

SOUTH AFRICA / JUDGMENT

**Minister of Finance and Another v
Law Society of the Transvaal (697/89)
[1991] ZASCA 88; 1991 (4) SA 544 (AD);
[1991] 2 All SA 555 (A) (29 August 1991)
[1991] ZASCA 88**

COURT

Supreme Court of Appeal

BEFORE

CORBETT, MILNE, F H GROSSKOPF, GOLDSTONE,
VAN COLLER

CASE / FILE NUMBER

697/89

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IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

CASE NO.697/89

In the matter between

THE MINISTER OF FINANCE FIRST APPELLANT
THE PRETORIA REGIONAL SERVICES COUNCIL
SECOND APPELLANT
AND THE LAW SOCIETY OF THE TRANSVAAL RESPONDENT

CORAM : CORBETT CJ, MILNE, F H GROSSKOPF, GOLDSTONE JJ.A. et VAN COLLER AJA.

DATE HEARD: 19 AUGUST 1991

DATE DELIVERED: 29 AUGUST 1991

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JUDGMENT

GOLDSTONE JA: The Regional Services Councils Act 109 of 1985 ("the Act") provides for the establishment of regional services councils. Provision is made for the levy by a regional services council of a regional services levy and of a regional establishment levy. This appeal concerns the latter in its application to attorneys, notaries and conveyancers practising in the Transvaal. It arises from a successful application by the Law Society of the Transvaal (the respondent) to the Transvaal Provincial Division in consequence of which a declaratory order in the following

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terms was issued:

"1. It is declared that attorneys, notaries and conveyancers practising in the Transvaal, are not liable under the determination made by the Minister of Finance by Government Notice 340 published in Government Gazette 10613 of 17 February 1987 ("the regulations") to pay regional establishment levies in terms of section 12(1) of the Regional Services Councils Act 109 of 1985 on monies received from their clients on account or in respect of disbursements made on account and in respect of fees and charges paid to:

1.1 counsel briefed on behalf of their clients; 1.2 correspondent attorneys, notaries and conveyancers engaged on behalf of their clients; 1.3 expert witnesses engaged on behalf of their clients; 1.4 deputy sheriffs and messengers of the

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court employed on behalf of their

clients. 2 Costs of the application including fees of two counsel to be paid by second up to and including the fourteenth respondent jointly and severally."

The judgment of the Court a quo (Van der Walt J) is reported as *Law Society, Transvaal v Minister of Constitutional Development and Others* 1989(4) SA 914 (T). The respondents in the Court a quo were the Ministers of Constitutional Development and of Finance and the twelve regional services councils which had then been established in the Transvaal. This appeal is prosecuted only by the Minister of Finance and The Pretoria Regional Services Council (fifth respondent in the Court a quo). Leave to appeal was granted to these two respondents on petition to the Chief Justice. The issue is whether attorneys, notaries and conveyancers practising in the Transvaal are liable to pay regional establishment levies on monies received from their clients in respect of disbursements made on account of fees and charges paid to the persons referred to in paras 1.1 to 1.4 of the order of the Court a quo. Acting pursuant to the provisions of s 12(1)(b) of the Act, the first appellant determined the manner of calculation and payment of regional establishment levies payable by every person carrying on or deemed to be carrying on an enterprise within any region. It is common cause that attorneys, notaries and conveyancers carry on "an enterprise" as defined in s 1 of the Act within the region in which their practices are situated. The determination is to be found in Government Notice R340 of 17 February 1987 published in Government Gazette 10613 of the same date. The schedule to the Notice prescribes the manner of calculation and payment of the regional services levy and regional establishment levy. In terms of para 5, the regional establishment levy -

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"shall be calculated and paid on the amount (in this Schedule referred to as the leviable amount) determined under paragraph 6 in relation to leviable transactions in respect of any month..."

In terms of para 6(1)(a) "the leviable amount in relation to leviable transactions" includes

"all amounts of consideration in respect of leviable transactions received by or accrued to the levypayer during the month or, at the option of the levypayer which shall be notified to the council concerned in writing, all such amounts actually received by him during the month ..."

In para 1 "leviable transaction" is defined to

mean in the case of an enterprise in the course of which

"(v) any trade, business, professional or other service is rendered, any such service rendered ...
whenever the relevant transaction was or is

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concluded." (My emphasis).

In the same paragraph "consideration", in relation to any leviable transaction, is defined to mean "the whole or any portion of" inter alia -

"(c) in the case of the rendering of any service, the price, fee or other amount payable in respect thereof."

