

SOUTH AFRICA / JUDGMENT

## Commissioner for Inland Revenue v Insolvent Estate JP Botha t/a Trio Culture (30/89) [1990] ZASCA 2; 1990 (2) SA 548 (AD); [1990] 2 All SA 163 (A) (26 February 1990) [1990] ZASCA 2

### COURT

Supreme Court of Appeal

### BEFORE

Hoexter, Nestadt, Milne, Nicholas, Friedman

### CASE / FILE NUMBER

30/89

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### Source record

COMMISSIONER FOR INLAND  
REVENUE Appellant  
and  
INSOLVENT ESTATE J P  
BOTHAS Respondent  
(Trading as "TRIO KULTURE")  
Case No 30/89 - mp  
IN THE SUPREME COURT OF SOUTH  
AFRICA APPELLATE DIVISION

In the matter between:

CORAM: HOEXTER, NESTADT,  
MILNE, JJA et NICHOLAS, FRIEDMAN, AJJA  
HEARD: 16 November 1989  
DELIVERED: 26 February 1989

### JUDGMENT

HOEXTER, JA

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From an office in the Transvaal town of Brits as well as from agency offices within the Pretoria-Witwatersrand-Vereeniging area one J P Botha ("the insolvent") carried on business from the end of July 1984 to the beginning of October 1984. During this short period the business generated a turnover in excess of thirty million rand. On 15 January 1985 the estate of the insolvent was finally sequestrated.

The insolvent carried on his business under the name of "Trio Kulture". He operated a milk-culture scheme which involved the recruitment, from members of the public, of growers of milk-culture. Each grower ("kweker") entered into a written agreement with Trio Kulture. In what follows I shall refer to this written agreement as the "kweekkontrak". The "kweekkontrak" was embodied in a printed form which was signed by both parties. Appended

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to this judgment as Annexure "A" is a copy of a specimen "kweekkontrak."

In respect of the Trio Kulture business enterprise the insolvent was not registered as a vendor in terms of sec 12 of the Sales Tax Act, 103 of 1978 ("the Act"). On 10 January 1986, and in terms of the Act, the appellant in this appeal ("the Commissioner") issued an assessment notice addressed to the trustee in the insolvent's estate ("the respondent"). The assessment was in respect of "Occasional sales" transacted by Trio Kulture during the period August/October 1984. The assessment reflected the said sales as having a taxable value of R30 587 534. This figure represented an estimation by the Commissioner of the turnover of Trio Kulture for the period August/October 1984.

An objection by the respondent against the aforesaid assessment was disallowed by the Commissioner,

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whereupon the respondent in terms of sec 22 of the Act appealed to the Income Tax Special Court for the Transvaal against the decision of the Commissioner. The parties put before the Special Court a written statement embodying the agreed facts of the case. It was common cause that -

"...die aanslae soos deur die Kommissaris

uitgereik korrek en verskuldig is indien AVB

regtens betaalbaar is, dit wil sê, indien dieappèl van die hand gewys sou word."

The Special Court concluded that the transactions reflected in the agreed facts were not "sales" within the meaning of

the Act and that, in consequence, they did not attract sales tax. The Special Court accordingly upheld the appeal and referred the assessment back to the Commissioner for revision in terms of its judgment. Pursuant to an order made by the President of the Special Court in terms of sec 86A(5) of the Income Tax Act, 1962, the Commissioner appeals to this Court against the decision of the Special Court.

The pith of the agreed facts submitted to the

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Special Court are thus conveniently summarised by the President of the Special Court (KRIEGLER, J):-

"Die geskil ontstaan naamlik uit 'n vrotmelkskema wat onder die naam Trio Kulture oor 'n tydperk van sowat twee-en-'n-half maande vanaf Julie tot Oktober 1984 hoofsaaklik in die Transvaal bedryf is. Die skema het dermate gefloreer dat daar binne daardie kort tydsbestek tientalle miljoene rande geïen is van diverse lede van die publiek. Die skema het in sy wese daarin bestaan dat Trio Kulture aan lede van die publiek 'n poeier verkoop het die wese waarvan gedroogte vrot melk was. Vir 'n besending van die poeier, hoogdrawend 'n 'aktiveerder' genoem, het die koper, 'n 'kweker' genoem, R750 betaal. Hy sou dan 25 pakkies aktiveerder daarvoor kry. Trio Kulture het 'n ooreenkoms opgestel waarluidens die kweker geregtig sou wees om gekweekte kultuur wat hy by sy huis dan sal groei met die gebruik van die oorspronklike poeier en glase melk aan Trio Kulture terug te verkoop teen R10 per kultuur. Die ooreenkoms het ook daarvoor voorsiening gemaak dat Trio Kulture oor 'n termyn van 'n jaar elke maand 'n honderd aldus gekweekte kulture terug sou ontvang waarvoor daar dan R10 elk betaal sou word. Dit beteken dan dat 'n kweker aan die einde van die eerste maand sy honderd kulture terug lewer waarvoor hy dan R1 000 kry. As die kontrak sy termyn vol loop, dan sal hy vir sy aanvanklike beïegging van R750 in die daaropvolgende jaar R12 000 kan in.

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Dit is nie verbasend nie dat die seepbel binne enkele maande gebars het. Die skema was in sy wese net so verrot soos die melk wat hy gebruik het. Dit verg nie die wysheid van nasig om te kan sien dat die skema nooit ooit lewensvatbaar was nie. Ten eerste was die produk waarom dit gegaan het, waardeloos. Dit was niks anders as gedroogte vrot melk nie. Daar is in die ooreengekome feitestel opgeteken dat daar by tye deur Trio Kulture teenoor die publiek hoog . opgegee is as sou die produk verwerk word in h

gesigroom Feit van die saak is dat die

produkt waardeloos was. Ten tweede, al kon daar geglo word deur die hoogs liggelowige dat vrot melk tog een of ander markwaarde het, is dit nouliks denkbaar dat daar mense rondloop wat so liggelowig is dat hulle glo dat sulke winste met so min moeite en so min vaardigheid of kennis verwerf kan word. Ten derde, blyk dit uit die ooreengekome feite dat Trio Kulture uit die staanspoor nooit enige bedoeling gehad het om selfs die skyn van h besigheid voor te hou nie. Daar is nie boek gehou nie. Daar is op h lukrake manier met die geld gewerk. Groot bedrae kontant het verdwyn en dit blyk asof die organiserende brein agter Trio Kulture uit die staanspoor geweet het, soos hy trouens moes geweet het, dat die musiek baie gou sou ophou speel. Daar is dus uit die staanspoor geraap en geskraap om die kontant wat ingevloei het, so gou as moontlik te laat verdwyn. Die skema was nooit lewensvatbaar nie."

