REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No 615/95

In the matter between:

COHEN BROTHERS FURNITURE (PTY) LIMITED	First Appellant
ALLIED RE-INSURANCE CO (PTY) LIMITED	Second Appellant

and

THE MINISTER OF FINANCE OF THE NATIONAL GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
THE MINISTER OF FINANCE OF THE PROVINCIAL GOVERNMENT OF THE EASTERN CAPE	Second Respondent
THE COMMISSIONER FOR INLAND REVENUE OF SOUTH AFRICA	Third Respondent

Coram: MAHOMED CJ, EKSTEEN, HARMS, SCOTT and ZULMAN JJA
Heard: 12 March 1998
Delivered: 23 March 1998

JUDGMENT

HARMS JA/

HARMS JA:

This appeal concerns the payment of withholding tax in terms of the provisions of the Income Tax Act 44 of 1984 (herein referred to as the "Act") of the erstwhile Republic of Ciskei for companies which had their place of effective management outside Ciskei. Because of the tortuous route the case took, it is advisable to set out the history of the matter in greater detail than would otherwise have been necessary.

[1] The Act in chapter 4 contained provisions relating to withholding tax. At this stage it is only necessary to note that a withholding tax was to be paid in respect of, i a, dividends declared or paid by a Ciskeian company at the rate of 15 cents in the Rand (s 12). According to s 13(a)(iii) as originally enacted "the withholding tax [had to] be paid in respect of the amount of ... any dividend declared or paid by a Ciskeian company ... if the person to whom such amount has been paid or is payable is ... an external company." An "external company" was defined in s 1 to mean "any company other than a Ciskeian company" and a Ciskeian company, in turn, was defined to

encompass a company incorporated or deemed to be incorporated in the Ciskei.

[2] The first appellant, Cohen Brothers Furniture (Pty) Ltd (hereinafter "Cohen Bros"), was a company incorporated in South Africa, and thus an external company according to the definition. The second appellant, Allied Re-Insurance Co (Pty) Ltd ("Allied"), on the other hand, was a Ciskeian company as defined. Allied was a wholly owned subsidiary of Cohen Bros.

[3] On 4 February 1991 and again on 3 September 1991 Allied declared dividends of, respectively, R21 006 799 and R16 500 000. Allied deducted withholding tax amounting to R3 151 019,85 and R2 475 000 in respect of these dividends from the amount due to Cohen Bros and paid the tax over to the Receiver of Revenue on 4 March 1991 and 27 September 1991. This was done pursuant to the provisions of s 16(a) of the Act to which I shall revert. The balance of the dividends was paid to Cohen Bros shortly after having been declared.

[4] In *Income Tax Case No 1544* (case no 9409) 54 SATC 456, Melamet J, sitting as President of the Special Income Tax Court (Transvaal), held on 10 March

1992 that the imposition of a similar withholding tax in terms of South African legislation on a Dutch company amounted to a discrimination based solely on the ground of nationality and, consequently, was a breach of the double taxation agreement between the Republic of South Africa and the Kingdom of the Netherlands.

[5] The double taxation agreement between South Africa and Ciskei was in terms similar or identical to the agreement referred to in [4]. Alluding to that fact and Melamet J's judgment, Cohen Bros requested the Receiver to refund the withholding tax paid by Allied. The Commissioner took legal advice and in consequence, one can safely presume, the Government of Ciskei amended the Act by way of the Income Tax Amendment Decree, 2 of 1993. The Decree deleted the definition of "external company" from the Act and amended s 13(a)(iii) to state that "the withholding tax shall be paid in respect of the amount of ... any dividend declared or paid by a Ciskeian company ... if the person to whom such amount has been paid or is payable is ... a company which has its place of effective management outside Ciskei."

Furthermore, s 3 of the Decree stated that it "shall be deemed to have come into operation on 1 March 1985". (The other amendments to the Act by the Decree need not be mentioned.)

