

SOUTH AFRICA / JUDGMENT

Commissioner for Inland Revenue v Bowman NO (612/88) [1990] ZASCA 28; 1990 (3) SA 311 (AD); (27 March 1990) [1990] ZASCA 28

COURT

Supreme Court of Appeal

BEFORE

Corbett, Smalberger, Milne, Friedman, Goldstone

CASE / FILE NUMBER

612/88

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IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

CASE NUMBER: 612/88

In the matter between: THE COMMISSIONER FOR INLAND REVENUE APPELLANT and NEIL BOWMAN N.O RESPONDENT

Coram: CORBETT CJ, SMALBERGER et MILNE JJA, FRIEDMAN et GOLDSTONE AJJA.

Date heard: Monday 19 March 1990

Date delivered: Teusday 27 March 1990

2 JUDGMENT

GOLDSTONE AJA:

Texchange (Pty) Limited (the company) rendered income tax returns to the appellant which reflected fictitious income. This case concerns those returns rendered for the 1977 to 1982 years of assessment. The company received income tax assessments from the appellant based upon such returns. In respect of each of those years the company had no taxable income. The amounts, as assessed, were paid by the company. No objection to any of the assessments was ever made by the company.

The company was subsequently liquidated by order of the Witwatersrand Local Division of the Supreme Court. The

3 respondent is the liquidator of the company. He claimed repayment from the appellant of each of the amounts paid by

the company to him pursuant to the aforementioned assessments. He did so on the basis that the payments constituted dispositions not for value. He alleged in his summons that they are liable to be set aside in terms of section 26(1) of the Insolvency Act, No. 24 of 1936 (the Insolvency Act). It is there provided that:

"26(1) Every disposition of property not made for value may be set aside by the court if such disposition was made by an insolvent -

(a) more than two years before the sequestration

of his estate, and it is proved that, immediately after the disposition was made, the liabilities of the insolvent exceeded his assets;

4 (b) within two years of the sequestration of his

estate, and the person claiming under or

benefited by the disposition is unable to

prove that, immediately after the disposition

was made, the assets of the insolvent exceeded his liabilities;

Provided that if it is proved that the liabilities of the insolvent at any time after the making of the disposition exceeded his assets by less than the value of the property disposed of, it may be set aside only to the extent of such excess."

Section 26 of the Insolvency Act is made applicable to companies in liquidation by the provisions of section 340 of the Companies Act, No. 61 of 1973.

An exception that the summons was bad in law and lacked averments

5 necessary to sustain an action was dismissed. With leave

of the Court a quo (De Klerk J), an appeal against that decision

is now before us. The judgment of the Court a quo has been

reported in 1989 (4) SA 63 (W) as *Bowman NO v Kommissaris*

van Binnelandse Inkomste.

The first ground of appeal argued by counsel for the appellant was that, having regard to the provisions of the Income Tax Act, No 58 of 1962 (the Act), the company did receive value for its payments, viz. its release from a lawful obligation to pay to the appellant the amounts assessed by him. In support of this ground of appeal we were referred to the judgment of Watermeyer CJ in *Estate Jager v Whittaker and Another* 1944 AD 246 where at 250/1 the learned Chief Justice said the following:

"The words 'disposition not made for value' mean, in their ordinary signification, a disposition for which

6 no benefit or value is or has been received or promised as a quid pro quo. The most obvious example of such a disposition is a donation and if we call to mind the definition of a donation given in Digest (50.17.82) *donari videtur quod nullo jure cogente conceditur*, it would appear prima facie that any payment, purporting to be made solely in discharge of an existing obligation, is in effect a donation if no obligation to make such payment in fact exists. If a lawful obligation to pay the money in fact exists, then the obvious benefit which the payer receives in return for such payment is a discharge from his liability to pay. Such a payment decreases his assets but at the same time it diminishes his liabilities, and in transactions which are entered into in the ordinary course of business such a discharge from a liability would be value for the payment made. For the purposes of this case, it is unnecessary to consider what the legal position would be if the obligation which is discharged arises from a promise to donate or a promise made in return for an inadequate consideration."

