

CASE NO.

11/90 IN THE SUPREME COURT OF NAMIBIA

In the matter between:

KARIN ESSELMANN

Appellant

and

THE SECRETARY OF FINANCE

Respondent

Heard on: 1990/10/08

Delivered on: 1990/11/13

Coram: Berker, CJ et Dumbutshena, AJA et Mahomed, AJA

APPEAL JUDGMENT

BERKER, CJ:

In this matter the Appellant appeals against a judgment of Hendler, J of the former Supreme Court of South West Africa, which judgment was upheld on appeal by the Full Bench of that Court.

The relevant facts of this matter are as follows:

Appellant is the widow of the late Heinrich Karl Josef Esselmann,

(the deceased), who died on 22 January 1976. The deceased left a valid will in which he appointed Appellant as executrix of his estate and sole heir. Appellant was duly appointed executrix, and as such appointed one Oehl to be her agent for the purpose of winding up the estate of the deceased. Such appointment did not, however, release her from any responsibilities as executrix.

On 3rd February 1976 the Secretary of Finance, who is the Respondent herein, wrote to Oehl as agent for Appellant, enclosing inter alia income tax forms to be completed in respect of the tax period 1973 to date of death on 22 January 1976, and v/hich had not been rendered by the deceased during his lifetime. Likewise attention was drawn to the fact that an amount of R23,923-80 was outstanding by the deceased in respect of assessed tax in respect of the tax. year 1972.

Despite numerous reminders the assessed tax for 1972 was not paid, nor were the returns for the years 1973 to 22nd January 1976, made.

Pressure was put on the executrix via her agent to comply with the demands made by the Respondent. On 20 June 1979 Respondent gave Appellant final notice to pay the outstanding tax for the year ending 28 February 1972, and render the required returns for 1973 to date of death within 30 days, failing which he would make tax assessments for the years in question on estimated income. The returns were then ultimately rendered on 18 July 1979, and Respondent thereafter calculated the amount of tax for each of

the years in question, and issued formal assessments in respect thereof. These notices of assessment were forwarded by ordinary post to Appellant's agent Oehl on 1 February 1980. Appellant in her evidence later asserted that she never received these assessments, and was unaware thereof as well as of the amounts assessed for each year until some time later. The tax which had already been assessed for the year 1972 also remained unpaid at this stage, so that a total amount of R79,083-05 had been assessed and for which payment was demanded by Respondent.

On 9 November 1980 a final demand for the payment of the tax amounting to R79,083-05 was sent by Respondent by registered post to Appellant at her correct postal address, requiring her to pay the outstanding amount within 14 days, failing which legal steps would be taken. Appellant in her evidence also denies having received such notice. Respondent in his additional replying affidavit does not deal with this allegation, does not deny it, and Appellant's evidence must therefore be accepted.

The whole matter was not pursued, however, and no action was taken by Respondent until 1986, when (after some inconclusive discussions between Appellant and Respondent had taken place in 1980) Respondent on 13 March 1986 sent a registered letter to Appellant demanding payment of the outstanding tax by 31 March 1986, otherwise proceedings would be instituted. There was no reaction by Appellant to this notice.

Respondent thereafter on 14 July 1986 filed a statement in terms

- 4 -of Section 83(1)(b) of the Income Tax Act 24 of 1981 (being identical to the former section 69(1)(b) of Ordinance No. 5 of 1974, which had been repealed) with the Registrar of the then Supreme Court of South West Africa. The statement (containing details of the outstanding tax) once so filed "had all the effects of, and any proceedings may be taken thereon, as if it were a civil judgement" in favour of the Secretary of Inland Revenue for a liquid debt of the amount specified in the statement".

I shall refer to this as "the judgment". On the same day the judgment was granted a registered letter was sent to Appellant "Mrs. Karin Esselmann, p.a. Boedel wyle H.J.K. Esselmann", demanding payment of the judgment sum within 21 days, failing which a warrant of execution would be issued.

Appellant thereupon launched an application for the setting aside of the judgment. The basis of the application was that the registered letter demanding payment v/as addressed to Appellant "p.a. boedel wyle H.J.K. Esselmann", and that from this it was not clear whether the demand was directed to Appellant personally or in her capacity as executrix. The application was opposed and evidence was led. From the evidence it became clear that Respondent intended the judgment and subsequent demand to be operative as against Appellant in her capacity as executrix, and not in her personal capacity. It also became clear that Appellant had no objection to the judgment being of force against her in her capacity as executrix, but that she strongly opposed

the judgment being granted against her in her personal capacity.

