54/96

Cases No 537/94 & 538/94
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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matters between :

HA GREENAN (estate Ebbelaar)	First Appellant
ABSA TRUST LIMITED	Second Appellant

against

COMMISSIONER FOR INLAND REVENUE	Respondent

and

H A GREENAN (estate Terblanche)	First Appellant
ABSA TRUST LIMITED	Second Appellant

against

COMMISSIONER FOR INLAND REVENUE	Respondent

COURT : VAN HEERDEN, HEFER, HARMS, SCOTT JJA and ZULMAN AJA

HEARD : 13 MAY 1996

DELIVERED : 24 MAY 1996

J U D G M E N T

VAN HEERDEN JA :

The fate of the second appeal before us is inextricably linked to that of the first appeal. For this reason, as well as for others that need not be spelled out, no more is required than a brief summary of the factual background to the first appeal.

During his lifetime the late JAC Ebbelaar ("the deceased") and messieurs Fouche and Venter were the only shareholders of a private company. They bound themselves to Nedbank Limited as sureties and co-principal debtors for the indebtedness of that company to the Bank. In May 1981 the deceased ceded to Nedbank his rights under a policy. The purpose of the cession was to provide security to Nedbank for the deceased's indebtedness to it. The policy had been taken out by the deceased with Sanlam Insurance Company Ltd for an amount of R250 000 and was payable at his death. The deceased also ceded his reversionary interest in the policy to Fouche and Venter.

The deceased died on 31 May 1981 and after his death the proceeds of the policy were paid by Sanlam to Nedbank. The latter applied the amount in settlement of the indebtedness which the deceased had incurred as surety for the company, and apparently paid the balance to Fouche and Venter. The proceeds of the policy constituted property deemed to be property of the deceased within the ambit of s 3(3)(a) of the Estate Duty Act 45 of 1955 ("the Act").

In his will the deceased appointed the second appellant's predecessor as the executor of his estate. After his death the Master from time to time issued letters of executorship to various officials of the second appellant's predecessor and later of that appellant itself. The latest appointment was that of the first appellant in his capacity as nominee of the second appellant. For convenience, however, I shall continue to outline the facts of the first appeal as if the first appellant had been appointed by the Master as executor from the outset, and as if the second appellant had been so designated under the deceased's will. In this context it remains to mention that in terms of s 16 of the Administration of Estates Act 66 of 1965 the second appellant accepted liability for the acts and omissions of the first appellant as executor.

In March 1987 the first appellant prepared a final liquidation and distribution account. It reflected that an amount of R67 511,43 was available for distribution to the deceased's legatees and heirs after provision had been made for the payment of estate duty in respect of that amount. An estate duty addendum to the account showed that, with the inclusion of the proceeds of the Sanlam policy, the total estate duty came to R58 655,60, of which the sum of R34 334,78 was attributable to those proceeds. Later in March 1987 the respondent, acting through the Master, issued an assessment reflecting that the estate duty payable was the amount of R58 655,60 as calculated in the addendum. Some time thereafter the first appellant paid to the Master the estate duty payable minus the amount of R34 334,78. He then proceeded to distribute the available assets to the legatees and heirs.

In parenthesis it may be mentioned that through the years the first appellant made various attempts to recover the duty attributable to the proceeds of the Sanlam policy from *inter alia* Fouche and Venter. However, the steps taken under s 11(b) of the Act proved fruitless, mainly because the first appellant was advised that his claims had become prescribed.

