THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 58/2010
No precedential significance

In the matter between:

THE ABRAHAM KROK TRUST **Appellant**

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE **Respondent**

Neutral citation:	*The Abraham Krok Trust v SARS* (58/10) [2010] ZASCA 153 (29 NOVEMBER 2010)
Coram:	NAVSA, NUGENT, MAYA and CACHALIA JJA and BERTELSMANN AJA
Heard:	**4 NOVEMBER 2010**
Delivered:	**29 NOVEMBER 2010**

ORDER

On appeal from: Tax Court, Johannesburg (Mathopo J and Messrs Hefer and Mabhoza sitting as court of first instance).

The appeal is upheld, and the cross appeal is dismissed, in both cases with costs that include the costs of two counsel. The order of the tax court is set aside and substituted by an order setting the assessment aside.

JUDGMENT

NUGENT JA (NAVSA, MAYA and CACHALIA JJA and BERTELSMANN AJA concurring)

[1] In 1973, under a notarial deed of donation, Ms Sarah Krok created 'The Abraham Krok Trust', and made certain donations to the trustees for the benefit of six children. In 1981 the notarial deed was revoked and substituted by a new trust deed. Under that trust deed the assets that were being held in the Abraham Krok Trust were 'deemed to have been divided into six trusts, one for the benefit of each of the children'. I will refer to those six trusts as the '1981 trusts'. Notwithstanding that the six trusts existed separately, the terms of each was to be governed by the terms of the 1981 deed, which also provided that they would be administered collectively under the name 'The Abraham Krok Trust'.

[2] In 1994 Mr Abraham Krok executed six trust deeds. The trust deeds established new trusts for the benefit of each of the children that I referred to earlier. Simultaneously Mr Krok donated a nominal sum to each of the trusts. I will refer to those trusts as the '1994 trusts'.

[3] Thus at the time that is now material each of the children was the beneficiary of two trusts – each was a beneficiary of one of the 1981 trusts, and each was a beneficiary of one of the 1994 trusts.

[4] Each of the 1981 trusts concluded an agreement of sale with its counterpart 1994 trust. In terms of each such agreement the 1981 trust sold to its counterpart certain stipulated assets. The purchase price payable in each case was R61 635 174. In each case the purchase price was to be discharged by the 1994 trust assuming certain liabilities amounting to R9 232 125 and the balance of R52 455 232 was treated as a loan owing by the 1994 trust to the relevant 1981 trust.

[5] In 1997 the 'Abraham Krok Trust' (the collective name under which the 1981 trusts were administered) made what was referred to as an 'award' to the 1994 trusts – retrospective to the 1996 tax year – in an amount of R52 455 232 in each case. At the same time the trustees of the respective trusts agreed that the amount of the 'award' would in each case be set off against the debt that was at that time owing by the relevant 1994 trust to its counterpart.

[6] For the 1996 tax year the Commissioner assessed 'the Abraham Krok Trust' for donations tax on the 'awards' that were made and for interest on that tax. The tax for which it was assessed amounted in all to R78 682 849 and the interest amounted to R93 862 092. Although assessed in that name it was agreed that in reality each of the 1981 trusts was assessed for its proportionate share of that amount.

[7] The 1981 trusts (acting under the name of the Abraham Krok Trust) objected to the assessments. The Commissioner dismissed the objections and the trusts appealed to the tax court. The tax court (Mathopo J with Messrs Hefer and Mabhoza) dismissed the appeal and ordered that the matter be referred back to the Commissioner to assess the trusts 'on the basis that the [donations were] made on 21 June 2006'. The trusts appeal against the dismissal of the appeal, with the leave of that court, and the Commissioner cross-appeals against the grant of the second part of the order.

[8] Section 54 of the Income Tax Act 58 of 1962 levies a tax called 'donations tax' on 'the value of any property disposed of (whether directly or indirectly and whether in trust or not) under any donation by any resident'. Section 55(1) defines a 'donation' to mean

'any gratuitous disposal of property including any gratuitous waiver or renunciation of a right'.

And 'property' means

'any right in or to property movable or immovable, corporeal or incorporeal, wheresoever situated'.

[9] Donations tax is payable by the 'donor' but if the donor fails to pay the tax within three months[1] then the 'donee' becomes jointly and severally liable with the donor for payment of the tax.[2] Where the donation has been made to any trustee to be administered for the benefit of a beneficiary then the 'donee' is defined to include the trustee. Donations tax paid or payable by a trustee in his or her capacity as such is recoverable from the assets of the trust.[3] In *Welch's Estate v Commissioner, South African Revenue Service*[4] this court observed that the effect of that inclusion in the definition of a 'donee'

'is to deem the trustee rather than the beneficiary to have benefited from the donation, even although the trustee obviously has not, and to render the trustee jointly and severally liable with the donor for the donations tax payable if the donor has not paid it within the prescribed period of three months from the date upon which the donation takes effect'.

