IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

REPORTABLE
CASE NO 194/03

In the matter between

THE COMMISSIONER SOUTH AFRICAN REVENUE SERVICE **Appellant**

and

ESTATE LATE H E STREICHER **Respondent**

CORAM: **HOWIE P, FARLAM, BRAND, LEWIS et HEHER JJA**

Date Heard: 14 May 2004

Delivered: 31 May 2004

Summary: **Estate duty – valuation of immovable estate property – s 5(1)(a) of Estate duty Act – meaning of 'in the course of the liquidation of the estate'.**

J U D G M E N T

HOWIE P

HOWIE P

[1] This case raises the question whether immovable property in a deceased estate was sold 'in the course of the liquidation of the estate' within the meaning of s 5(1)(a) of the Estate Duty Act 45 of 1955.

[2] The sole executor in the respondent's estate, Mr DM Streicher, was the surviving spouse of the late Mrs HE Streicher who died in 1981 and to whom he was married out of community of property. For convenience I refer to him as 'the respondent'. The estate assets included ten units of Karoo land on which *bona fide* farming operations were carried on. The respondent was the owner of an undivided half share of five of the units.

[3] In her Will the deceased bequeathed the land she owned outright to their son, Johannes Jacobus Streicher and her undivided half share of the jointly-owned land she bequeathed to their son, Fransie Naude Streicher. In both instances she bequeathed a usufruct to the respondent. In return for their inheritances the sons referred to each had to pay a third son, Daniël Myburgh Streicher, a specified bequest price.

[4] In 1983 the respondent and Johannes Jacobus Streicher entered into a redistribution agreement involving five of the units, in terms of which, subject to the bequest price provision, they were to become the property of the respondent.

[5] The first and final liquidation and distribution account in the estate was submitted to the Master in Cape Town on 15 April 1985. In the account, lodged by the respondent, the five units that were the subject of the redistribution agreement were awarded, and to be transferred, to the respondent and an undivided half share in each of the other five were awarded, and to be transferred, to Fransie Naude Streicher.

[6] The value attributed to each unit in the account was determined in accordance with a valuation by the Land Bank. The total value of all ten units was shown in the account as R289 177,50.

[7] That part of the account constituting the respondent's estate duty return showed the dutiable amount as nil.

[8] In terms of Government Notice 125 of 27 January 1956 a Master has, in relation to matters concerning deceased estates, the powers of the appellant. The Master did not query or challenge the land valuations in the account or the nil return which, as the appellant's representative, he was empowered by s 8(1) of the Act to do.

[9] In 1997, however, the appellant received information that all the land in question had been sold in May 1984 for R1 750 000. In due course, in the year 2000, he issued an assessment in terms of which estate duty of R436 502,68 was payable. The respondent appealed successfully to the Cape

Income Tax Special Court which set aside the assessment. The President of that court (Conradie J) thereafter granted the appellant leave to appeal directly to this court.

[10] It is indeed true that all ten units were sold in May 1984. They were sold, as one, for R1 750 000. The sellers were stated in the relevant agreement to be the respondent in his personal capacity and as usufructuary, and Fransie Naude Streicher 'as blote eienaar'. The buyer was a Mr Christoffel Petrus Jochemus Prinsloo. Occupation was to be given on 1 August 1984 and transfer was due to take place, as far as possible, on 1 August 1985.

[11] At the hearing before us it was conceded at the outset on the appellant's behalf that the sum of R436 502,68 was incorrectly based on the deceased's having been the owner of all ten units. On the correct facts the sum of duty claimed was reduced to R293 307,18.

[12] Various questions were debated by the parties' counsel. The primary, and in my view, decisive one is whether the sale to Mr Prinsloo was 'in the course of the liquidation' or merely 'during' the liquidation. That question arises when regard is had to the provisions of s 5(1) of the Act. In so far as is now relevant it reads:

'(1) The value of any property in the estate of any person shall be

(a) in the case of property … disposed of by a purchase and sale which in the opinion of the Commissioner is a *bona fide* purchase and sale in the course of the liquidation of the estate of the deceased, the price realized by such sale;

…

(g) In the case of any other property, the fair market value of such property as at the date of death of the deceased person …'

[13] It is common cause that if (g) applies, the respondent had, in terms of the definition of 'fair market value' in the Act, as read with s 1(2), a choice to reflect the value of the immovable property in the estate as its value according to a Land Bank valuation. As indicated, he exercised that choice.

[14] In view of what has been outlined above, if the sale to Prinsloo was 'in the course of the liquidation of the estate' within the meaning of the Act then the appellant was correct in assessing duty on the basis of the sale price. If it was not a sale within the scope of that expression then the account was correctly drawn and the court below was right in setting aside the assessment.

[15] As to whether it is a matter for the appellant's opinion whether a sale is in the course of the liquidation of an estate, this question was left open in *Holden's Estate v Commissioner for Inland Revenue* 1960 (3) SA 497 (A) at 502A-B. It will be noted that the court would appear to have thought that the

answer was in the affirmative. However, that can only have been its view in relation to the Commissioner's opinion as to the facts relevant to the issue of 'course of liquidation'. I say that because the meaning of the expression 'within the course of the liquidation of the estate' is clearly not a matter of fact but of law. Therefore, although constraints limit or even bar judicial interference with the exercise of a discretionary opinion, plainly it is for this court, as it was for the court below, to interfere if the appellant took a wrong view of what the true meaning of the expression is in law. The nature and extent of such interference is another matter. I shall deal with it below.

[16] The appellant's interpretation of that expression is evident from certain letters written on his behalf to representatives of the respondent during an exchange of correspondence preceding the hearing in the Special Court. In those letters the contention is advanced that s 5(1)(a) applies '(i)ndien bates van die oorlede verkoop word **gedurende** die likwidasieproses' and that '(i)n the course of the liquidation' means "**during**" the liquidation, (my emphasis).