In order to appreciate the nature of the dispute which developed between the parties, reference must at this stage be made to a number of the provisions of the Act. In terms of s 2(2) estate duty shall be charged upon the dutiable amount of an estate which, under s 3(1), shall consist of all property of a deceased as at the date of his death, and all property which is deemed to be the deceased's property at that date. S 11(b) provides that where duty is levied on the proceeds of a policy, such as the Sanlam policy, the person liable for duty shall be the executor, provided that where those proceeds are recoverable by any person other than the executor such person shall be so liable. Sections 12, 13(1), 18 and 19 read as follows :

> "12. Notwithstanding anything to the contrary contained in section *eleven*, any duty payable under this Act shall be payable by and recoverable from the executor of the estate subject to the duty : Provided that the liability under this section of any executor shall be a liability in his capacity as executor only and for an amount not exceeding the available assets in the estate.
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> 13. (1) Every executor who is required to pay duty in respect of any property referred to in paragraph (a)(i), or in the proviso to paragraph (b)(i) or (b)(iA), or in paragraph (b)(ii), of section 11, shall be entitled to recover from the person liable therefor the duty

attributable to such property.

18. Before delivering or transferring any property of the deceased to any heir or legatee the executor shall satisfy the Commissioner that due provision has been made for the payment of any duty payable under this Act.

19. Every executor who pays over or parts with the possession or control of any property under his administration without first paying any duties payable under this Act, shall be personally and jointly and severally liable with any other person to whom he has paid over, or to whom he has delivered, any such property, for the amount of the duty ascertained by the Commissioner to be payable in respect thereof."

As said, the first appellant distributed the assets in the estate when the duty attributable to the Sanlam policy was still outstanding. The respondent consequently could not recover that amount from the first appellant in his capacity as executor of the estate. This caused the respondent to adopt the stance that the first appellant was personally liable under s 19 since the value of the distributed assets exceeded the said amount. He also threatened that unless that amount and interest on it were paid steps would be taken to enter judgment against the appellants in terms of s 25 of the Act. The respondent's attitude led to the institution of motion proceedings in the Witwatersrand Local Division by the appellants. The main relief sought by them were orders declaring that they were not personally liable for payment of the outstanding duty (and interest), and interdicting the respondent from proceeding against them under s 25. The application was opposed by the respondent and dismissed by the court *a quo* (Strydom J). Subsequently the appellants were granted leave to appeal to this court. Strydom J, also granted the respondent leave to appeal against the costs awarded in favour of the respondent in so far as, in effect, the costs of only one counsel were allowed.

The application was founded on the premise that under s 19 an executor who distributes assets to heirs or legatees incurs personal liability only for duty payable in respect of such assets, and that the proceeds of the Sanlam policy had never been in the possession or under the control of the first appellant. The reasoning of the court *a quo* which led to the dismissal of the application, and which was supported in this court by the respondent, may be thus summarised.

In terms of s 12 it is the executor who is primarily liable for the payment of <u>any</u> duty payable under the Act. The proviso to s 12 relates to the amount of the executor's liability and not to the principle thereof. Hence, that liability is limited to such amount as is recoverable from the available assets in the estate. S 19 must be read with s 12. The intention was clearly that the executor in his capacity as such be responsible for the payment of duty and that, if he distributes assets from which such duty can be paid without paying the same, he will be personally liable. The link between those sections is s 18 in terms of which the executor, before delivering or transferring any property of the deceased to an heir or legatee, shall satisfy the respondent that the provision has been made for the payment of any duty payable under the Act. The construction of s 19 contended for by the appellant is in direct conflict with the approach in Commissioner for Inland Revenue v MacNeillie's Estate, 1961(3) SA 311 (A) 326. The phrase "in respect thereof" in s 19 does not refer to the duty payable in respect of particular assets distributed by the executor but rather to "any duties payable under this Act."

Before dealing with the construction put on s 19 by Strydom J a few observations on his general approach are called for. It is necessary, firstly, to distinguish between the liability imposed by the Act, on the one hand upon an executor *qua* executor and, on the other, upon an executor in his personal capacity. In interpreting s 19 one should therefore be careful not to place too much emphasis on the overall scheme of the Act to render an executor *qua* executor primarily liable for the payment of all estate duty. Secondly, s 12 clearly deals with such liability and not with the personal liability which an executor may incur under s 19. Thirdly, although s 18 requires an executor to satisfy the respondent that due provision has been made for the payment of <u>any</u> duty payable under the Act before delivering or transferring any property to an heir or legatee, the sanction for non-compliance is to be found in s 19, and in that section alone. Finally, the approach in <u>MacNeillie's Estate</u> at 838 concerns provisions in revenue laws which are reasonably open to more than one interpretation. It was for this reason that Steyn CJ said :