At the conclusion of the hearing of the Application Strydom, J. held that inasmuch as it had clearly emerged that Respondent intended to obtain the judgment against Appellant in her capacity as executrix, and that on the other hand the Appellant had no objection against the granting of the judgment against her in her capacity as executrix, but sought to set aside the judgment if this v/as against her in her personal capacity, the practical way to decide the application was to amend the judgment to make it clear that it was granted against Appellant in her capacity as executrix of her late husband's estate, and not against her in her personal capacity. This was achieved by a suitable Order granted by Strydom, J. on 2 October 1986.

The whole matter then rested until 3rd March 1987, when Respondent issued summons against Appellant in respect of the tax for the years 1973 to 22nd January 1976 amounting to R55 024,83, the assessed tax for the year 1972 having in the meantime been paid. From the Particulars of Claim and Further Particulars thereto it is clear that Respondent instituted the action against Respondent personally in terms of section 74 of the Income Tax Ordinance No. 5 of 1974.

Appellant then excepted to the Particulars of Claim as disclosing no cause of action. The exception was heard by Levy, J. who dismissed the exception. In so far as the grounds for the exception, and the dismissal thereof, may become relevant I shall

deal with them later. The exception having been dismissed the Appellant then filed a plea, the essence of which was that on the facts relied upon by Respondent he had no legally enforceable claim against Appellant on a proper interpretation of Section 74(b) of the Ordinance. I shall deal with the legal and factual issues raised by the pleadings in some detail later. Ultimately Respondent replicated and the matter went to trial before Hendler, J. on 3 May 1988. Protracted evidence was led by Respondent and one of his witnesses, as well as by Appellant. Hendler, J. thereafter gave judgment in favour of Respondent in the sum claimed, namely R55 024,85, plus interest and costs.

Appellant then applied for leave to appeal against this judgment, which Hendler, J. dismissed. Appellant then applied for leave to appeal to the Appellate Division of the Supreme Court of South Africa, which was still at the stage the final Court of Appeal, which granted such application on January 1989.

By virtue of Article 138(2)(b) of the Constitution all appeals noted to the Appellate Division of the Supreme Court of South Africa are deemed to have been noted to this Court, so that this Court is now seized with the jurisdiction to hear this appeal. As a result the appeal was placed on the roll of this Court and thereafter heard by it.

The following additional facts are also relevant. It was common cause that the Appellant was at all times fully aware that no tax returns had been rendered in respect of the period referred to,

that she was under, an obligation to render these returns to Respondent, and that the ultimate tax assessment would amount to a substantial amount.

As far as the administration of the estate is concerned Final Liquidation and Distribution Accounts were filed with the Master of the Court on 8 November 1976. in which the assets of the estate were awarded to Applicant as sole heiress of the estate of her late husband. The Account then laid for the statutory inspection period and no objections thereto was raised. As far as the Master was concerned, the formal liquidation and distribution of the estate was thereby finalised, and a filing notice issued on 10 January 1987.

The assets in the estate were awarded to and handed over and transferred (in the case of immovable property) prior to the closing off of the estate on 10 January 1987 by Appellant in her capacity as executrix to herself in her personal capacity as sole heir.

Before dealing with the relevant provisions of the Ordinance I will shortly restate the issues before the Court in this matter. They arise from the claim by Respondent against the Appellant in her personal capacity for the taxes assessed by Respondent in December 1979 in respect of the income of the deceased during the years 1973 to date of death. Respondent relies on his right to claim those taxed from Appellant by virtue of the provision of section 74 of the Ordinance. This is the only provision which

renders a representative taxpayer liable to pay personally the tax in respect of the income earned by a deceased during his lifetime, where normally such person would only be liable to pay such tax in her representative capacity.

The interpretation of section 74 of the Ordinance is therefore crucial. If it does not apply, Appellant cannot be held liable personally for such tax.

I shall now turn to the legal provisions of the Ordinance which are of immediate relevance to the issue concerned.