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In the Special Court it was submitted on behalf of the respondent that the Trio Kulture scheme constituted a lottery within the meaning of sec 1 of the Gambling Act, 51 of 1965 ("the Gambling Act") and that the transactions in terms whereof members of the public bought milk-culture from Trio Kulture were void ab initio. Having regard to the agreed facts, and in the light of decisions such as *Rex v Lew Hoi and Others* 1937 AD 215; *Rex v Gondo* 1951(3) SA 509(A); and *Yannakou v Apollo Club* 1974(1) SA 614(A), the Court a quo examined the submission so advanced on behalf of the respondent, and it concluded that the scheme was in fact a lottery hit by the prohibition contained in sec 2 of the Gambling Act. In this connection the President in the course of his judgment observed:-

"Ons het hier te make gehad met 'n skema wat geen kommersiële substratum anders dan as h lotery kon

gehad het nie

Die bedrae wat ek reeds vroeër genoem het, dui daarop dat Trio Kulture op iedere transaksie reeds aan die einde van die eerste maand R250

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slegter af sou wees as dit werklik 'n koop en verkoop was wat hier plaasgevind het. Die skema was, na my mening, niks anders as h redelik behendig vermomde lotery nie. Hy het sy bestaan daarin gehad dat die organiseerder van Trio Kulture so gou moontlik van soveel moontlik lede van die publiek soveel geld moes in. Die tweede element daarin sou wees dat die aanvanklike kwekers heel moontlik op die kort termyn sou baat daarby, maar binne 'n betreklike kort tyd moes die hele kaartehuis in duie stort en sou enige latere kwekers wat hulle R750 per battery aktiveerder betaal het, bedroë daarvan moes afkom. Dit was, om beeldspraak te gebruik, 'n mallemeule wat al hoe vinniger moes draai en diegene wat betyds opgeklim het, sou miskien h rukkie lank genot daaruit kcm put, maar die latere opklimmers sou deur die middelpuntvliedende ekonomiese kragte van die skema afgesmyt word."

And again:-

"h Mens moet aan die hand van die voorbeeld wat SCHREINER, AR in Gondo gegee het, terugs staan en objektief kyk na die skema en volgens so h objektiewe betragting is dit duidelik dat wat hier gebeur het, die riskering van die R750 was wat met 'n wins verhaal kon word afhangende van die toevalligheid van hoe vroeg dit betaal is. Dit was h willekeurige geluk wat die kweker kon tref as hy betyds op die mallemeule geklim het. Die skema was in sy wese dan nooit iets anders as 'n lotery binne die bedoeling van die omskrywing in Wet 51 van 1965 nie."

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The Special Court proceeded next to consider whether, despite the fact that the "sales" concluded between Trio Kulture and the growers recruited to the scheme were void ab initio, sales tax might not nevertheless be payable thereon in terms of the Act. Pointing out that the definition in the Act of "goods" as "corporeal movable things" would embrace the "vrot poeier" or activator delivered by Trio Kulture to the growers, the Court then embarked upon the further inquiry whether the transactions in question amounted to "sales" within the meaning of the Act. In the concluding portion of his judgment the learned President reasoned thus:-

"Meer spesifiek dan is die vraag dan of die omskrywing van 'verkoop' in artikel 1 van Wet 103 van 1978 die begrip so wyd rek dat dit hierdie andersins nietige transaksies betrek. Daardie omskrywing lui so : 'Verkoop (beteken) met betrekking tot goed, 'n ooreenkoms ingevolge waarvan 'n party daarby ooreenkom om goed aan 'n

ander te verkoop ' Die omskrywing loop

baie breër, maar daar is niks in die res van die

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omskrywing wat na my mening ter sake is by die uitpluis van die huidige vraag nie. Daar is bepaald niks in die res van daardie omskrywing wat h andersins nietige beding weer asem inblaas op een of ander statutêre fiksie nie. Ons is aangewese dan, enkel en alleen op die omskrywing tot die mate wat ek dit reeds aangehaal het en waaruit dit blyk dat die sleutelbegrip tog maar verkoop in sy gewone sin is.

Die bevinding wat ek reeds gemaak het, kom daarop neer dat hier geen koop en verkoop in die gewone sin van die woord was nie. Aangesien die wettereregterlike omskrywing nie daardie begrip uitbrei nie, bly die resultaat dan dat daar vir die doeleindes van Wet 103 van 1978 hier ook geen verkoop transaksies was nie. Die transaksies het bygevolg nie verkoopbelasting ingevolge bedoelde Wet ontlok nie."

The Commissioner's notice of appeal sets forth

the following two grounds of appeal:-

"1 Dat die Hof gefouteer het in sy bevinding dat, in ag geneem die feite voor die Hof, die transaksies ab initio nietig was, en in die alternatief,

2. Die Hof moes beslis het dat ongeag die bevinding dat die ooreenkoms tussen TRIO KULTURE en die kwekers nietig was,

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die betrokke transaksies nogtans 'verkope' was soos omskryf in artikel 1 van die Verkoopbelastingwet van 1978."

Before this Court the argument advanced on behalf

of the Commissioner was devoted almost exclusively to the

first ground of appeal. The alternative contention set

forth in the second ground of appeal was not, however,

abandoned. Counsel for the respondent supported the

findings of the Special Court to the effect (1) that the

"kweekkontrakte" were illegai and void and (2) that they

did not amount to "sales" within the meaning of the Act.

As to the Commissioner's first ground of appeal the

respondent relied upon the decision of this Court in

Visser en 'n Ander v Rousseau en Andere NNO 1990 (1 ) SA

139 (A). To this decision reference will be made

hereafter as "the Visser case". For the respondent it was

contended that the decision in the Visser case effectively

disposed of the argument adumbrated in the Commissioner's

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first ground of appeal. It is convenient to deal at once with this last contention.

The Visser case also had its origins in a scheme ("the kubus scheme") based upon the cultivation of a milk-culture with the aid of an "activator" sold by a company ("the company") based in the Cape Province. The scheme operated for ten months before the company was liquidated. At the date of liquidation there were many growers who either had sold units of dried product to the company for which they had not yet received payment, or had bought units of activator and were entitled to offer for sale to the company units of dried product at the end of each month in respect of each unit of activator bought. There were also growers, who, having received payment for the dried product, had made a profit from their transactions with the company. The liquidators of the company treated

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the kubus scheme as a lottery within the meaning of the Gambling Act; and they refused to recognise claims from growers on any contractual basis. However, the liquidators were prepared to repay to growers who had bought activator the amount of the price paid by them; but only to the extent that they had received from the company less than they had paid to it. The liquidators further contended that the company was entitled to recover the excess from the growers whose receipts from the company had exceeded what they had paid to it. This last contention relied upon secs 26 and 29 of the Insolvency Act, 24 of 1936, on the footing that in paying such excess the company had made dispositions without value. In an action by the liquidators as plaintiffs in the Cape of Good Hope Provincial Division ("the CPD") it was held that the liquidators were entitled to claim from the growers whose receipts from the company had exceeded what they had paid

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to the company. The judgment of the CPD is reported sub

nom Rousseau and Others NNO v Visser and Another 1989(2)

SA 289(C). A "Statement of Agreed Facts" was handed in at the trial and incorporated in the judgment of the CPD (at 293D-299G). Paragraph 1.4 of the Statement of Agreed Facts (see 294B/D) read as follows:-

"Defendants admit ' that the aforesaid business activity of the company constituted a lottery as contemplated by s 2(1) of the Gambling Act 51 of 1965, in that the company could only continue to pay R10 per unit of 'dried product' to growers by selling more 'activators' to more growers on an ever-increasing scale. The company's ability to pay R10 per unit of 'dried product' to growers was therefore dependent upon the company's ability to continue to sell more and more 'activators'."