I would immediately observe that in the present case the payments were made in circumstances where there was no underlying obligation to pay any amounts at all to the appellant. There was no income earned by the company and therefore no normal income tax was assessable or payable under the Act: section 5; and see the authorities referred to in *Secretary for Finance v Esselmann* 1988 (1) SA 594 (SWA) at 599 D - 600 D. The present is thus a situation similar to those expressly left-out of consideration by Watermeyer CJ.

In *Goode, Durrant and Murray Ltd v Hewitt and Cornell* NNO 1961 (4) SA 286 (N) Fannin J said at 291 F that:

"Whether an insolvent has received 'value' for a disposition must be decided by reference to all the

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circumstances under which the transaction was made."

The passage in which that dictum appears was cited with approval in this Court in *Langeberg Kooperasie Bpk v Inverdoorn Farming and Trading Company Ltd* 1965 (2) SA 597 (A) at 604 B - D; and *Umbogintwini Land and Investment Co (Pty) Ltd (In Liquidation) v Barclays National Bank Ltd and Another* 1987 (4) SA 894 (A) at 912 H - 913 B; and see *Swanee's Boerdery (Edms) Bpk (In Liquidation) v Trust Bank of Africa Ltd* 1986 (2) SA 850 (A) at 859 F - I.

In having regard to all the circumstances under which the transaction was made, I am of the view that one must seek the substance rather than the form thereof. In the case before us, on the facts alleged in the summons, in substance no income tax was payable by the company to the appellant. The payments, therefore, did constitute dispositions of property not made for value. To use the words of Watermeyer CJ in the passage

9 from Jager's case, cited above, "no benefit or value is or has been received or promised as a quid pro quo". The first ground of appeal advanced by counsel must be rejected.

It was then submitted on behalf of the appellant that the provisions of the Act are such as to make assessments of income tax final and conclusive, not only as against the taxpayer but also, on insolvency, as against a liquidator or trustee. In this regard we were referred to the following provisions of the Act:

section 77(1) which provides that all assessments required to be made under the Act shall be made by the Commissioner or under his direction; section 78(1) which enables the Commissioner to estimate a person's taxable income where such person is in default in furnishing any return or information or the Commissioner

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is not satisfied with the return or information furnished by any person;

section 81(1) which provides for objections to be made to assessments and section 81(5) which provides that where no objection is made to any assessment, subject to the right of appeal, it becomes final and conclusive;

section 83 which provides for appeals against decisions of the Commissioner to a special court for hearing income tax appeals;

section 88 which provides that pending an appeal the obligation to pay income tax shall not, unless the Commissioner so directs, be suspended;

section 89(1) in terms of which the Commissioner determines the date upon which income tax chargeable shall be paid;

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and section 89(2) in terms of which interest becomes payable on overdue payments;

section 91(1)(a) which deems income tax payable to be a debt due to the State; and section 91(1)(b) which empowers the Commissioner, where income tax or interest has not been paid, to file with the clerk or registrar of any competent court a certified statement setting forth the amount of income tax or interest due and provides that

such statement thereupon has the effect of a civil judgment;

section 92 which makes it incompetent for any person in any proceedings in connection with any statement filed in terms of section 91(1)(b) to question the correctness of any assessment on which such statement is based, notwithstanding that objection and appeal may have been lodged thereto;

section 94 which provides that the production of any document under the hand of the Commissioner purporting to be a copy of an extract from any notice of assessment shall be conclusive evidence of the making of such assessment and, except in the case of appeal proceedings, shall be conclusive evidence that the particulars of such assessment are correct; section 102(1) providing for repayment of income tax proved to the satisfaction of the Commissioner to have been overpaid; and section 102(2) which provides that the Commissioner may not authorize such repayment unless the claim therefor is made within three years after the date of the assessment in question.

It would be strange, submitted the appellant's counsel, if against the background of all these provisions, it was open to a liquidator or trustee to reopen assessments to which

there never has been an objection. Indeed, so the submission

ran, if a liquidator or trustee could do so, it would have

the result of enabling an assessment to be reopened ten or even twenty years after it had become final and conclusive under the provisions of the Act. It was further submitted that the provisions of the Act must be deemed to have overridden the provisions of section 26(1) of the Insolvency Act.

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