

SOUTH AFRICA / JUDGMENT

Ritchie NO v Ritchie NO and Others (75467/15) [2016] ZAGPPHC 1235 (11 November 2016)

[2016] ZAGPPHC 1235**COURT**

North Gauteng High Court, Pretoria

BEFORE

Mali

CASE / FILE NUMBER

75467/15

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Policy**REPUBLIC OF SOUTH AFRICA****IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, PRETORIA****CASE****NO: 75461/15****Date:**

11/11/2016

Not

reportable

Not

of interest to other judges

Revised.

In

the matter between:

RITCHIE N.O., NICOLE
JAENEE APPLICANT
and
RITCHIE N.O., WINSTON
HENRY 1ST
RESPONDENT
RITCHIE
N.O., ANNE
BEATTIE 2ND
RESPONDENT
RITCHIE
N.O., WINSTON
JOHN 3RD
RESPONDENT
LOMBARD
N.O., JOHAN
GODFRIED 4TH
RESPONDENT
RITCHIE
N.O., SUDNEY
STEPHEN 5TH
RESPONDENT
RITCHIE
N.O.,
JULIANA 6TH
RESPONDENT
VAN DER LINDE N.O.,
JACQUES GIDEON 7TH
RESPONDENT
RITCHIE
N.O., RAYMOND
WAYNE 8TH
RESPONDENT
RITCHIE
N.O., GELLE
CATHRINE 9TH
RESPONDENT
RITCHIE
MOTORS (PTY)
LTD 10TH
RESPONDENT
THE
COMMISSONER OF SOUTH
AFRICAN 11TH
RESPONDENT
REVENUE
SERVICES

JUDGMENT**MALI J**

1. This is an application for a declaratory order for the payment of interest on the proportionate share of estate duty attracted as a result of the receipt by the first to tenth respondents of the proceeds of policies on the life of the deceased Allister Ritchie.

The deceased is the late husband of the applicant.

2. The payment of interest in accordance with the interest charged by the eleventh respondent the South African Revenue Service ("SARS").
3. The majority of the parties in this matter seem to be members of the same family, although they are cited in their respective official capacities. According to the applicant there is a history of acrimonious relationship between her and some of the respondents.
4. The first to fourth respondents are cited as trustees for the time being of the Winston Ritchie Family Trust ("WRF").

4.1 The first respondent being Winston Hendry Ritchie N.O., an adult male with Identity number: [...], currently residing at [...] Street, Standerton, 2430;. He is also the Director of the tenth respondent.

4.2 the second respondent being Anne Beattie Ritchie N.O., an adult female with Identity number: [...], currently residing at [...] Street, Standerton, 2430;

4.3 the third respondent being Winston John Ritchie N.O.. an adult male with Identity number: [...], currently residing at [...] Street, Standerton, 2430;

4.4 the fourth respondent being Johan Godfried Lombard N.O., an adult male with Identity number: [...], currently residing at [...] Street, Standerton, 2430;

4.5 the fifth respondent being Sydney Stephen Ritchie N.O, an adult male with Identity number: [...], currently residing at [...], Meer en See, Richards Bay, 3901;

4.6 the sixth respondent is Juliana Richie N.O, an adult female with Identity number: [...], currently residing at [...], Meer en See, Richards Bay, 3901

4.7 the seventh respondent is Jacques Gideon van der Linde N.O, an adult male with Identity number: [...], currently residing at [...] Street, Garsfontein Ext 08, 0081;

4.8 the eighth respondent is Raymond Wayne Ritchie N.O., an adult male with Identity number: [...], currently residing at [...], Meer en See, Richards Bay, 3901;

4.9 the ninth respondent is Gelle Cathrine Ritchie N.O., an adult male with Identity number: [...], currently residing at [...], Lourensford Road 14318, Somerset West, 7130;

4.10 the tenth respondent is Ritchie Motor (Pty) Ltd, a private company, with registration number: 1947/027904/07, duly incorporated in terms of the company laws of the Republic of South Africa, with its principal place of business situated at 17 Church Street, Standerton.

4.11 the eleventh respondent is the Commissioner of the South African Revenue Service, ("the Commissioner"), responsible for administering the provisions of, inter alia, the Estate Duty Act. It has its registered address situated at 299 Bronkhorst Street, Brooklyn, Pretoria. There is no relief sought against the Commissioner, it only being cited as a party having an interest.