The judgment of the CPD was delivered by MUNNIK, JP.

Having recited the "Statement of Agreed Facts" and having alluded to the evidence adduced, the learned Judge-President remarked (at 300G/H) -

"From the evidence as a whole, read with the stated case and the admissions made by counsel

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during the course of argument, the following facts can be taken as proved or common cause:

- (a) The kubus scheme amounted to a lottery as contemplated by s 2(1) of the Gambling Act 51 of 1965.
- (b) (c) (d) (e) "

With leave of the CPD the defendants in that action appealed to this Court. The judgment of this Court in the Visser case was delivered by BOTHA, JA. Having recounted the facts the learned Judge said the following (at 146 E/G):

"Uit die voorgaande blyk dit dat dit van geluk afhanklik was of 'n bepaalde kweker wat 'n aktiveerde gekoop het en die droë produk aan die maatskappy gelewer het, die betaling van die prys vir laasgenoemde sou ontvang al dan nie, na gelang van of die skema die punt van ineenstorting verbygegaan het of nie. Op hierdie grondslag is dit gemeensaak tussen die partye in die huidige geding dat die skema 'n onwettige lotery uitgemaak het soos beoog word in artikel 2(1) van die Wet op Dobbelaar 51 van 1965, saamgelees met die toepaslike woordskrywings in art 1 van die Wet. Daaruit volg dit dat die deelnemers aan die skema, die maatskappy en die kwekers, hulle skuldig gemaak het aan misdrywe ingevolge die Wet, as daar by hulle die vereiste mens rea

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aanwesig was."

For the sake of completeness mention may be made of the fact that in a further action by the liquidators of the company against certain growers (reported sub nom

Rousseau en Andere v Malan en 'n Ander 1989(2) SA 451(K))

the defendants likewise conceded (see 458C) -

" dat die maatskappy se sakebedrywighele 'n

lottery daargestel het soos bedoel in art 2(1) van die Wet op Dobbelaar 51 van 1965."

Regarding the Visser case it is clear, I think,

that both in the trial action and on appeal the Court was

invited to deal with the matter on the footing that it was

common cause that the kubus scheme amounted to a lottery

within the meaning of sec 2(1) of the Gambling Act. In

these circumstances, so I consider, whether or not such a

scheme constitutes a lottery may, so far as this Court is

concerned, be a question still open and upon which.

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perhaps, the last word has not yet been spoken. For a

number of reasons (only one whereof need hereafter be briefly mentioned) it seems to me that in the instant case the correctness of the finding by the Special Court that the insolvent's business scheme was a lottery within the meaning of the Gambling Act, may be open to some measure of doubt.

What can hardly be open to doubt is that the insolvent's business scheme was conceived in fraud. The insolvent knew that Trio Kulture would be able to meet its contractual obligations to buy the dried product produced by growers only for so long as new growers were recruited at a rate faster than that at which growers earlier recruited were able to produce the dried product. It cannot be gainsaid, furthermore, that reflection upon the terms of the "kweekkontrak" and a simple arithmetical calculation should have made clear at once to any

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prospective grower of ordinary intelligence that the scheme was not a viable economic proposition; and that, sooner or later, it was doomed to failure. Why then, it may be asked, did the scheme attract so many investors? The probable answer is supplied by history which teaches us that in the human breast greed and gullibility are often partners. It is on these twin weaknesses that all confidence-tricksters trade; and not a few flourish.

However, neither the palpable fraudulence of a money-making scheme nor the credulity of its victims by itself points to a conclusion that all the statutory elements of a lottery are present. As indicated by WATERMEYER, AJA in *Rex v Lew Hoi and Others* (supra) at 219, the "gambling element" must be present for a scheme to be a lottery of the kind which legislation seeks to prohibit. In *Lew Hoi's* case this Court had to consider the provisions of Transvaal Law 7 of 1890. In that Law the

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material portion of the definition of a "lottery" (see 218)

was:-

"Lotery beteekent iedere lotery in de algemeene en aangenomen betekenis van het woord, waarby inteekening plaats vindt, en meer in het byzonder ieder schema, inrichting, systeem, plan of ontwerp, waarby een prys of pryzen gewonnen, getrokken of voor geworpen worden of kunnen worden door het lot, dobbelsteen of andere methode van kans." (My emphasis).

Upon a consideration of the relevant case law WATERMEYER,

AJA (at 220) reached -

"...the conclusion that the essential characteristics of a lottery under Law 7 of 1890, are (a) some payment by the participant in the form of a stake, (b) in return for this payment or in consequence of it, acquisition by the player of a right to a prize on the occurrence of an event, (c) determination of the occurrence of the event by chance."

In sec 1 of the Gambling Act "lottery" is defined thus:-

"...'lottery' means any lottery in the generally accepted meaning of the word, and more particularly every scheme, arrangement, system, plan or device by which any prize is or may be gained, won, drawn, thrown or competed for by lot, dice or any other method of chance, either

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with or without reference to the happening of any uncertain event other than the result of the application or use of such lot, dice or other method of chance and also includes any scheme, arrangement, system, plan or device, which the Minister may from time to time by notice in the Gazette declare to be a lottery." (My emphasis).

A perusal of the "kweekkontrak" reveals nothing in its terms which would suggest even remotely to a prospective grower that in buying the activator from Trio Kulture he was hazarding a stake on the possibility of winning a "prize". However that may be, and assuming for present purposes the propriety of regarding payment of money by Trio Kulture to growers as a "prize", the following logical difficulty in the way of a finding of a lottery suggests itself. Can the acquisition of a right to a "prize" by a grower under the scheme be said to be determined by "a method of chance"?

