

CASE NO 562/91

THE DE LEEF FAMILY TRUST *First Appellant*

ERNEST ARMANDT DE LEEF *Second Appellant*

THE JACOBS FAMILY TRUST *Third Appellant*

MARCUS SONNY JACOBS *Fourth Appellant*

and

THE COMMISSIONER FOR INLAND REVENUE *Respondent*

JOUBERT, A C J:

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

THE DE LEEF FAMILY TRUST First Appellant

ERNEST ARMANDT DE LEEF Second Appellant

THE JACOBS FAMILY TRUST Third Appellant

MARCUS SONNY JACOBS Fourth Appellant

and

THE COMMISSIONER FOR INLAND REVENUE ... Respondent

Coram: JOUBERT A C J et SMALBERGER J A et

NICHOLAS HOWIE KRIEGLER A J J A.

Heard: 5 March 1993

Delivered: 31 March 1993

J U D G M E N T

JOUBERT, A C J:

In motion proceedings instituted by the Appellants in the Transvaal Provincial Division against the Respondent (the "Commissioner") for certain declaratory orders regarding the levy of transfer duty VAN DER WALT J dismissed them, holding that transfer duty was payable by the Second Appellant ("De Leef") and the Fourth Appellant ("Jacobs"). VAN DER WALT J refused the appellants leave to appeal against his judgment. The appellants were granted leave in terms of sec 20(4)(b) of Act 59 of 1959 to appeal to this Court.

The material background facts to the present appeal may conveniently be summarized as follows:

1. Longterm Investments (Pty) Ltd (the "Company") was the registered owner of a certain immovable property (the "fixed property") situated in the Municipality of Walmer, Division of Port Elizabeth. It was the only asset of the Company. De Leef and Jacobs each held 50% of its shares and were also its only directors.

2. At a general meeting of the shareholders on 3 April 1983 it was resolved by special resolution in terms of sec 349 of the Companies Act 61 of 1973 that the Company be wound up voluntarily. According to sec 350 this was a members' voluntary winding-up of the Company. One Lewis Snitcher was nominated as liquidator of the Company.
3. On 4 May 1983 the special resolution was registered by the Registrar of Companies in accordance by the provisions of sec 200, and thereupon the Company was placed in voluntary winding-up by its members (sec 350(1) of Act 61 of 1973).
4. On 14 June 1983 the Master's Office at Cape Town, issued a certificate of appointment as liquidator to Lewis Snitcher (sec 375(1) of Act 61 of 1973).
5. On 8 December 1983 the Master's Office at Cape Town issued a certificate of registration to the Third Appellant (the "Jacobs Family Trust") which was created

by a Deed of Trust executed on 18 November 1983.

6. On 16 April 1984 the Master's Office at Cape Town issued a certificate of registration to the First Appellant (the "De Leef Family Trust") which was created by a Deed of Trust executed on 27 March 1984.
7. On or about 4 May 1984 according to para 9 of De Leef's founding affidavit oral agreements were entered into between De Leef and the Trustees of the De Leef Family Trust, and also between Jacobs and the Trustees of the Jacobs Family Trust "in terms whereof we each ceded to the First and Third Applicants respectively all our rights as shareholders, including the right to liquidation distributions and our right to take transfer of the said property. The terms thereof were duly communicated to the said Lewis Snitcher, who accepted the said agreements and gave effect to them." (My underlining). In para 5 of his replying affidavit De Leef added an additional averment that the De Leef

Family Trust and the Jacobs Family Trust purchased those ceded rights from him and Jacobs respectively by crediting them in their books of account each in the sum of R275 000-00 as loans payable on demand. What this averment amounts to in law is that the causa of each cession was a sale.

8. On 10 May 1984 Lewis Snitcher signed a power of attorney for the purpose of passing transfer of the fixed property to the Trustees of the De Leef Family Trust and of the Jacobs Family Trust. This power of attorney recorded the causa for the registration of transfer as follows:

"The above property is awarded to the abovementioned Transferees in terms of a liquidation dividend dated the 4th May, 1983 at a valuation of R550 000-00."

(My underlining).

It is self-evident from the foregoing facts that no

liquidation dividend was declared prior to 10 May 1984.

Moreover, the De Leef Family Trust and the Jacob Family Trust were not in existence on 4 May 1983 since they were created on 27 March 1984 and 18 November 1983 respectively.