BACKGROUND FACTS

5. The Deceased Estate, the SSR Trust, the WRF Trust, and the 10th respondent were beneficiaries of various life insurance policies taken out on deceased life ("the Policies"). During or about 2008, the proceeds of the Policies were paid directly to the Beneficiaries. They were paid as follows:

The Deceased Estate:

R 1 470 353.00

The SSR Trust:

R 4 150 687.00

The WRF Trust:

R 4 150 687.00

The Tenth Respondent:

R 2 160 534.00

6. In terms of section 3(3)(a) of the Act, the proceeds from the Policies were included in the net value of the Deceased Estate, and were reflected in the Final Liquidation and Distribution Account of the Deceased Estate ("the L&D Account")[1] dated 22 December 2008, copies were made available to the SSR Trust, the WRF Trust and the 10th respondent, although the first to tenth respondents ("respondents") deny having sight of the L&D account.

The amount of R 1 886 452.20 was apportioned to the Beneficiaries as follows:

the 10th respondent R

341 573.50

the SSR Trust: R

656 210.31

the WRF Trust R

656 210.30

the Deceased Estate: R

232 458.09

Total Estate Duty Due: R

1 886 452.20

7. On 27 July 2010 the applicant made payment of estate duty and interest in the amount of R33 823.83, calculated from 26 February

2008 to 27 July 2010 due by the deceased estate. This payment was made before the issue of the original assessment by the

Commissioner.

8. On 30 August 2011 the Commissioner issued original assessments in respect of estate duty payable by the late estate. On 21 May 2012 first to tenth respondents filed notice of objection to the assessments on the basis that the Commissioner failed to allow them the deduction of premiums together with interest they paid in respect of the policies. On 17 January 2014 the Commissioner partially upheld their objection.

9. On 18 February 2014 the Commissioner issued a notice of revised reduced assessments to the applicant. In the second last paragraph of the said letter it is stated:

"Please note that interest is still to be charged on the revised estate duty, under section 10 of the Estate Duty Act."

10. On 14 May 2014 the Commissioner issued a reduced assessment in the form of Rev 250 to the applicant. At page 2 of Rev 250 note 2 and 3 it is stated "Payment must be made within 30 days from the date of assessment at any SARS branch office. If applicable, an assessment of the payment of interest (Rev 249) will be issued in terms of section 10 (1) of the Act.

11. On 19 November 2014 the Commissioner issued a Rev 249 to the applicant advising that R649 104. 15 was the amount of interest

payable.

ISSUE

12. The issue for determination is whether the first to tenth respondents are liable for interest chargeable by the Commissioner on the estate duty because of the late payment of estate duty.

LAW

13. Section 9 (1) of the estate duty Act 45 of 1955 (" the Act") provides that the Commissioner shall assess the duty payable under this Act and shall in respect of every estate liable for the duty issue a notice of assessment to the executor or, if there is no executor to any person liable for the duty.
14. Section 10 (1) of the Act provides if any duty remains unpaid at the expiration of a period of thirty days from the date of payment notified in accordance with sub-section (2) of section nine, there shall be payable, in addition to the unpaid duty, interest at the rate of six per cent per annum on the amount of unpaid duty calculated from the date of the expiration of the said period to the date of payment: Provided that, where the assessment of duty is delayed beyond a period of twelve months from the date of death, interest at the rate of per cent per annum shall be payable as from a date twelve months after the date of death on the difference (if any) between the duty assessed and any deposit (if any) made on account of the duty payable within the said period of twelve months.
15. Section 10 (2) Whenever the Commissioner is satisfied that the delay in the payment of duty within the period of thirty days from the date of payment notified in accordance with sub-section (2) of section nine, or within the period of twelve months from the date of death, as the case may be, has not been occasioned either by the executor or by any person liable for the duty, he may allow an extension of time within which the duty may be paid without interest if, before the expiration of the said period of thirty days or the said period of twelve months, as the case may be or such further period as the Commissioner may allow (a) a deposit on account of the duty payable is made of an amount which, in the opinion of the Commissioner, is reasonable regard being had to the amount of the duty payable; and
(b) application is made in writing to the Commissioner for such extension of time.
16. Section 11 provides that where duty is levied on property which, in accordance with sub-section (3) of section three, is deemed to be property of the deceased - (i) as to property referred to in paragraph (a) of that sub-section, the executor: Provided that where the amount due under the policy is recoverable by any person other than the executor, the person liable for the duty shall be the person entitled to recover the amount.\
17. In NATAL JOINT MUNICIPAL PENSION FUND v ENDUMENI MUNICIPALITY ("Endumeni") 8 at paragraphs [18]-[19], it was held that, in interpreting a contract, the court must have regard to the

language of the clause as well as the purpose for which it was agreed. At paragraph [26] the SCA stated: 8 2012 (4) SA 593 SCA:

"In between these two extremes, in most cases the court is faced with two or more possible meanings that are to a greater or lesser degree available on the language used. Here it is usually said that the language is ambiguous although the only ambiguity lies in selecting the proper meaning (on which views may legitimately differ). In resolving the problem the apparent purpose of the provision and the context in which it occurs will be important guides to the correct

interpretation. An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration."