Any grower who entered into a "kweekkontrak" with Trio Kulture became entitled to payment, as of right, when

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the grower had produced and delivered the dried product to Trio Kulture ("the due date") in terms of the "kweekkontrak". Now it is perfectly true that whether or not the grower would in fact receive payment from Trio Kulture remained, until the due date, a matter of uncertainty. Objectively viewed, however, such uncertainty stemmed from the fact that the scheme was a fraudulent one involving (1) the likelihood that the insolvent might at any stage siphon off money from the coffers of Trio Kulture and (2) the inevitability that at some or other stage funds in Trio Kulture would dry up. In this connection the problem which arises is the following. When at the due date a grower was or was not paid, as the case might be, could it be said that payment or non-payment had been determined by a method of chance? It is by no means clear to me that this question is to be answered affirmatively. Whenever a contract (legal or illegal) requires A to pay a

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sum of money to B upon B's performance of something, actual payment to B on due date in the ultimate analysis depends upon A's willingness and ability to pay; and that uncertainty cannot be finally resolved until due date. In my view there is considerable force in the contention that the resolution of this particular imponderable (the ability to pay) which inheres in so many bilateral transactions, cannot be viewed as determination by a method of chance; and that in the instant case the grower's right to payment depended entirely or overwhelmingly on the predictable behaviour of the grower (his production of the dried product by a simple process) rather than upon the selection of the grower as a lucky winner by a method of chance.

I find it unnecessary, however, to decide whether or not the insolvent's scheme constituted a lottery. If it was a lottery then the "kweekkontrakte" were void. In the view which I take of

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the appeal sales tax was payable in terms of the Act in respect of the "kweekkontrakte" whether they were legal and enforceable or illegal and void. For purposes of the appeal, and without so deciding, I shall assume in favour of the respondent that the Special Court was correct in its finding that the scheme constituted a lottery within the meaning of the Gambling Act; and, accordingly, that the "kweekkontrakte" were void ab initio. On that assumption, and for the reasons which follow, it seems to me that the "kweekkontrakte" nevertheless were "sales" within

the meaning of the Act. In my view the respondent has failed to discharge the onus which he bears (see sec 23 of the Act) of proving that the amount in question is not liable to sales tax and that the decision of the Commissioner in so assessing him to sales tax is wrong.

Since a contract which is forbidden by statute is illegal and void, a Court is bound to take cognizance of

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such illegality; and it cannot be asked to enforce or to uphold or to ratify such a contract: *Cape Dairy and General Livestock Auctioneers v Sim* 1924 AD 167 at 170.

It is sometimes said that any juristic act' performed i'n defiance of a statutory prohibition is not only ineffective, but further that it should notionally be thought away. Thus in *Schierhout v Minister of Justice* 1926 AD 99, INNES, CJ, having cited the Code 1.14.5, remarked at 109:-

"So that what is done contrary to the prohibition of the law is not only of no effect, but must be regarded as never having been done - and that whether the law giver has expressly so decreed or not; the mere prohibition operates to nullify the act."

Such general propositions are useful to stress the concept that inter partes an illegal jural act is devoid of legal consequence. But from such convenient generalisations it is not to be inferred that because an agreement is illegal a Court will in all circumstances and for all purposes turn

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a blind eye to its conclusion; or deny its very existence.

As pointed out by VAN DEN HEEVER, J in *Van der Westhuizen v Engelbrecht and Spouse; & Engelbrecht v Engelbrecht* 1942 OPD 191 at 199 -

"When we say a juristic act is void or voidable, we pass judgment upon it from various points of view, basing our judgment upon the degree or direction of its effectiveness "

And at 200 -

"...juristic acts may be impugned from varying directions and to different degrees."

That the above approach is jurisprudentially sound is

demonstrated by many everyday practical situations.

Obvious examples which spring to mind are sales conducted

on a Sunday in violation of Provincial Ordinances; and

agreements pertaining to unlawful dealing in rough or uncut

diamonds or unwrought precious metals. To the conclusion

of such illegal agreements the law accords recognition for

particular purposes. That they are void inter

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partes does not rob them of all legal result. Por

example, in dealing with a contravention of sec 142 of

Transvaal Law 15 of 1898, INNES, CJ in *Rex v Goldflam* 1904

TS 794 remarked at 796:-

"The detectives proved, and Mr Stallard does not controvert the point, that there was an agreement to buy; and that if the transaction had not been forbidden by sec 141 it would have been an agreement upon which an action could have been brought. If that be so, it appears to me that there was a purchase within the meaning of the section"

Cases in point are not confined to the criminal law. In

*Van der Westhuizen v Engelbrecht* (supra) VAN DEN

HEEVER, J elucidated the logical distinction with which he

was there concerned by reference to the facts of *Wilken v*

*Kohler* 1913 AD 135, in which case this Court held that in

terms of sec 49 of Ordinance 12 of 1906 of the Orange River

Colony an oral contract for the sale of land in the Free

State was void. Having mentioned (at 201) that a party to

such an agreement was (qua contracting party) remediless,

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VAN DEN HEEVER, J proceeded to say:-

"In other directions the contract did have legal effect. It would have been futile for either party to claim, as against the tax collector,

that no sale had taken place or against creditors

(supposing that had been the object of the transaction) that no disposition in fraud of creditors had been committed."

Assuming that the "kweekkontrakte" are hit by the prohibition in the Gambling Act, the fact of the matter is that in the instant case the Court is not being asked to "enforce" or to "uphold" or to "ratify" a contract which the law expressly forbids. The Court merely looks at the provisions of the Act in order to see whether the agreement contained in the "kweekkontrak" comes within the literal language of the Act.

It is common cause that the dried product represents "goods" as defined in the Act. In defining "sale" sec 1 of the Act casts the net widely. Omitting provisos and exceptions not material to the issue in this

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appeal, sec 1 decrees that in the Act, unless the context otherwise indicates -

"...'sale', in relation to goods, means an agreement whereby a party thereto agrees to sell, grant, donate or cede goods to another or exchange goods with another or otherwise to dispose of goods to another, including without in any way limiting the scope of this definition -

(d any other transaction whereby the ownership of goods passes or is to pass from one person to another,

wheresoever such agreement or transaction is entered into or concluded, but does not include -

On behalf of the respondent it was urged before us that no transfer of ownership in goods was possible pursuant to a void transaction; and that in the definition of "sale" in sec 1 of the Act there was discernible as a common denominator of the various acts therein mentioned (sale, donation, cession, exchange, disposal) the notion of

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transfer of ownership in goods. This last submission does not appear to me to be sound. In the statutory definition of "sale" a reference to the passing of ownership occurs in sub-para (d). In the first place it is to be noticed, however, that sub-para (d) deals with a transaction -

"...whereby the ownership of goods passes or is to pass from one person to another." (My emphasis).