[6] It is common cause that the place of effective management of Cohen Bros was outside Ciskei at Germiston. *Prima facie*, the withholding tax paid by Allied was legalised by these amendments and neither Cohen Bros nor Allied could reclaim from the Government of Ciskei the payments made. Undeterred, the appellants applied to the Supreme Court of Ciskei (General Division) for an order declaring that the Decree was in conflict with certain fundamental rights enshrined in the Republic of Ciskei Constitution Decree 45 of 1990, alternatively declaring that it was invalid to the extent that it had retrospective effect because it (still) violated the double taxation agreement between South Africa and Ciskei. Relief was sought against the Government of Ciskei and its Commissioner for Inland Revenue.

[7] In due course the relief sought in terms of both these formulations was abandoned by the appellants, and the relief claimed was limited to an order declaring that the Decree, properly interpreted, "did not operate so as to reopen or resuscitate the

question of the recoverability of the taxes [already] paid". Later it was extended to incorporate a declaration to the effect that the Decree did not entitle the respondents to retain the monies in question. Later still a prayer for repayment was introduced.

[8] Because of the demise of the Republic of Ciskei on 27 April 1994, the original respondents were substituted with the present respondents who act in their official capacities as representatives of organs of the South African government. Nothing turns on this.

[9] Belatedly the respondents applied in a counter application for an order declaring that the sums paid as withholding tax were due, owing and payable in terms of the Act as amended by the Decree; further, that the respondents were entitled to retain the monies in payment of the "new" withholding tax.

[10] The application was heard by Pickard JP and Tshabalala J in what was called the Ciskei Provincial Division. In the event an order to the following effect was made:

(a) It was declared that the tax paid in terms of the unamended Act was repayable (par 1 of the order).

(b) It was also declared that the respondents were entitled to apply the provisions of the amended Act to the applicants to the extent that they may be liable, and to set off such liability against the amounts already paid (par 2).

(c) The parties had each to bear their own costs (par 3).

[11] The appellants applied for leave to appeal against par 2 and 3 of the order, which was refused by Pickard JP. Subsequently, a petition for leave to appeal to this Court was successful and it was additionally ordered that the costs of the application for leave to appeal to this Court and to the Court *a quo* were to be costs in the appeal.

[12] Once again belatedly, but also incorrectly, the respondents by petition sought leave from the Chief Justice to cross-appeal against par 1 and 3 of the order. When the attention was drawn to the fact that no application for leave to cross-appeal had been made to the court of first instance, the respondents urgently applied to that court for leave to cross-appeal, which was granted. In the course of this judgment Pickard JP had the following to say about the form of the order originally granted:

> "Let me say at the outset the numbering of those two paragraphs [referred to above as par 1 and 2], when this order was granted by this

> Court ... was purely fortuitous for easy reading. These should not be construed as two separate unrelated orders. ... (I)t was one order granted ... and no great significance must be attached to the numbering and the *paragraphing.*"

[13] Shortly before the hearing of the appeal, the respondents decided to attack the correctness of the judgment in *Income Tax Case No 1544* referred to in [4] above. That gave rise to a postponement, the respondents undertaking to pay the costs of the postponement and of the (by then abandoned) petition to the Chief Justice for leave to cross-appeal.

Having set the stage, I turn to consider the contentions on appeal. In the light of my later conclusion, it becomes unnecessary to consider whether the judgment of Melamet J was correct or not. I am prepared to assume that, in the light of the double taxation agreement read with s 48 of the Act (which grants precedence to the provisions of a double taxation agreement), the imposition of a withholding tax upon an "external company" (such as Cohen Bros) registered in South Africa was not permitted by the Act in its unamended form. It is common cause that the Act as amended did not conflict with the agreement and that the imposition of a withholding tax upon a company having its place of effective management outside Ciskei did not discriminate on the ground of nationality. The question is then what the effect was of s 3 of the Decree (which, it will be recalled, provided that the Decree was deemed to have come into operation on 1 March 1985) upon dividends that had been declared, and a withholding tax that had been paid, before the date of the Decree. More particularly, was the new withholding tax due and payable in respect of the dividends declared by Allied and could the Commissioner retain the amounts paid for that purpose?