18. The applicant's case is that the respondent unlawfully and unreasonably refused to pay their proportionate share of the Estate

Duty, as early as December 2008 upon the finalisation of the L&D account. The payment of the proportionate shares of the estate duty by the SSR Trust, the WRF Trust and the Tenth Respondent was only made on 29 April 2014.

19. It was further submitted on behalf of the applicant that the refusal of the respondents to make payment of the proportionate shares of the estate duty on time effectively caused delay in the payment of estate duty. The applicant submits that in the alternative the delay endured from the date of original assessment 30 August 2011 to date of payment on 29 April 2014.
20. Respondents deny receiving assessment that despite The Commissioner having made clear determinations and or assessment against them. Nothing is clearer than the SARS determination. In the event of dispute they have a right to approach SARS.
21. The duty remained unpaid because it was not paid at the expiration of 30 days from 30 August 2011 the date of original assessment. It has been established that the respondents received the assessments despite their denial which is countered by the filing of the notice of objection to the same assessment. On 5 August 2015 the Commissioner issued separate individual assessment of the interest payable on the proportionate revised estate duty to the SSR Trust, the WHR Trust and Ritchie Motors. The respondents challenge the validity of the assessments, albeit in a wrong forum. For the sake of completeness, an assessment as defined in section 1 of the Tax Administration Act as follows:

'the determination by the Commissioner, by way of a notice of assessment (including a notice of assessment in electronic form) served in a manner contemplated in section 106 (2).....of an amount upon which any tax leviable under this Act is chargeable".

22. In ITC 1740 (65 SATC 98) at 104 E-F Galgut DJP held that in order to fall within this definition, 'what is required is at least a purposeful act, one whereby the document embodying the mental act is intended to be an assessment'. In my view, the overwhelming impression created by the notices issued by the Commosioner is that it is indeed, the notices or documents constitute assessments.
23. Furthermore the Commissioner did the appropriate thing by issuing the assessments to the respondents, they are the ones who lodged objection in their respective capacities. The respondents cannot lodge objections in their names and expect the assessments to be issued to another.

24. The respondents' further refusal to pay the interest *inter alia* based on the interpretation of section 13 of the Act. Section 13 provides that the applicant is entitled to recover the estate duty

from the respondents which she is required to pay. The provisions of section 13 is misplaced. The provisions of section 11 are clear that the amount due under the policy is recoverable by any person other than the executor, the person liable for the duty shall be the person entitled to recover the amount. In *casu* the persons liable for the duty are the respondents. Section 13 of the Act is silent with regards to the payment of interest. It follows that the person liable to pay for duty is liable to pay interest on the said duty.

25. The respondents submitted that the only time they received claim for payment for interest was when the applicants attorneys wrote to them on 14 August 2015. The respondent's denial of the assessment issued by the Commissioner on 30 August 2011 is somewhat perplexing because the respondents lodged an objection to same on 21 May 2012.
26. The Commissioner's letter to the abovementioned objection dated 17 January 2014 speaks for itself. The letter is headed "Request for reduction of Interest Declined". The letter makes reference to the unsatisfactory manner of calculation of the deposit by the applicant and the delays related thereto. It is also apparent from the letter that one of the reasons for disallowance of the tenth respondent's objection is the length of time taken to make a request for reduction in interest only on 21 May 2012.
27. The begging question is why the respondents bothered to request a reduction in interest in the event that the applicant is the only taxpayer responsible for payment of same. In my view they acknowledge that as the beneficiaries of the property of the deceased who are liable for estate duty it follows that they are liable for interest thereon. The only plausible reason for them refusing to pay interest is that they were unsuccessful in their objection to the Commissioner.
28. According to the respondents on 26 January 2012 their attorneys wrote to the applicant informing her about the objections lodged against the estate duty assessment. The applicant denies receiving the said letter. I do not understand the relevance of the letter written on 26 January 2012 when the applicant made her payment in 2010.
29. The respondents buttress their argument on the basis of partial allowance of objection by the Commissioner. The disallowance of the objection placed the liability of interest upon the applicant. With respect the interpretation adopted by the Commissioner that the total amount of interest should be borne by the applicant is not acceptable. On the proper interpretation of section 11 read with section 10 (2) of the Act the law is clear the respondents are liable for estate duty; it therefore follows that they are liable for interest.