In the second place sub-para (d) constitutes, in my opinion, a discrete element in the statutory definition to be read disjunctively from the introductory portion thereof. It is significant, I consider, that the words in the introductory portion of the definition postulate no more than agreement whereby a party to the agreement agrees to do something. Fulfilment or actual performance thereof is not a requirement of the definition.

This appeal involves a fiscal enactment. The rule of construction in taxing statutes was enunciated in

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1869 by LORD CAIRNS in *Partington v The Attorney-General* 21

LT 370 (HL) at 375 in the following words:-

" as I understand the principle of all fiscal

legislation, it is this: If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the law the case might otherwise appear to be. In other words, if there be an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute."

The above rule of construction was endorsed by this Court in *CIR v George Forest Timber Co Ltd* 1924 AD 516 at 531/2.

In CIR v Simpson 1949(4) SA 678(A) CENTLIVRES, JA in dealing with a fiscal definition, remarked (at 695):-

"In construing the definition regard must be had to the cardinal rule laid down by ROWLATT, J., in Cape Brandy Syndicate v Inland Revenue Commissioners (1921 (1), K B 64 at 71) and approved by SIMON, V C, in Canadian Eagle Oil Company, Ltd v The King (1946, A C 119 at p 140). That rule was as follows:

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'In a taxing Act one has to look merely at what is clearly said. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing to be implied.

One can only look fairly at the language used.'

I shall assume that the above rule should be qualified by saying that even in taxing statutes something may have to be implied by necessity. Cf. Randfontein Estates G M Co., Ltd v Randfontein Town Council (1943, A D 475, at pp 494, 495) and the cases there cited."

It is trite that a fiscal enactment must be expressed in clear and unambiguous terms. If the language used raises a doubt as to the liability of the taxpayer to tax, the Court is bound to invoke the rule of contra fiscum. There are other ancillary aids to construction. In the course of argument it was submitted on behalf of the respondent that particularly apposite to the problem of interpretation in the instant case was the presumption that a reference in a statute to a transaction is a reference to a legally

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valid transaction. A useful illustration of reliance on the said presumption is afforded by the judgment of this Court in Die Staat v Le Grange 1962(3) SA 498(A). That decision is authority for the view that a person to whose possession a State motor vehicle has been entrusted for official purposes cannot in terms of sec 138(2) of

Transvaal Ordinance 18 of 1957 grant permission to himself to use the vehicle beyond the limits of the owner's consent; and if the possessor does use such vehicle on a public road for his own purposes, he is guilty of a contravention of sec 138(2). In delivering the judgment of the Court STEYN, CJ observed (at 502G-503A):-

"Die uitspraak van die Hof a quo gaan uit van die stelling dat h persoon met wettige toesig oor h voertuig, volgens art 138(2), ook aan homself toestemming kan verleen om die voertuig buite die perke van die eienaar se verlot te bestuur. Hierdie stelling wil my voorkom onjuis te wees. In die eerste plek moet die verwysing na 'toestemming', tensy die teendeel blyk, geag word 'n verwysing na 'n regsgeldige toestemming te wees. (Vgl. Ndhlovu v Mathega, 1960(2) SA 618 (A A) op

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bl 624). Ek kan weinig vind wat op die teendeel

dui. Dit is moeilik om aan te neem dat bv 'n parkeerbeampte, onder wie se toesig 'n voertuig gelaat is, of 'n polisiebeampte wat met toesig oor 'n voertuig as corpus delicti belas is, volgens hierdie sub-artikel kan toestem tot die bestuur daarvan vir welke doel ook en deur wie ook al.

'n Toestemming wat alle bevoegdhede te buite gaan, is regtens geen toestemming nie. Om by die toepassing van die sub-artikel 'n wettigende uitwerking te hê, moet dit, sou ek meen, 'n bevoegde toestemming wees." (My emphasis).

In *Abbott v CIR* 1963(4) SA 552(C), a Full Bench of the Cape Provincial Division commented upon the limits of the field of operation of the said presumption. CORBETT, AJ (in whose judgment BEYERS, JP and DIEMONT, J concurred) remarked as follows (at 556D/F):-

"There is a general presumption, which is applied as a rule of construction in the interpretation of statutes, that a reference in a statute to a transaction or deed is a reference to a legally valid transaction or deed (see Steyn, *Die Uitleg van Wette*, 2nd ed p 113) and it might be argued that this supports counsel's submission. Such presumptions are, however, merely guides to construction and must give way where other considerations, such as those of language,

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context and circumstance, indicate a contrary intention on the part of the Legislature."

The second sentence in the excerpt from *Abbott v CIR*

(supra) quoted above was cited with approval by RABIE, ACJ in *Kauluma en Andere v Minister van Verdediging en Andere* 1987(2) SA 833(A) at 857B/E - in which case, on the wording of the statute concerned, it was held that there was no room for the application of the said presumption.

In considering whether or not the presumption should be invoked in any particular case much depends upon the precise formulation of the statutory enactment in question and its true compass. By way of illustration two further decisions of this Court may be contrasted. In *De Kock v Helderberg Ko-op. Wijnmakerii Bpk.* 1962(2) SA 419(A) the presumption was relied upon to repel an argument that an Act which allowed a co-operative society registered under a previous Act to carry on with its activities, permitted even such activities as were ultra vires the society's regulations. At 427C/D STEYN, CJ said:-

"Dit kon nouliks die bedoeling van die Wetgewer gewees het om in art 90(1)(c) onwettige werksaamhede ingevolge sulke ingeldige regulasies, onverskillig of hul strafbare misdrywe uitgemaak het al dan nie, met toekomstige regmatigheid te bekleed. Die bedoeling was om die voortsetting van h wettige status quo te veroorloof, en nie om onwettigheid en misdrywe te laat voortduur as geoorloofde bedrywighede slegs omdat hul by die inwerking-treding van die Wet reeds in swang was nie."

On the other hand in *Ndhlovu v Mathega* 1960(2) SA 618(A) it was decided that the mere fact that the plaintiff had been conveyed for reward contrary to the provisions of the Motor Carrier Transportation Act, 39 of 1930, did not in itself deprive him of the right of action created by sec 11(1) of the Motor Vehicle Insurance Act, 29 of 1942. It

was held that the words "carried otherwise than for reward"

in para (iii) of sec 11(1) of Act 29 of 1942, and the words

"carried for reward" in para (iv) should be literally

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construed and applied; and that the contemplated carriage

for reward was not confined to carriage not punishable

under sec 9 of Act 39 of 1930.

In the process of statutory interpretation it is

the function of the Court to determine what the Legislature

means from the words it has used. If the language of an

enactment is unambiguous that is an end of the matter.