It is common cause that Appellant in her capacity as executrix testamentary of her husband's estate, became a "representative taxpayer" in terms of section 72(2) of the Ordinance, read with subsection (d) of the definition of "representative taxpayer". Section 72(2) reads as follows:

"72(2) Every representative taxpayer referred to in paragraph (d) of the definition of 'representative taxpayer' in section 1 shall as regards the income received by or accrued to any deceased person during his lifetime be subject in all respects to the same duties, responsibilities and liabilities as if the income were income received by or accrued to or in favour of him beneficially and shall be liable to assessment in his own name in respect of that income, but any

such assessment shall be deemed to be made upon him in his representative capacity only."

Sub-section (4) of Section 72 thereafter deals with the implementation of the provisions of sub-section (2) above by providing:

"(4) Any tax payable in respect of any such assessment shall, be recoverable from the representative taxpayer, but to the extent only of any assets belonging to the person whom he represents which may be in his possession or under his management, disposal or control."

Section 73(2) then provides further that any executor or administrator of a deceased estate:

". . . .who, as such, pays any tax in respect of the taxable income of any deceased person shall be entitled to recover the amount so paid from the estate of such deceased person or to retain out of any moneys of the estate of such deceased person that may be in his possession or that may come to him as executor of such estate, an amount equal to the amount so paid."

The crucial section however is section 74 of the Ordinance, which reads as follows -

"74. Every representative taxpayer shall be personally liable for any tax payable by him in his representative capacity, if, while it remains unpaid -

a) he alienates, charges or disposes of the income in respect of which the tax is chargeable; or

b) he disposes of or parts with any fund or money, which is in his possession or comes to him after the tax is payable, if the tax could legally have been paid from or out of such fund or money.

I shall deal with other relevant section of the Ordinance when dealing with the arguments advanced by the parties.

Appellant's main submissions in argument are as follows. There can be no liability for payment for taxes unless a proper "income tax assessment" has been made and served upon the person liable to pay such taxes. He supports this submission by referring to sections 53(3), 53(5), 57(1) and 65(1) and (2) of the Ordinance. Section 53(3) in particular enjoins the Secretary (Respondent) that he is obliged to give notice of the assessment to the taxpayer so assessed. Furthermore, he submitted that any notice of assessment in respect of tax incurred by a deceased during his lifetime and assessed after his death, must be served on the

executor representative taxpayer in accordance with section 83(2) of the Ordinance (as amended), which provides for the methods of service of all notices etc., including notices of assessment. The relevant part of this section reads as follows:

"83(2) Any notice required or authorised under this Ordinance to be served upon any person or upon any company shall be effectually served-

(a) in the case of a person other than a company-

(i) if delivered to him: or

(ii) if let with some adult person apparently residing at or occupying or employed at his last known abode, or office or place of business in the Territory; or

(iii) if despatched by registered post in an envelope on which is written his name and his last known address which may be any such place or office as is referred to in paragraph (a)(ii) or his last known post office box or private bag number or that of

his employer;"

In connection therewith he pointed out that in the income tax returns dated 18 July 1979, submitted by Appellant in respect of the tax years 1973 to date of death, she wrote under the heading "meld POSADPES waarheen u aanslag gepos moet word" P.O. Box 3497, Windhoek, 9100", being her personal postal address, and under the heading "Meld WOONADRES" she wrote "Sanderburg Road, Windhoek", both these addresses being her personal addresses. Despite this information, the Respondent sent the notices of assessment to Oehl.

Appellant's Counsel referred to a considerable number of cases dealing with the meaning of "assessment", the need of such assessments to be brought to the notice of the taxpayer and allied matters. I do not consider it necessary to deal with them individually, except to say that they support the submission made by Counsel that before there can be any liability to pay tax there must be a proper "notice of assessment", which must be brought to the notice of the taxpayer.

Another provision of the Ordinance furthermore appears to be very much in point, and that is the definition of "assessment" in section 1 of the Ordinance, as substituted by section 1 of Ordinance No. 3 of 1976, and the relevant portion of which reads as follows -

"'assessment" means the determination by the Secretary, by

way of a notice of assessment served (my underlining) in a manner contemplated in section 83(2) -

- a) of an amount upon which any tax leviable under this Ordinance is chargeable; or
- b) of the amount of any such tax; or
- c) of any loss ranking for set-off;

(Sections 2 and 3 of the amended section make this definition in certain respects retrospective).