> "...a Court would give effect to a manifest intention to tax a particular person in respect of particular property, unless

> the words to be construed, whether they appear in an assessment provision or elsewhere, are intractable. The Court would in such a case, in interpreting such words, allow itself the latitude, within the limits distinguishing interpretation from legislation, which is necessary to give effect to such an intention."

Having regard to the interconnection between sections 18 and 19, it is undoubtedly reasonable to assume that it was the underlying intention of the legislature to impose personal liability upon an executor who transfers property in circumstances where duty is and will remain payable by him in his capacity as executor. But did the legislative give effect to such intention? Now, s 19 is a curious provision. It appears to provide for personal liability on the part of an executor although there may still be sufficient undistributed assets in the estate from which all outstanding duty may be recovered. Be that as it may, the key phrase is "in respect thereof". On a linguistic approach that phrase clearly refers to the duty payable in regard to specific property paid over or parted with by an executor and not, as the court *a quo* would have it, to any duty payable under the Act. This is borne out by the fact that, because of the scheme of the Act and in particular the provisions of sections 11 and 13, an assessment of duty under s 9 must quantify the duty attributable to specific classes of property. It is true that the introductory passage of s 19 refers to "any duty payable under this Act", but in imposing personal liability upon an executor the section then limits its ambit. The limitation is that his liability is restricted to duty payable "in respect thereof". In respect of what? Clearly the duty payable in respect of "such property" which is specific property transferred in violation of s 18.

Counsel for the respondent contended, however, that the phrase "ascertained by the Commissioner to be payable" makes all the difference. He conceded that had that phrase not been incorporated in s 19 the appeals would have to succeed, but argued that because of its incorporation in the section the respondent may determine that the outstanding duty - up to the value of the transferred property - is payable in respect "thereof". Thus, if the outstanding duty amounts to R100 000 and the value of the transferred property - presumably the value reflected in the estate accounts - is R60 000, the respondent may determine that the latter amount is "the amount of the duty... payable in respect thereof". In my view this construction violates the clear language of s 19. An executor's personal liability is for the amount of duty payable in respect of "such property", and not for the value of that property. What the respondent is called upon to do, is to make a simple arithmetical calculation of the duty payable in respect of the transferred property. Such calculation may already appear in an assessment, but a new calculation may be called for if a class of property has been transferred to co-heirs or -legatees. Thus, if a deceased has left an immovable property in different undivided shares to various heirs, the property has been transferred to them, and duty amounting to, say R30 000, payable in respect of that property remains outstanding, the extent to which each heir incurs joint and several liability with the executor may have to be determined.

In the final analysis the construction of s 19 for which counsel for the respondent contended would require a significant reformulation of the concluding part thereof. As it now reads, its language admits of one interpretation only. Put differently, its language is, in the words of Steyn CJ, intractable. And since the first appellant never had control or possession of the proceeds of the Sanlam policy, s 19 could not give rise to personal liability on his part in respect of the duty attributable to that policy.

Because the cross-appeals before us must necessarily fall away in the event of the appeals being upheld, nothing more need be said about them.

In the result the appeals succeed, and the cross-appeals are dismissed, with costs. In each appeal the following is substituted for the order made by the court *a quo* :

"(1) It is declared that neither of the applicants is liable personally to pay to the respondent the sum claimed by the respondent in respect of estate duty payable by the estate of the deceased.

(2) The respondent is interdicted from entering judgment against the applicants for payment of the said estate duty in terms of section 25 of the Estate Duty Act 45 of 1955.

(3) The respondent is directed to pay the applicants' costs."

H J O VAN HEERDEN

CONCURRED : HEFER JA
HARMS JA
SCOTT JA
ZULMAN AJA