[17] I think that interpretation is incorrect. Generally, there is in law a difference between 'during' and 'in the course of'. This is illustrated by the many cases which deal with the respective phrases 'in the course of employment' and 'in the course of business', as employed in the various

legislative enactments over the years providing for third party compensation for fatal and bodily injury in motor accidents and in the formulation of the principles of vicarious delictual liability.

[18] In *Standard General Insurance Co v Hennop* 1954 (4) SA 560 (A) the question was whether a registered insurer was liable to compensate an injured passenger who was being conveyed in a car which was involved in an accident due to the negligence of its driver. The question was whether, even if the driver was driving in the course of his business, the passenger was being conveyed in the course of that business. The court said (per Centlivres CJ)[1]

'The Act does not say that the insurance company is liable if you were a passenger in my car while I was driving in the course of my business; before the company can be held liable it must be shown that you were being conveyed in the course of my business. The words used by the Legislature connote that there must be some relationship between your presence in the car and my business.'

[19] In *Ngubetole v Administrator, Cape and another* 1975 (3) SA 1(A) the primary question concerned the meaning of the phrase ' in the course of employment' in the then applicable motor accident compensation legislation. In the judgment, Corbett JA explained[2] that those words would usually, but might not always, mean the same in relation to that legislation as they did in

[1] At 565D-E.

the sphere of vicarious liability. Subject to the need for a flexible approach that could result in a satisfactory casuistic determination of when, under the legislation, an act was done 'in the course of employment', it nevertheless appeared that such an act was one done in the exercise of the functions to which the employee was appointed.[3]

[20] On the strength of the statements in *Hennop* and *Ngubetole* to which I have referred, and the many earlier authorities which those judgments cite, I conclude that a sale 'in the course of the liquidation of the estate' in s 5(1)(a) of the Estate Duty Act means a sale between which and the liquidation process there is some relationship. Put another way, it means a sale effected in the exercise of the functions involved in the liquidation. In short, the sale must be one in implementation of the liquidation process. It must therefore be by the executor or on behalf of the executor, in the latter's capacity as executor, not in the latter's personal capacity as beneficiary.

[21] I would add that the legislature had good reason to use the wording it chose. The norm is that estate duty is based on the value of the estate assets as at the date of the deceased's death. Section 5(1)(a) permits a departure from that norm. Heirs and legatees are naturally free to sell their rights to their inheritances for such prices as they see fit. However, the sale price of

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[2] At 8G-9C.

estates assets, if that price is to bear upon the assessment of estate duty and thereby play a role in determining what the beneficiaries eventually receive from the estate, should logically and appropriately be within the powers and functions of the executor to control. An executor has to act with careful regard in relation to those who have, or might have, an interest in, or rights to, the estate. In realising estate assets the executor is subject to the views of the heirs and, if necessary, the Master.[4] This structure seeks to ensure that disposal of estate assets in the liquidation process not only pays heed to the subjective wishes of the beneficiaries but is also safeguarded by responsible, independent and dispassionate oversight. That being so, if a price is agreed to by the executor, that fact is, generally, a stamp of reliability signifying the realisation price as a sound enough indicator of current market value as at the date of sale to justify reliance upon it for purposes of determining the duty. By contrast, unchecked disposal of their rights by the heirs or other beneficiaries is subject to erratic considerations. Obviously it would normally be in their best interests to obtain the best possible price but it is not unrealistic to imagine the pressure of straitened financial circumstances inducing the acceptance of sale prices below current fair market value.

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[3] At 9E-F.
[4] Section 47 of the Administration of Estates Act, 66 of 1965.

[22] In the present case, of course, the properties sold included the estate's erstwhile undivided half-share in five of the units. An undivided half-share 9is not an attractive purchasing proposition to someone totally unrelated to the holder of the other half-share. But that negative feature was removed by the respondent's acquisition, via the distribution agreement, of sole ownership. In these circumstances, however, the realised price was no guide at all to the market value of the deceased's half share, or, for that matter, once all the properties were bundled together, of her solely owned units. Had the disposal been by the respondent *qua* executor it would have been necessary for him to have regard to s 5(1) and to the need, in contemplating disposal, to consider carefully whether the estate assets were being sold for acceptable prices.

[23] These considerations militate further against construing 'in the course of' as 'during' even if there can, in theory, be scope for interpreting the same wording in two different statutes to mean different things.

[24] Section 24 of the Act as it applied to the present case contained a subsection (7) (since repealed) which empowered the court below to give such decision as in its view the Commissioner ought to have given. It follows that this court can do the same. It was common cause between

counsel that if the appellant's interpretation of the material words was in our view wrong we should substitute our decision for his.

[25] Quite apart from the consideration that in selling to Prinsloo the respondent did not purport to act as executor but only in his personal capacity as usufructuary, and as his son, Fransie's, representative, the following further facts demonstrate that the sale was not in the course of the liquidation:

1. All the units of land were sold together as one. The *merx* included the respondent's undivided half share in five of the units. His property was not an estate asset. It was not part of the liquidation process to sell it.
2. It was not necessary for any estate purpose to sell any of the immovable estate assets prior to finalisation of the account.
3. The sale was consequent upon the decision by the respondent and Fransie to sell, pursuant to the redistribution agreement, in advance of their receiving transfer from the estate.

[27] It follows that the appellant was not entitled to rely on s 5(1)(a) and that the valuations reflected in the account are not assailable.

[28] The appeal is therefore dismissed, with costs.

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CT HOWIE
PRESIDENT
SUPREME COURT OF APPEAL

CONCUR:

FARLAM JA

BRAND JA

LEWIS JA

HEHER JA