9. As appears from transfer duty receipt No 7069, issued on 24 May 1984 by the Receiver of Revenue at Cape Town, transfer duty in the amount of R15 900-00 was paid by the De Leef Family Trust and the Jacobs Family Trust.
10. By Deed of Transfer No T 32616/84, dated 25 June 1984, Lewis Snitcher as transferor transferred the fixed property to the Trustees of the De Leef Family Trust and of the Jacobs Family Trust as transferees. The causa for the transfer was recorded as follows: "-- the above property was awarded to the abovementioned Transferees in terms of a liquidation dividend at a valuation of R550 000-00." In this way the fixed property was transferred directly to the De Leef Family Trust and the Jacobs Family Trust from the Company (in

liquidation). There was no liquidation dividend prior to 25 June 1984. In law a valid causa is not required for a valid transfer of fixed property. See Commissioner of Customs & Excise v Randles, Brothers and Hudson Ltd, 1941 AD 369 at pp 398-399, 411 and Van der Merwe Sakereg, 2nd ed. p 305-314 for a full discussion. What is required is evidence from which the transferor's intention to transfer ownership (animus transferendi dominii) and the transferee's intention to acquire ownership (animus accipiendi dominii) can be ascertained. This aspect was, however, not raised on the papers in the present matter.

11. On 12 July 1984 liquidator Lewis Snitcher signed his affidavit in respect of his First and Final Liquidation and Distribution Account from which it appears that there was a cash shortfall of R3 959-12 which he collected from De Leef and Jacobs. By doing so the realization of the fixed property, the in order to pay

debts, was avoided. The Company (in liquidation) was solvent. Its fixed property, valued at R550 000-00, was to be distributed in specie to De Leef and Jacobs as shareholders in equal shares. The true factual position, however, was that liquidator Lewis Snitcher had already on 25 June 1984 transferred the fixed property to the Trustees of the De Leef Family Trust and of the Jacobs Family Trust.

12. On 25 October 1984 Jacobs acknowledged in writing that he had received the sum of R250 000-00 from the Company (in liquidation). He also admitted that the payment was made to him prior to the confirmation of the Liquidation and Distribution Account by the Master. On 29 October 1984 De Leef made an identical acknowledgment in writing. Both written acknowledgments alleged that the said sums of money were received by them "on account of the secured/preference award due to me/us."

13. On 30 October 1984 the Master in terms of sec 408 of Act 61 of 1973 confirmed the First and Final Liquidation and Distribution Account.
14. On 17 July 1985 the Company was in terms of sec 419(1) of Act 61 of 1973 dissolved.

The Court a quo held that De Leef and Jacobs were liable for transfer duty. The ratio decidendi of the judgment was that on 4 May 1983 when the Company was placed in voluntary winding-up as a result of the registration of the special resolution by the Registrar of Companies (sec 200 of Act 61 of 1973), they acquired the right to obtain transfer of the fixed property upon confirmation of the liquidation and distribution account. They could then claim from liquidator Lewis Snitcher transfer of the fixed property into their names. "This right they had acquired and held since the 4th of May 1983". Let us now consider the applicable provisions of the Transfer Duty Act No 40 of 1949. Transfer duty has often been said to be

rather a misnomer because the liability for it, in respect of land, does not arise on the date of transfer of land but on the date of acquisition of the right to acquire ownership thereof irrespective of whether or not the land is transferred into the name of the acquirer (subject to cancellation or dissolution of the transaction). See Jones Conveyancing in South Africa by H S Nel, 4th ed., 1991 p 144 and the authorities there cited. The same flaw, however, does not seem to attach to its Afrikaans counterpart viz. hereregte. The relevant portion of sec 2(1), the charging section, reads as follows:

"Subject to the provisions of section 9, there shall be levied for the benefit of the Consolidated Revenue Fund a transfer duty (hereinafter referred to as the duty) on the value of any property - - -
 - - - - -
 - - - - - acquired by any person
 - - - - -
 by way of a transaction or in any other manner - - - -".

Sec 2(1) must be read in conjunction with the following pertinent definitions in sec 1, namely :

"Property" means land and any fixtures thereon - - - - -"

"Transaction" means any agreement whereby one party thereto agrees to sell, grant, donate, cede, exchange, lease or otherwise dispose of property to another - - - - -"

"Date of acquisition" means -

(a) in case of the acquisition of property - - - by way of a transaction, the date on which the transaction was entered into, irrespective of whether the transaction was conditional or not or was entered into on behalf of a company already registered or still to be registered and, in the case of the acquisition of property otherwise than by way of a transaction, the date upon which the person who so acquired the property became entitled thereto - - - - ."

(My underlining).