The starting point for the inquiry remains the intention of the Legislature as expressed in the statute. If anything is clear, it is that the Decree was the direct result of Melamet J's decision. That means that the intention must have been to fill, as far as possible, the lacuna created. A withholding tax on external companies was replaced by one on companies having their place of effective management outside Ciskei. Companies released from liability were external companies having their place of effective business in Ciskei; companies brought into the net were companies registered in Ciskei, having their place of effective business outside Ciskei and deriving income by way of dividends from other Ciskeian companies. Anyone with a smattering of knowledge of the so-called TBVC states will immediately appreciate that it was highly unlikely that any or any appreciable number of companies fell into either category. The only conceivable reason why the Act was amended retrospectively for about eight years, was a legislative desire to keep what had been reaped under the provision before amendment

Mr **Kuper**, for the appellants, countered this rather obvious conclusion by reference, to what he called, the "principle" in *Wijesuriya v Amit* [1965] 3 All ER 701 (PC). That appeal emanated from Ceylon and concerned the interpretation of a fiscal statute which had been amended retrospectively by much the same wording used in s 3 of the Decree. Lord Wilberforce said (at 703A-C):

> "The question therefore remains whether the express provision of the amending Act was sufficient to bring about the result for which this government agent contends. This question is to be determined according

> to the ordinary principles of construction which apply to a statute which is (a) retrospective, (b) fiscal, and (c) in parts penal. It must be shown that the enacting words clearly cover the case to which it is sought to apply them. The court will no doubt prefer an interpretation which gives effect to the amending Act, rather than one which denies it any efficacy, but it will not strain the language used, nor will it rewrite or adapt it to cover cases other than those to which it clearly applies."

On an analysis of the wording of the statute involved, he came to the conclusion that the effect of the retrospective amendment in that case legalised the levy of the tax to the extent that it had been paid or collected, but that it did not otherwise impose a tax retrospectively. The main reason for the latter conclusion was found in the administrative provisions which could not be applied to unpaid past taxes.

With the principle set out in the quotation no-one can quarrel, but Mr **Kuper** sought to distill another principle from the reasoning of the Board, namely that the Commissioner had to show that the pre-existing collection and enforcement machinery could apply to the case of past unpaid taxes without modifications and violence to the scheme of the Act (cf *Wijesuriya* at 703D-E). I have serious misgivings about whether the Board ever intended to lay down any new principle. It seems to me that the Board was merely applying the principle quoted to the facts of the case. In any event, I find it singularly unhelpful for the interpretation of one statute to have regard to how another court interpreted a different statute. More appropriate is the "general observation" by Lord Dunedin (in *Whitney v Inland Revenue Commissioners* 1926 AC 37 52) to which Schreiner JA had occasion to refer in the context of estate duty (*Commissioner for Inland Revenue* v *Lazarus' Estate and Another* 1958 (1) SA 311 (A) at 326D) namely that -

> "(o)nce that it is fixed that there is [a tax] liability, it is antecedently highly improbable that the statute should not go on to make that liability effective. A statute is designed to be workable, and the interpretation thereof by a Court should be to secure that object, unless crucial omission or clear direction make that end unattainable."

In addition, in *Shewan Tomes & Co Ltd v Commissioner of Customs and Excise* 1955 (4) SA 305 (A), Schreiner ACJ said (at 312A):

> "Where one is dealing with a case of true retrospectivity it will generally, I apprehend, be more difficult to draw inferences as to the Legislature's presumed intention not to produce injustice, since *ex hypothesi* the Legislature is creating a situation in which the conduct of persons is affected by rules that did not exist at the time of the conduct."

Even if for the sake of argument one adopts the line of reasoning of the Board, the appellants' contention must fail. The Act, before and after amendment, levied the withholding tax on dividends paid or still payable. In other words, the mere fact that the Ciskeian company had paid dividends did not affect its obligation to pay the withholding tax. The Ciskeian company (Allied in this case) was always "the person liable for the withholding tax", not the recipient (s 15). That liability remained whether the Ciskeian company had paid the dividends or was still liable to pay them (s 16(a)). Section 16(b) states that any person (Allied in this case) making payment of a withholding tax had a number of options: To deduct or withhold the amount of the withholding tax, to recover the amount from the recipient, or to retain it out of other monies belonging to the recipient. It follows from this, in the words of Lord Wilberforce, that the pre-existing enforcement machinery in the Act enabled the tax authorities to recover withholding taxes for past periods and after payment of the dividend concerned. More important, I would have thought, is the question whether the *post* amendment enforcement machinery made recovery possible, but in this case it does not matter because the effective machinery remained unchanged.