Where meaning is unequivocally expressed there is neither

need nor room for ancillary aids to interpretation. As

VAN WINSEN, AJP pointed out in *Parow Municipality v Joyce*

and *McGregor (Pty) Ltd* 1974(1) SA 161 (C) at 165H - 166A:-

"these rules of statutory exegesis are

intended as aids in resolving any doubts as to the legislature's true intention. Where this

intention is proclaimed in clear terms either expressly or by necessary implication the assistance of these rules need not be sought."

Had it been Parliament's intention to ordain that illegal

agreements of sale should not attract sales tax, nothing

would have been simpler than to have said so. Here it

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omitted to do so. In defining a "sale" sec 1 of the Act uses words of general and very broad

signification. Unless there is to be noticed in the Act itself some sound reason for a restrictive

interpretation, the general words of the definition must receive a general meaning; and full and

fair effect must be given to the language used. In its ordinary meaning the word "agreement"

signifies an accord or concurrence of minds. On the face of it, so it seems to me, the

"kweekkontrak" comes squarely within the letter of the definition of "sale" in sec 1 of the Act. In

the "kweekkontrak" Trio Kulture agreed to sell goods to others. To read "an agreement whereby a

party agrees to sell" in the statutory definition as signifying "an agreement enforceable at law

whereby a party agrees to sell" involves, so I consider, an arbitrary retrenchment of the ordinary

and natural meaning of the word. Is there then to be found elsewhere in the Act an indication that

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the ordinary and natural meaning must be curtailed or cut down? I do not think that there is.

I have had the advantage of reading the judgment prepared by my Brother NESTADT. NESTADT, JA detects in secs 5(2)(a) and 7 of the Act indications that Parliament contemplated the payment of sales tax by vendors only in respect of "valid sales". With that appraisal I would respectfully disagree. In my judgment the provisions of the Act cited by my Brother do not in fact conduce to the conclusion reached by him. I have been unable, moreover, to find elsewhere in the Act any provision which betrays such a design on the part of the Legislature.

In my judgment the language of the statutory definition of "sale", viewed in the contextual setting of the Act, is sufficiently clear and unambiguous to obviate recourse to any of the general presumptions which may be invoked as guides to the construction of equivocal

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statutory enactments.

The conclusion at which I arrive is that the definition of "sale" in sec 1 of the Act comprehends agreements of sale whether they be legal or illegal, This construction is not, I consider, an unreasonable one. Nor does it produce any obvious repugnance or inconsistency. In particular (cf. the remarks of STEYN, CJ in *De Kock v Helderberg Ko-op* (supra) quoted earlier in this judgment) such construction does not in any way serve to perpetuate any illegality or criminal infraction. It seems to me rather to accord both with common sense and sound commercial principle. Beyond the context of a statute itself any speculation upon the intention of Parliament in enacting it is dangerous. Bearing in mind this hazard it is nevertheless difficult not to be repelled, more particularly perhaps in the case of a fiscal statute, by the notion of a capricious legislative intent to

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discriminate in favour of vendors in illicit sales.

For the foregoing reasons I consider that sales tax was payable in respect of the "kweekkontrakte" and, accordingly, that the assessment was correctly raised by the Commissioner. By way of a petition addressed to this Court the Commissioner seeks condonation of the late filing of the record of proceedings with the Registrar of this , Court. The lapse is satisfactorily explained and the relief sought is not resisted by the respondent. The necessary condonation is granted.

The appeal succeeds with costs, including the costs of two counsel. The order of the Income Tax Special Court allowing the respondent's appeal to it, and remitting the assessment to the Commissioner, is set aside. The following order is substituted therefor:-

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"Die appèl teen die Kommissaris se aanslag word afgewys."

G G HOEXTER, JA

NICHOLAS, AJA ) FRIEDMAN, AJA ) Concur

CASE NO. 30/89

/ccc

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

COMMISSIONER FOR INLAND REVENUE APPELLANT

INSOLVENT ESTATE J P BOTHA RESPONDENT

trading as TRIO KULTURË

CORAM: HOEXTER, NESTADT, MILNE JJA et NICHOLAS, FRIEDMAN AJJA

DATE HEARD: 16 NOVEMBER 1989

DATE DELIVERED: 26 FEBRUARY 1990

NESTADT, JA:

I have come to a different conclusion. In

my opinion the special court correctly held that (i) the scheme

was a lottery within the meaning of Act 51 of 1965 (the Act):

(ii) the sales in question were ab initio void; and (iii) no

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2. sales tax in terms of Act 103 of 1978 (the Sales Tax Act) was therefore payable.

In considering whether the scheme was a lottery ((i) above), the special court adopted what may be called an objective approach. This meant that it mattered not that the growers may not have realised that they were participating in a lottery (because, for example, they thought the powder was of value). I agree with this. Neither the "generally accepted meaning" of a lottery nor the more specific definition thereof in sec 1 of the Act in terms requires the subjective element. The indications in our case law dealing with the meaning of a lottery are rather to the contrary. Thus it has been held that in deciding whether a scheme is a lottery its "substantial object" and "practical working" are looked to. (R vs Cranston 1914 AD 238; S vs Midas Novelties (Pty) Ltd and Another 1966(1) S A 492(A) at 498 in fin

- 499 A and 500 A; see too R vs Bertram Davis 1915 TPD 155 at 159 and LAWSA, Vol 10, para 427, at p 305-6).

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In R vs Ellis Brown Ltd 1938 AD 98 at 101 a contention that the scheme there in issue was not a lottery because it was not intended to be one was rejected, apparently on the basis that this consideration was irrelevant. To similar effect is what Lord ALVERSTONE CJ said in Willis vs Young and Stembridge 1907(1) KB 448 at 453-4 viz:

"We are fully aware of the ingenuity of the gentlemen who originate these schemes, and of their advisers, and doubtless this will not be the last attempt to devise a scheme to keep outside the statute dealing with lotteries; I do not say to evade the statute, for a practice is either within a statute or not."

There is, I think, good reason for not taking account of the participants' state of mind. In many cases these schemes are so designed as to disguise their true nature. To require an awareness on the part of the participants that the scheme is a lottery and an intention to gamble might result in the prohibition against lotteries and the legislature's object in curbing their mischief (as to which see Milton: South African

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4. Criminal Law and Procedure, Vol 3, Part I, chap E, p 13) being frustrated. In a given case (particularly the present) one could have some participants who see the scheme for what it is whilst others, being more naive or less perceptive, do not. Were their animus one of the relevant criteria, a scheme would be a lottery as far as the former are concerned but not as regards the latter. An interpretation of the word lottery which avoids such a result is desirable. This is achieved by in each case looking to the subject-matter of the scheme. If in fact the three essentials of contribution, prize and chance are present, it is to be classified as a lottery, irrespective of whether the parties intended to gamble. I am, of course, not dealing with the issue of criminal liability (created by sec 8). Here, mens rea probably would be required (see Milton op cit p 19-23).