In Commissioner for Inland Revenue v Freddie

Consolidated Mines Ltd, 1957(1) S A 306 (A) CENTLIVRES C J

in construing Act 40 of 1949 held at p 311 B-C: "It is

clear from the whole scheme of the Act that payment of the duty (apart from cancellation) must be made whether or not the property is transferred into the name of the purchaser. The word 'acquired' in the charging section (sec 2) must therefore be construed as meaning the acquisition of a right to acquire the ownership of property". In this connection the right to acquire the ownership of land includes a personal right to obtain dominium in immovable property (ius in personam ad rem acquirendam). See Secretary for Inland Revenue v Hartzenberg, 1966(1) S A 405 (A) at p 409 A-B and Secretary for Inland Revenue v Estate Roadknight and Another, 1974(1) S A 253 (A). OGILVIE THOMPSON C J held at p 258 B-C : "It is well established that the word 'acquired' in sec 2(1) of the Act ordinarily denotes, not ownership already obtained, but the acquisition of a right to obtain dominium. The concept is sometimes expressed by saying that 'acquired' includes the acquisition of a jus in personam ad rem acquirendam". What

is required by sec 2(1) is that the acquirer acquired a right to obtain the dominium of land.

Furthermore, it is important to bear in mind when an unconditional right vests in the holder thereof.

It is trite law to draw a distinction between dies cedit, i.e. the time has come when the right is due or owing, and dies venit, i.e. the time for enjoyment of the right has arrived so that possession, delivery or transfer of its subject-matter may be claimed. Voet 36.2.1., Jewish Colonial Trust Ltd v Estate Nathan, 1940 A D 163 at p 176. In the case of a conditional right or interest no vested right is acquired prior to fulfilment of the condition.

As stated, De Leef and Jacobs each held 50% of the Company's shares. With reference to shares it was held in Randfontein Estates Ltd v The Master, 1909 T S 978 per INNES C J at p 981-982:

"They are simply rights of action - jura in

personam - entitling their owner to a certain interest in the company, its assets and its dividends. As between those in whose names they are registered in the books of the company, and any other person with whom the registered holders deal, they may be freely assigned, even though the original registration remains unaltered, And that is the ordinary way in which such shares are dealt with; they pass from hand to hand, and form the subject of many transactions without the original registration in the books of the company being disturbed."

This Court has consistently held a share in a joint stock company to be a jus in personam, the ownership of which passes by cession in due form. See Liquidators, Union Share Agency v Hatton, 1927 A D 240 at pp 250, 251, 252, and Jeffery v Pollak and Freemantle, 1938 A D 1 at pp 14, 22, 28.

The nature of a share may be elaborated on by stating that it represents a complex of rights and duties of a shareholder, including the latter's right to participate

in a distribution of the company's surplus assets on its liquidation. (LAWSA, vol 4 s v Companies, para 37.) According to Palmer's Company Law, 25th ed 1992, vol 1 para 6.002 the principal rights which a share may carry are:

- "1. the right to dividend if, while the company is a going concern, a dividend is declared;
2. the right to vote at the meeting of members, and
3. the right, in the winding up of the company, after the payment of debts to receive a proportionate part of the capital or otherwise to participate in the distribution of assets of the company."

See also Cilliers, Benade, Henning, Du Plessis and Delpont, Corporate Law, 2nd ed., 1992 para 14.10 :

"The share certificate on the other hand is a tangible document evidencing the legal relationship between the company and the shareholder. In his capacity as a party to this legal relationship there accrue to the shareholder -

- (a) rights, mainly the right to dividends when

they have been declared and the right to participate in a distribution on liquidation; and

- (b) duties, mainly to honour the provisions of the articles."

It follows from the foregoing that when De Leef and Jacobs on 3 April 1983 at a general meeting of members adopted the special resolution to wind up the Company voluntarily they were the owners of their respective shares and that they already had a vested right (dies credit) to participate equally in the distribution of the surplus assets of the company on its liquidation. This vested right formed an asset in their private estates and was transmissible. Dies venit, however, would occur only after confirmation of the liquidator's liquidation and distribution account by the Master (sec 408) when the liquidator was in terms of sec 409 obliged to proceed immediately with the distribution of the Company's surplus assets in accordance therewith. After confirmation of the liquidation and distribution account they

would have enforceable jura in personam ad rem acquirendam to obtain transfer of the fixed property in their own names provided that it had not been realized to liquidate debts and was available for distribution..

The placing of the Company in winding-up by the registration of the special resolution by the Registrar of Companies on 4 May 1983 set in motion the voluntary winding-up procedure which is simpler and faster than other types of winding-up. Such procedure is utilised where the Company is solvent and is not being dissolved because it is insolvent. It is subject to fewer statutory limitations while the rights of creditors are protected. No meetings of creditors are held since the creditors have no say in the winding-up procedure. The liquidator can be instructed by the members in general meeting. See Cilliers, Benade, Henning, Du Flessis and Delport, op.cit., para 28.06. The effect of the adoption of the voluntary winding-up procedure was that the Company remained a corporate body and

owner of its assets, but the powers of its directors (De Leef and Jacobs) ceased except in so far as their continuance was sanctioned by the liquidator or by the Company in general meeting of its members (sec 353(1), (2)(b)). Moreover, any transfer of shares without the sanction of the liquidator would be void (sec 341(1)).