Having replaced the old withholding tax, the question is whether the amounts paid are to be considered payments of the new tax. According to Lord Dunedin (*loc cit*) there are three stages in the imposition of a tax -

> "... there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next there is the assessment. ... [An] assessment particularises the exact sum which a person liable has to pay. Lastly come the methods of recovery, if the person taxed does not voluntarily pay."

Pickard JP had some difficulty with the first stage of the enquiry, holding that he could not decide on the papers whether Cohen Brothers had its place of effective management outside Ciskei. The answer is that such an allegation was made in the founding affidavit and admitted in answer. Assessment, the second issue, does not arise because the Act envisages a self-assessment, the calculation of a percentage of the dividends declared by the Ciskeian company, Allied. Concerning the method of collection, that also causes no problem - the amounts, albeit on a slightly different basis, have been paid. It seems artificial to ascribe an intention to the legislature that the old tax collected should be repaid simply in order to be recycled. The clear intention was to legalise the payment and collection of the old tax save insofar as the possible exceptions referred to are concerned. Section 17 always provided that withholding tax was payable within 30 days after the date upon which (for present purposes) a dividend is payable or within such further period as the Commissioner may approve. This means, as far as transactions antedating the Decree are concerned, that the new withholding tax became due when the Decree came into effect (cf *Curtis v Johannesburg Municipality* 1906 TS 308), or was deemed to have become due on an earlier date such as the date of payment of the dividend (*Shewan Tomes & Co Ltd v Commissioner of Customs and Excise supra*). Upon either interpretation the tax concerned was due by the time the application was launched.

It follows from this that the respondents were entitled to an order in terms of their cross application. Par 2 of the order of the court below, which was supposed to be in the favour of the respondents, did not do justice to their case. It did not cater for the fact that the liability for withholding tax had been established, it assumed that the "respondents" - presumably the Commissioner - had to "*apply* the provisions regarding withholding tax" while the Act provided for a self-assessment, and it permitted a setoff by the Commissioner at some future date, something that was unnecessary and legally ill-conceived.

Par 1 of the order declared that the amounts paid by the appellants are repayable to them, presumably because the old withholding tax had been repealed retrospectively. But, one can only assume, this declaratory order was intended to be subject to the setoff provision contained in par 2 of the order. It does not follow that the declaratory order should have been granted even if one concludes that the effect of the Decree was to require repayment of the tax already paid. In the light of the conclusion in connection with par 2, the order in par 1 was purely academic. A declaratory order cannot be granted in relation to an academic dispute, and it follows that the order cannot stand.

Mention has been made of the fact that the parties had to bear their own costs. The reason given was that, taking into account the form of the order, "both parties were substantially successful, or, if you like, that both parties were substantially unsuccessful." It would therefore appear that the learned judge in the portion quoted in [12] above, misinterpreted his own judgment. In any event, the appellants' success in the court below was illusory and did not justify an order of costs in their favour.

In the result the following order is made:

1. The appeal is dismissed with costs.
2. The cross-appeal is upheld with costs.
3. The order of the court below is substituted with the following order:

"(a) The application is dismissed.

(b) As far as the cross application is concerned, is it declared that the tax paid by the second applicant during 1991 was due and owing to the third respondent in terms of the provisions of the Income Tax Act, 1984 (Ciskei) as amended by Decree 2 of 1993 (Ciskei) as withholding tax and that the applicants are not entitled to a refund in respect thereof.

(b) The Applicants are to pay the costs of the application and the cross application, jointly and severally, including the costs of two counsel where employed."

4. All costs include the costs of two counsel.

5. It is noted that the respondent undertook to pay certain wasted costs.

L T C HARMS
JUDGE OF APPEAL

MAHOMED CJ)
EKSTEEN JA) AGREED
SCOTT JA)
ZULMAN JA)