Judged in the light of what has been stated, the scheme was, in my view, a lottery. Of course, this does

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not expressly appear from the stated case. But it may (see Supreme Court Rule 33(3)) and is to be inferred from the admitted facts. The R750, being the "price" of the powder, was the stake. The prize was the monthly payment of R1,000 (payable after delivery of the product). And the element of chance on which payment of the prize depended was also sufficiently present. BOTHA JA in *Visser en 'n Ander vs Rousseau en Andere* NNO 1990 S A 139(A), dealing with a scheme which was substantially similar to ours (and which was regarded as a lottery), explained the chance element as follows (at 146 B - E):

"Gevolglik is dit duidelik dat die skema aan die gang gehou sou kon word slegs vir solank as wat die Maatskappy daarin kon slaag om meer en meer nuwe kwekers te verwerf aan wie aktiveerders verkoop kon word, want dit was slegs uit die opbrengs van sulke steeds toenemende verkope dat die Maatskappy sou kon voorbly om kwekers te betaal wat die droë produk aan die Maatskappy gelewer het. Terselfdertyd is dit duidelik dat, heel uit die staanspoor uit, reeds vanaf die oomblik toe die skema h aanvang geneem het, dit gedoem was om vroeër of later in duie te stort. Die ineenstorting sou kom sodra die verkope van verdere

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aktiveerders aan bykomende kwekers gedaal het tot 'n vlak waarna die maatskappy nie meer in staat sou wees om uit die opbrengs daarvan te voldoen aan die eise van kwekers vir die betaling van die prys van die droë produk wat aan die maatskappy gelewer is nie. Wanneer daardie dag sou aanbreek, was nie moontlik om te voorspel terwyl die skema nog aan die gang was nie. Uit die voorgaande blyk dit dat dit van geluk afhanklik was of 'n bepaalde kweker wat 'n aktiveerder gekoop het en die droë produk aan die maatskappy gelewer het, die betaling van die prys vir laasgenoemde sou ontvang al dan nie, na gelang van of the skema die punt van ineenstorting verbygegaan het of nie."

Or, in the more graphic language of KRIEGLER J:

"Dit was 'n willekeurige geluk wat die kweker kon tref as hy betyds op die mallemeule geklim

het."

The underlying principle is, I consider, that referred to by

SCHREINER JA in R vs Gondo 1951(3) S A 509(A) at 514 E, namely:

"Those prospects (of receiving a prize) depend to an overwhelming degree on the unpredictable behaviour of other persons over whom the holder in question can exercise no control."

Also apposite is the following statement of WILSON J in S vs

Mbonambi 1986(3) S A 839(N) at 843 G - H:

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"(T)his scheme and similar chain-letter schemes or other schemes depending on an ever-increasing participation by members of the public for their successful completion, are lotteries..."

Is the conclusion that the scheme was a

lottery negated by the consideration that the right to a prize is

dependent not on chance but on delivery of the product by the

grower to Botha? I do not think so. Obviously WATERMEYER AJA

in R vs Lew Hoi and Others 1937 AD 215 at 220 had, in dealing

with the second characteristic of a lottery, to refer to the

"acquisition by the player of a right to a prize on the

occurrence of an event". It could obviously not be a

requirement that a prize actually be received. Nevertheless, as

is clear from the rest of the judgment (and from numerous other

authorities), it is the chance of receiving a prize that is one

of the essentials of a lottery. And for the reasons stated, the

scheme here in issue had this ingredient. The true prize was the

receipt of R1 000,00 per month, not merely the right to receive

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it.

There was no dispute (in relation to (ii) above) that, if the scheme was a lottery, the sales by Botha to members of the public were void. Plainly, the sales of the powder were part of and indeed essential to the operation of the scheme. The powder being worthless, such sales were each in reality the sale of a right to participate in the scheme. Such right is recognised, if not conferred, by the written contract entered into between Botha and each of the growers (and which is annexure A to the stated case). In the light of the wide definition of "ticket" in sec 1 of the Act, annexure A is a ticket. It was these tickets which were sold. Such sales are prohibited by sec 2(1)(d) and constituted offences in terms of sec 8. Applying the principles of *Swart vs Smuts* 1971(1) S A 819(A) at 829 E - F, it is clear that the legislature intended that they be void (*Yannakou vs Apollo Club* 1974(1) S A 614(A) and 622 A; *LAWSA*, Vol 10, paras 429 and 430, p 308).

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The issue whether, despite the sales being void for illegality, sales tax was payable ((iii) above) depends on an interpretation of certain provisions of the Sales Tax Act. The broad scheme of the Act was analysed by this Court in *Charles Velkes Mail Order 1973 (Pty) Ltd vs Commissioner for Inland Revenue* 1987(3) S A 345(A) at 353 G seq. Briefly stated, it provides for the payment of a sales tax calculated at a given percentage of the "taxable value" of a wide-ranging number of specified transactions, services and goods (sec 5(1)). That which is relevant to the present matter is the "sale of goods" (see sec 5(1)(a)). "Sale" is defined in sec 1. It is in far wider terms than the ordinary common law meaning of sale. Thus it includes the donation and exchange of goods and the provision of what would normally be regarded as services. Essential in each case, however, is "an agreement" or "any other transaction whereby the ownership of goods passes or is to pass from one person to another". The "taxable value" is determined by

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reference to "the consideration accruing to the seller" or (inter alia where no consideration is payable) to the cost of the goods or the market value thereof, whichever is the less (see sec 7 and especially sub-secs (1), (3) and (6)).

It will be apparent from what has been said that for sales tax to be payable, there must be either an agreement or a transaction (of the kinds referred to). The meaning of "transaction" (which is not defined) is somewhat obscure. It seems to be conceptually different to "agreement". I shall assume that the tickets (and powder) were "goods" as defined in sec 1 and that the prohibition against lotteries did not affect the passing of ownership thereof from Botha to the growers. But this cannot avail the Commissioner. Where, as here, agreements (of sale) were purportedly entered into, I am inclined to think that his claim to sales tax had to be and was based on such agreements rather than on the sales being "transactions". In any event, the powder and therefore the

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tickets had no market value and accordingly a nil taxable value.

This leaves for consideration the question

whether the sales in issue qualified as agreements within the

meaning of the Sales Tax Act. In my view they did not. A

void contract has been described as being "devoid of any legal

effect... (I)t is as though no contract had been made ... It is a

mere nothing ..." (Wessels' Law of Contract in South Africa, vol

1, para 639; see too De Wet and Yeats: Kontraktereg en

Handelsreg, 4th ed, 80-1 and Christie: The Law of Contract in

South Africa, 335). As INNES CJ in *Schierhout vs Minister of*

Justice 1926 AD 99 at 109 said:

"It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect. The rule is thus stated: 'Ea quae lege fieri prohibentur, si fuerint facta, non solum inutilia, sed pro infectis habeantur; licet legislator fieri prohibuerit tantum, nec specialiter dixerit inutile esse debere quod factum est.' (Code 1.14.5). So that what is done contrary to the prohibition of the law is not only of no effect, but must be regarded as never having been done - and that whether the law giver has expressly so decreed or not; the mere prohibition operates to nullify the act."