The Court a quo held that on 4 May 1983 (i.e. upon registration by the Registrar of Companies of the special resolution to wind up the Company) De Leef and Jacobs acquired "the right to obtain transfer of the property from the company in liquidation upon confirmation of the liquidation and distribution account". (Record p 73). The Court a quo would seem to have found that on the said date De Leef and Jacobs acquired jura in personam ad rem acquirendam which brought them within the ambit of the charging sec 2(1) of Act 40 of 1949 and accordingly rendered them liable for transfer duty.

This conclusion of the Court a quo is, with

respect, untenable for the following reasons :

1. I have already indicated supra that one of the rights appertaining to a share is the shareholder's right in the winding-up of the company to participate at some future date in the distribution of the company's surplus assets. Such a right vests (dies credit) in the shareholder on obtaining ownership of the share and is transmissible, but dies venit will occur only after confirmation of the liquidator's liquidation and distribution account by the Master (sec 408) whereupon the liquidator should immediately proceed in terms of sec 409 to distribute the surplus of the company's assets in accordance therewith. It is only after confirmation of the liquidator's liquidation and distribution account that dies venit occurs. That is when the shareholder acquires the enforceable right to obtain transfer of immovable property (ius in personam ad rem acquirendam). The shareholder will then in

terms of sec 2(1) of Act 40 of 1949 be liable for transfer duty irrespective of when transfer actually occurs.

2. There is in the present matter no juristic fact (regsfeit) or juridical ground by virtue of which dies venit on 30 October 1984 in regard to ius in personam ad rem acquirendam could be antedated to 4 May 1983. Nor is there any provision in Act 61 of 1973 which authorises such antedating to determine when dies venit occurred.
3. Besides, according to our modern system of administration of deceased estates the heir or legatee of an unconditional bequest obtains a vested right (dies credit) to be entitled to the bequest on the death of the testator (a morte testatoris). Such a right is transmissible but his claim is enforceable only at some future time when the executor's liquidation and distribution account has been confirmed (dies venit).

He then has a enforceable right to claim payment, delivery or transfer of his bequest (ius in personam ad rem acquirendam). Estate Smith v Estate Follett, 1942 A D 364 at p 383, Greenberg v Estate Greenberg, 1955(3) S A 361(A) at p 364, Secretary for Inland Revenue v Estate Roadknight and Another, supra. It is pointed out in The Law of Succession in South Africa, 1980, by Corbett, Hahlo, Hofmeyer and Kahn, p 164 note 176, that although these judgments speak of 'confirmation' of estate accounts by the Master no provision is made for confirmation, as such, in the Administration of Estates Act 66 of 1965 (nor was there any such provision in the previous Act 24 of 1913). It is suggested that 'confirmation' in the context should be taken as a reference to the fact that the accounts had lain for inspection, without objection, for the statutory period. See also Meyorowitz in his Law and Practice of Administration of Estates, 5th ed. p 261.

The legal principles of vesting are not affected. I may add that the same principles are mutatis mutandis applicable to the administration of an insolvent estate by a trustee. See secs 110 to 113 of the Insolvency Act 24 of 1936.

In the present matter De Leef and Jacobs had not on 4 May 1983 obtained personal rights to acquire the ownership of the fixed property (iura in personam ad rem acquirendam). Dies venit had not occurred. A year later (4 May 1984) by entering into the cessions with the Trustees of the De Leef Family Trust and of the Jacobs Family Trust they divested themselves of their rights to take transfer of the fixed property. Thereupon dies venit could not avail to vest in them the right to claim transfer of the fixed property after confirmation of the executor's account since their rights had been ceded to the two Trusts. They had no iura in personam ad rem acquirendam. De Leef and Jacobs did

not acquire iura in personam ad rem acquirendam since they had ceded their rights and furthermore the Company (in liquidation) had already on 25 June 1984 divested itself of the fixed property in favour of the two Trusts. The result is inescapable that De Leef and Jacobs cannot be liable in terms of sec 2(1) of Act 40 of 1949 for transfer duty inasmuch as they never obtained enforceable rights to acquire the ownership of the fixed property (iura in personam ad rem acquirendam).

In the result the appeal must succeed.

The following orders are granted:

1. The appeal succeeds with costs.
- 2.- The following order is substituted for the order of the Court a quo viz.
 - (a) declaring that no further transfer duty is payable by any of the applicants in relation to the transfer of two undivided equal half shares in the property to the First and Third Applicants

(b) costs of the application to be borne by the
Respondent.

C. P. Joubert

C. P. JOUBERT A C J.

SMALBERGER J A
NICHOLAS A J A Concur.
HOWIE A J A
KRIEGLER A J A