Respondent submitted several arguments in reply to Appellants contention that a proper notice of assessment, which had to be brought to the notice of the prospective taxpayer, was a prerequisite before section 74 comes into operation. The argument contained in the heads of arguments put forward were, inter alia that the provisions of section 85 dealing with service of any notice on a taxpayer by post, created a presumption that a notice sent was received by the taxpayer. There was therefore an onus on Appellant to prove that she did not receive the notices of assessment, or that they were brought to her attention, and that in the circumstances she had not discharge the onus placed on her. I find no substance in this argument. Another point raised in the original heads of argument was that Appellant was estopped from denying that she received or became aware of the notices of assessment. I also find no substance

in this argument, and therefore also reject it.

Without going into the numerous authorities to which Mr. Maritz on behalf of Appellant referred us to, I am satisfied that his contention that a proper notice of assessment must be served on a taxpayer, including a representative taxpayer, before such tax becomes payable, is correct.

The argument advanced by Respondent is, however, that irrespective of the specific provisions referred to, on a proper interpretation taking into consideration the whole scheme of the ordinance, and in particular in the light of section 5 thereof, Appellant was liable for the payment of taxes in her representative capacity already prior to any assessment being made by Respondent. In casu he submitted that Appellant in her capacity as representative taxpayer was liable for the payment of taxes of the deceased prior to the disposal of the assets and moneys in the estate to the Appellant as sole heir to her husband's estate, such disposal having taken place prior to the 10th January 1987, the estate having been finalised in November 1986.. in which the assets in the estate were awarded to Appellant. In fact in the heads of argument it is submitted that "the relevant enquiry is v/hether the deceased's estate, and therefore the Appellant in her representative capacity, was liable prior to May 1976 to pay (my underlining) the taxes now claimed by the Respondent. It is not clear to me why a date prior to May 1976 was given. It seems to me that if Respondent's argument is correct such liability for taxes arose either on

the

date of death of the deceased, or on 3rd February 1976 when Respondent forwarded the Income Tax Forms for completion.

Respondent's main argument however was based on the provision of section 5 of the Ordinance, and in particular the provision that "there shall be paid annually for the benefit of the Territory Revenue Fund an income tax in respect of the taxable income received by or accrued to or in favour of . . . any person". This, he argued, makes any person liable to pay tax without the legal requirement of a formal notice of assessment or other act. Consequently, so the argument ran, the notice of assessment in the present case was not necessary to create the liability to pay, and appellant could not dispose or award the assets in the estate before payment of the tax ultimately qualified. If he did so, he was then liable to pay personally as he then fell squarely within the ambit of section 74 of the Ordinance.

I find myself unable to agree to this submission. Section 5 of the Ordinance cannot be read in vacuo, but must be read in the context of all the other provisions of the Ordinance. In my view section 5 merely established generally the liability (my underlining) to pay tax, but does not make tax payable before it has been assessed. Sections 72, 73 and 74, as well as a number of other sections have referred, to earlier, make this clear.

It was suggested that Appellant, who was fully aware at all times that the tax in respect of the years 1973 to date of death was outstanding, should have made provision for such tax. This could

have been achieved by awarding the assets in the estate to her as heir, and to make such award subject to her taking over the debt personally if and when the notices of assessments were served on her. This course, which would have protected the Secretary, was however not followed. Although Appellant was grossly negligent in not providing the necessary returns to the Secretary despite numerous reminders, the Secretary also was sadly lacking in his duty to press for early returns, or even make an assessment on estimates, which he did not do. Nor did he object to the liquidation accounts when they were lying for inspection. He only took action much later, which led to the present action.

Having found that there was no tax payable inasmuch as no notices of assessments were issued by the Secretary and served on Appellant at the time when she, in her capacity as executrix, awarded the assets in the estate to herself as sole heiress after no objection were received to the accounts (in which no mention was made of the taxes in issue here), the provisions of section 74 of the Ordinance do not apply, and consequently the appeal must succeed.

In the light of the above -

- (1) Appellant's appeal against the judgment of Hendler, J, succeeds and is set aside, with costs, and substituted by an Order dismissing Respondent's action against Appellant, with costs; and

- 17 -(2) Respondent is ordered to pay the costs of this appeal, including the costs of the application for leave to appeal in the Court a quo.

H.J. BERKER: CHIEF

JUSTICE I concur:

DUMBUTSHENA, A.J.A.

I concur:

MAHOMED, A.J.A.

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