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On this basis no sales capable of attracting sales tax took place. It was suggested, however, that the principle does not apply here; that on a proper interpretation of the Act, tax is payable on both valid and void sales; more particularly as to the latter, though the sales did not give rise to any contractual relations, they had fiscal consequences. Some support for this is the notion that a void act may have legal consequences (see "Void and Voidable Acts" by C C Turpin, 1955 SALJ 58, especially at 60). Thus in *Estate Phillips vs Commissioner for Inland Revenue* 1942 AD 35 at 52 and *Potter and Another vs Rand Townships Registrar* 1945 AD 277 at 285-7 there is reference to the concept of "relative nullity". Whatever the scope of this, I cannot agree that it is of application in casu. It is a recognised canon of construction of statutes that any reference in any law to any action or conduct, is presumed, unless the contrary intention appears from, the statute itself, to be a reference to a lawful or valid action or conduct (see *Kauluma en*

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Andere vs Minister van Verdediging en Andere 1987(2) SA 833(A) at 856 H - 857 D and cases there cited). This presumption can, of course, be rebutted by other considerations such as the language and context of the particular legislation. But that is not the case here. On the contrary, the indications are that, differing from the Income Tax Act, under which income is taxed even if it arises from an illegal source (Meyerowitz and Spiro: Income Tax in South Africa, para 300), Parliament contemplated only valid sales being taxed under the Sales Tax Act. Thus (by way of example), in terms of sec 5(2)(a) the date of conclusion of a sale of goods is deemed to be the date on which delivery is effected or the date on which the "consideration payable" is paid, whichever date is earlier. In sec 7 there are references to "consideration accruing to the seller" (sub-sec 1(a)) and "balance owing by the purchaser" (sub-sec 2(a)). The same applies to the other agreements and transactions which give rise to the payment of sales tax. But even if there was ambiguity,

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the contra fiscum rule would apply in favour of the interpretation that sales tax may only be levied on valid sales.

I would dismiss the appeal.

NESTADT, JA

Case No 30/89 /wlb

SUPREME COURT OF SOUTH AFRICA APPELLATE DIVISION

INSOLVENT ESTATE J P BOTHA

(Trading as "TRIO KULTURE") Respondent

CORAM: HOEXTER, NESTADT, MILNE JJA et

NICHOLAS, FRIEDMAN AJJA

DATE OF HEARING: 16 November 1989

DELIVERED: 26 February 1990

MILNE JA/

MILNE JA:

I have had the privilege of reading the judgments prepared by my Brother Hoexter and my Brother Nestadt. I agree with Hoexter JA that the appeal must succeed. In my view the transactions in respect of which the appellant issued the assessment notice were not part of a lottery and it is accordingly unnecessary to decide whether, if they were part of a lottery, they attracted tax in terms of the Sales Tax Act, No 103 of 1978.

In his judgment Hoexter JA comes to the conclusion that the

decision in *Visser en 'n Ander v Rosseau en Andere* NN O

1990(1) SA 139 (A) does not preclude this Court from holding

that the "sales" subjected to tax by the appellant were not

part of a lottery. I agree with that conclusion. I was a party to the decision in that case and the question of

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whether or not the business of the company constituted a lottery within the meaning of s 2(1) of the Gambling Act No 51 of 1965 was not in issue either in the Court a quo or in this Court nor was the point even raised in argument. It is true that the passage from the judgment of Botha JA, cited by Hoexter JA, is capable of being construed as a finding that because it was dependent on chance whether or not the grower received payment of the prize, the scheme constituted a lottery. That was the basis on which the learned Judge explained what was common cause -and, indeed, it seemed to me then and still seems to me now, that that must have been the basis on which the concession was made. The record is, however, silent as to the reason for the concession. Whatever the reason may have been, the important point is that the concession was made and any finding as to whether or not the scheme was a lottery was therefore unnecessary for the decision of the case. That decision, is, therefore,

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no bar to a finding that the transactions in this case were

not part of a lottery.

It is important to bear in mind in considering this question

that the Court a quo did not and could not find that the

growers were part of "'n bedrieglike kompiot". As the

learned Judge a quo rightly remarked

"in die lig daarvan dat daar ongeveer 8 000 kwekers was, wat eise ingedien het in die insolvente boedel van Trio Kulture, is dit ook 'n onbegonne taak om te bepaal wie bedrieg is en wie bedrieër was van daardie kwekers."

The case must therefore be decided on the basis that it was not established that any of the growers were knowingly parties to a simulated transaction. Hoexter JA advances what are, to my mind, convincing reasons for finding that the transactions with which we are concerned were not part of a lottery (but finds it unnecessary to decide whether they were because he takes the view that even if

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they were they still attract sales tax). A lottery "in the generally accepted meaning of the word" consists

"... in schemes for the distribution of prizes by the drawing of lots. The prohibition of the law normally extends to lotteries in which the participants have contributed a consideration in order to qualify for a chance to win the prize".

MILTON S A Criminal Law and Procedure Vol 3 2nd ed Chapter

E1 p 1 . In view, however, of the wide definition of the meaning of "lottery" in the Gambling Act a number of schemes or arrangements which one would not normally think of as constituting lotteries have been held to be lotteries within the meaning of the Act or its predecessors. See MILTON supra cit at p 18. We were not, however, referred to any case in which it was held that the mere fact that receipt of

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the "prize" is determined by chance constitutes the particular scheme or transaction a lottery. A "prize" is defined in very wide terms in s 1 of the Gambling Act. It means "any movable or immovable property". If the fact that

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the receipt of the "prize" is dependent on chance constitutes a lottery (assuming the other elements to be present) it seems to me that a wide variety of transactions would be hit by the Gambling Act which the legislature could never have intended to be hit. Various forms of investment in speculative ventures come to mind. If A invests a sum of money in a development company under a contract which entitles him to a much larger sum of money in say, 5 years time,

the mere fact that the company will not be able to pay A unless certain unpredictable market forces operate and it is clear that whether or not A receives payment of the larger sum is therefore dependent on chance cannot, in my view, turn a speculative venture into a lottery.

I may add that had I not come to this conclusion I would have been inclined to agree with Nestadt JA for the reasons given by him that, when the legislature referred to an

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"agreement" in defining "sale" in the Sales Tax Act No 103

of 1978 it could not have intended to refer to something that is devoid of any legal effect.

A J MILNE

Judge of Appeal

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