I would emphasize that what is here referred to is the price, fee or other amount payable for the rendering of the service. The question which arises is thus whether the monies received by attorneys, notaries and conveyancers for the disbursements referred to in the order of the Court a quo are properly to be regarded as part of the

"price, fee or other amount payable" in respect of

7 "any ... professional or other service rendered" by attorneys, notaries or conveyancers. Counsel for the appellants correctly conceded that the reference to "price" was not apposite in the case of professional services. He submitted, however, that the disbursements in question would form part of the fee or other amount payable by their clients to attorneys, notaries or conveyancers. The service rendered by them, so the argument ran, would include the employment by them of the services of an advocate, correspondent attorney, notary or conveyancer, expert witness, deputy sheriff or messenger of the court and, in respect thereof, they would undertake personal liability to pay for such service. Monies expended in that way by the attorney, notary or conveyancer would be recovered by them from their client.

In terms of the regulations and more particularly

8 the definition therein of "consideration" the leviable amount in respect of rendering a service is the price, fee or other amount paid to the person who renders the service. That is the plain meaning of sub-paragraph (c) of the definition of "consideration" read with sub-paragraph (a)(v) of the definition of "leviable transaction". That the price, fee or other amount is what is paid to the person who renders the service is echoed in the last part of the definition of "consideration" where provision is made for the inclusion of any interest or finance charge payable to

"the person rendering the relevant service."

The monies now in question are in nowise paid to the attorney, notary or conveyancer for a service rendered by him. They are paid in respect of the service rendered by counsel, correspondent attorney, notary or conveyancer,⁹ expert witness, deputy sheriff or messenger of the court, as the case may be, on behalf of the client. The monies may not be claimed from the client by the instructing attorney, notary or conveyancer save in respect of the service performed by the third party. In no way does the fee or other amount accrue to and in no way is it received by the attorney, notary or conveyancer for a service rendered by him. The fact that because of a professional practice or a contract the attorney, notary or conveyancer may be personally liable to pay for the service performed by the third party in no way has as a consequence that the attorney, notary or conveyancer himself performs that service. The respondent correctly accepts that the fee charged by an attorney, notary or conveyancer for the work performed by him in relation to instructing counsel or other third party is properly to be regarded as part of the fee of such attorney, notary or conveyancer and that the levy would

10 be payable thereon. In my judgment it is unnecessary to accept the invitation by counsel for the respondent to find support for the foregoing

conclusion

in the use by the Minister of Finance in para. 6(1)(a) of the regulations of the words "received by or accrued to the levypayer". Those words in a revenue statute, over many years, have been judicially interpreted to describe a receipt by, or an accrual to, the taxpayer on his own behalf or for his benefit: *Meyerowitz and Spiro on Income Tax*, paras 138-144; *Geldenhuis v Commissioner for Inland Revenue* 1947(3) SA 256(C) at 265/6; *Secretary for Inland Revenue v Smant* 1973(1) SA 754(A) at 764 B-C. The initial force of that submission is diminished by the exclusion at the end of the definition of "consideration" of

"any amount received by or accrued to an agent on behalf of his principal".

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Counsel for the appellant submitted that 'as

exclusions or provisos are usually enacted to qualify

something contained in the preceding enactment (*S v Rosenthal* 1980(1) SA 65(A) at 81 E-F; *South African Textile and Allied Workers' Union and Others v Skipper International*

(Pty) Ltd 1990(4) SA 842(A) at 847 A-C), it must be assumed that but for the exclusion amounts received by or accrued to an agent would have been included in the definition of "consideration". On the other hand, an exclusion or

proviso may also be inserted -

" ex majori cautela in order to quiet any fear there might be that the language used by the Legislature might be misconstrued."

Per Centlivres JA in R v Abel 1948(1) SA 654(A) at 662. In this case we are concerned with what I have already held to be the clear meaning of sub-paragraph (c) of the definition of "consideration" read with sub-paragraph (a)(v) of the definition of "leviable transaction". It is unnecessary, therefore, to decide whether the exclusion referred to above was inserted to qualify some other part of the lengthy definition of "consideration" or was inserted ex majori cautela. On that question I express no view. It is similarly unnecessary to call in aid the provisions of the Income Tax Act 58 of 1962 referred to by the learned Judge a quo (at 919 G - 920 H) with reference to the provisions s 12(8) of the Act which reads:

"Any levy referred to in subsection (1) may be deducted as an operating expense for the purposes of income tax by any employer or person."

On a proper interpretation of the relevant provisions of the Act and regulations the Court a quo correctly granted the order sought by the respondent.

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The appeal is dismissed with costs, including the costs of two counsel. The costs are also to include those occasioned by the applications for leave to appeal in this Court and in the Court a quo.

R J GOLDSTONE

CORBETT CJ)

MILNE JA)

F H GROSSKOPF JA) CONCUR

VAN COLLIER AJA)

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