 (A) at 425E-426A. The Income Tax Court cases relied on by Mr van Rooyen in this regard (ITC 76 (1927) 3 SATC 68 (U) at 70 and ITC 1552 (1989) 55 SATC 82 (T) at 86) are distinguishable and do not support his contentions. On the various meanings of "vested" see Cameron and others (eds) *Honoré's South African Law of Trusts* (5th ed 2002) par 347 at 556-557.
14 On the nature and ambit of *constitutum possessorium* see *Jefferson, Executor of Stewart v De Morgan* 1882 ECD 205 at 216-221; *Goldinger's Trustee v Whitelaw & Son* 1917 AD 66; *Mankowitz v Loewenthal* (note 8 above) at 766A-G; *Epol (Edms) Bpk v Sentraal-Oos (Koöperatief) Bpk en Andere* 1997 (1) SA 505 (O) at 510E-G.

inferred that the donor had intended to transfer ownership of the donation from himself to the donees, but would continue to retain it, in a different capacity, on behalf of the donees. Even less is there any indication, in the deed or the surrounding circumstances, that the donor would henceforth hold the donation in terms of a loan for consumption (*mutuum*), which loan would be interest-free and repayable (presumably by his estate) on his death. If this had been his intention, and that of the donees, it would undoubtedly have been expressed in the deed. The appellant has clearly come nowhere near making out a case on this basis, as a cursory survey of the following lucid exposition of the law will demonstrate:

Constitutum possessorium is never presumed. The party alleging it must prove that the following requirements have been fulfilled:

a) the transferor must be the owner and the possessor of the thing at the moment of transfer;
b) the transferor must cease to possess the thing for himself and begin to hold the thing in the name of the transferee;
c) the transferee must consent that detention be retained by the transferor; and
d) there must be a clearly proved *causa detentionis* in the form of a clearly proven contractual relationship under which the transferor becomes the detentor for the transferee.

From the foregoing it is clear that an intention *simpliciter* to transfer ownership is not sufficient. The intention must be that the transferor will henceforth hold the thing on behalf of the transferee under a new contractual relationship. This involves an agreement that the transferor will henceforth hold the thing as detentor on behalf of the transferee as well as a distinct *causa detentionis* for holding so.

The *causa detentionis* can either be the result of an express agreement between the parties or it can take the form of a tacit agreement deduced from the surrounding circumstances. In principle there is no restriction on the type of *causa detentionis* on which the parties may decide but *causae* which envisage only slight benefits for the transferor are viewed with a great deal of suspicion.

Finally, the bona fides of the parties must be beyond doubt. It must be proved that the parties had the genuine intention to transfer and accept ownership. If the arrangement is merely a sham or if it smacks of bad faith, the courts are reluctant to accept that ownership passes especially if the rights of third parties will be

prejudiced. [15]

[31] Even if the appellant were able to persuade this court that ownership of the donation had indeed passed from the donor to the donees by way of *constitutum possessorium*, it would not be able to get over the insurmountable hurdle of demonstrating that they then concluded a tacit agreement of loan for consumption.[16] It is trite that a tacit agreement can be inferred only from the clear and unambiguous conduct of the parties thereto.[17] In the present case the parties gave no indication whatever, by their conduct or otherwise, that they intended concluding such an agreement. It can simply not be deduced from their conduct, in the context of the known facts and circumstances of the case, that they agreed to make the donation the subject of a loan agreement in terms of which the donor, divested of his ownership of the donation, would henceforth retain it as the borrower of the amount of the donation. It goes without saying that it would be virtually impossible to show that they agreed that the loan would be interest-free and repayable on the death of the donor.

[32] It follows that the appeal must be dismissed with costs.

D H VAN ZYL

Judge of the High Court

I agree.

15 LAWSA (1st reissue 2002) vol 27 par 372 at 308.
16 See in general LAWSA (1st reissue 1999) vol 15 par 268-283 at 154-162.
17 See the discussion in Christie (note 10 above) at 91-101.

D M DAVIS

Judge of the High Court

I agree.

N J YEKISO

Judge of the High Court