30. In terms of section 10 the respondents are liable to pay duty which they did. It therefore follows as a matter of logic that the interest upon their proportionate share is payable or is due by them. The intention of the statute is that the delay in payment of estate duty must attract interest; however the statute is not intended to punish the executor for others misdeeds.
31. Furthermore the definition of Tax in the Tax Administration Act is:
- "tax', for purposes of administration under this Act, includes a tax, duty, levy, royalty, fee contribution, penalty, interest and any other moneys imposed under the tax Act'.[2]
32. The respondents as other persons liable for duty had an obligation to apply for extension of time to pay the duty or inform the Commissioner about the delays, instead they objected to the assessment by applying for reduction of the interest. Needless to say the objection was filed late considering the date of assessment. That on its own shows that the respondents acknowledged their duty towards payment of interest. To the respondent's submission from the bar that the applicant is liable for interest due to her failure to apply for the extension resulting in the postponement of interest with respect the rules are clear the parties fall or rise by their affidavits. It is my view that SARS waved the applicant's responsibility, as executrix, to be the party responsible when the assessments were sent directly to the respective respondents.
33. On the proper interpretation of section 10 (1) and (2) of the Act the estate duty was supposed to be paid on the expiration of 30 days from 30 August 2011 by the executor or any person liable for the duty. It is common cause that part payment of the duty was made by the applicant in 2010.
34. The act could not have intended to burden the executor of the estate in the event there are other persons liable for duty. The remedy provided for in Section 10 (2) is open to anyone who is liable for payment of the duty. On the application of Endumeni above it is unbusinesslike to expect the executor of the estate to pay for interest of duty payable by another person.
35. In passing the only amount of interest which might be due by the applicant is the portion related to the miscalculation of deposit in respect of interest by her on the proportionate share of the estate. Regrettably that issue is not before court it is an issue between the applicant and the Commissioner. Having regard to the above the applicant's application must succeed.
36. In the result I make the following order;
- 36.1 The Winston Richie family trust is liable to pay the interest in the amount of R224 470.61, levied by the Commissioner of the South African Revenue Services, in terms of 10(1) of the Estate Duty Act, no 45 of 1955 on its apportioned estate duty relating to the Late Estate Raymond Allister Ritchie.

36.2 The Sydney Stephen Ritchie Trust is liable to pay the interest in the amount of R224 470.61 , levied by the Commissioner of the of the South African Revenue Services, in terms of 10(1) of the Estate Duty Act, no 45 of 1955 on its apportioned estate duty relating to the Late Estate Raymond Allister Ritchie.

36.3 Ritchie Motor (Pty) Limited is liable to pay the interest in the amount of R116 842.44 , levied by the Commissioner of the of the South African Revenue Services, in terms of 10(1) of the Estate Duty Act, no 45 of 1955. on its apportioned estate duty relating to the Late Estate Raymond Allister Ritchie.

36.4 In addition to the amounts referred to in prayers 36.1, 36.2, and 36.3 above, the Winston Ritchie Family Trust, the Sydney Stephen Ritchie Trust and Ritchie Motors (Pty) Limited are each liable to pay any further interest that may become payable by them respectively, in pursuance of section 10(1) of the Estate Duty Act, No 45 of 1955, which interest relates to their apportioned estate duty from the Late Estate Raymond Allister Ritchie.

36.5 The Winston Ritchie Family Trust, the Sydney Stephen Ritchie Trust, and Ritchie Motors (Pty) Ltd shall make payment of their respective liabilities as referred to in prayers 36.1, 36.2, and 36.3 above to the Commissioner of South African Revenue Services within 21 Days of this order being made.

36.6 The First to tenth Respondents are ordered to pay the costs of this application, costs to include costs of counsel.

N.P. MALI

JUDGE OF THE HIGH COURT

Counsel for the Applicant:

Adv. J. G. Smit

Instructed by:

NATALIE LUBBE & ASS

Counsel for the 1st to 10th Respondents: Adv. A. Lewis

Instructed by:

LANGVELDT & NEL ATTORNEYS

Date of hearing:

25 July 2016

Date of Judgment:

11 November 2016

[1] See Annexure "N4" of the papers

[2] Tax Administration Act 28 of 2011.

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