[10] A donation that is made by a trustee to the beneficiary of a trust would ordinarily attract donations tax. But such a donation is exempted from the tax by s 56(1)(*l*),[5] which exempts 'property which is disposed of under a donation if such property is disposed of under and in pursuance of any trust'. In *Welch's Estate* Marais J observed that 'the obvious purpose of [the exemption] is to avoid donations tax

[1] Or such longer period as the Commissioner may determine.
[2] Section 59 read with s 60(1).
[3] Proviso to the definition of 'donee' in s 55(1).
[4] 2005 (4) SA 173 (SCA) para 24.
[5] Incorrectly referred to as s 56(1)(e) in *Welch's Estate*.

being levied twice upon what was in essence one donation by the donor'.[6] In the same vein he said later:[7]

'Section 56(1)(*l*) seems to be intended to protect the donor and the trustee from the levying yet again of donations tax upon the ultimate disposal by the trustee of the *corpus* to the beneficiary who gives nothing in return for it. Its apparent purpose is simply to avoid taxing twice what is in reality one donation traceable to the initial act of the donor in settling assets upon the trust'.

[11] Whatever the true nature of the 'awards' that were made by the 1981 trusts to the 1994 trusts, I think it must be accepted that if they were capable of being applied to extinguish the debts that were owing by the 1994 trusts to the 1981 – and the trustees say that they were capable of doing so – then they must have been 'disposals of property' by the 1981 trusts as contemplated by the definition of a 'donation'. For purposes of this judgment I will treat and refer to them as such. I will also assume that the disposals were made 'gratuitously' – although that is disputed by the trustees – and thus would ordinarily be donations that attract donations tax under s 54.

[12] The present dispute between the trustees and the Commissioner arose in the following way. At some stage after the trusts were assessed for donations tax the trustees consulted counsel, who informed them that in his view the disposals 'might' (I emphasise that the advice went no further than that) not have been authorised by the trust deeds – in which case they would have been invalid. (I should add that there is no dispute that at all times the trustees genuinely believed that they were authorised to make the awards.) Upon receiving that advice the trustees took the view that if the disposals had indeed been unauthorised that would add another string to their bow in their dispute with the Commissioner. If the disposals had been unauthorised and were thus legally invalid – so their argument went – then they were not taxable under s 54 because that section, they submitted, applied only to legally valid donations. But the trustees intended to argue in the alternative (amongst other things) that if the disposals were authorised, and thus taxable under s 54, they were similarly exempt from tax under s 56(1)(*l*). So they decided that for so long as there was uncertainty as to the validity of the disposals they would not pin their colours to either mast but would

[6] Para 25.
[7] Para 70.

await, if necessary, a definitive determination by a court on the validity or otherwise of the disposals.

[13] The written objections to the assessment that the trustees placed before the Commissioner reflected, essentially, that view of the matter that was taken by the trustees, which later formed the basis for the submissions that were made to this court. They submitted in their objection that 'on a proper construction of the deed … the trustees had no power to make [the awards]' and thus the awards were 'invalid and of no force or effect, and could not constitute a donation as contemplated by section 54, read with section 55 …' (the contention being that s 54 taxed only legally valid donations). But if the awards were authorised, they submitted in the alternative, then they fell within the exemption. (Other objections were taken that are not now relevant.)

[14] The response of the Commissioner on the first point was that it mattered not whether the disposals were valid or invalid at law – in either event the disposals occurred in fact and s 54 required no more than that. On the second point the Commissioner was more definite. He contended that the disposal was not authorised by the trust deed and was thus not made 'under and in pursuance' of the trust – accordingly it fell outside the exemption. That was the only ground that he advanced – in the reasons for his assessment and in this court – for why the exemption did not apply.

[15] Argument before us was directed largely to the proper construction to be placed upon the various sections. The respective arguments raise interesting questions of construction of the relevant sections but on the view that I take of the matter those questions need not be resolved.

[16] It will be apparent from the respective positions that the parties have adopted that the validity or otherwise of the disposals is not necessarily decisive of the trustees' case. But that is not so for the case advanced by the Commissioner. On the case advanced for the Commissioner the disposals are taxable only if the trustees were not authorised to make them, for only then would they fall outside the exemption (on the construction of the exemption adopted by the Commissioner). If the disposals

were indeed authorised then the Commissioner accepts that they fall within the exemption. Thus it is critical for the Commissioner's case that the trustees were not authorised to make the disposals.

[17] At first counsel for the trustees submitted that the disposals were not authorised by the trust deed but he later abandoned the submission. When the question was probed with counsel for the Commissioner in the course of the appeal he could advance no reasons why the disposals were not unauthorised. After the hearing of the appeal we directed certain questions to the Commissioner in clarification of his position. It seems that by then he had found a second wind because his counsel submitted in reply to those questions that the trustees had indeed not been authorised to make the disposals and he advanced reasons why that was so.

[18] It is not usual for a court to pronounce upon the validity of a bilateral transaction if all the interested parties are not before it – which they usually will not be in tax proceedings. By itself that seems to me to suggest that the legislature did not intend s 54 to apply only to an authorised donation (as submitted for the trustees) nor to exempt from donations tax only authorised donations (as submitted for the Commissioner) and thus the validity or invalidity of the transaction would be irrelevant. But once more it is not necessary to pursue that enquiry.

[19] In his reply to our questions the Commissioner submitted that the court is indeed entitled to determine the validity of the disposals. He added that in this case the court is not called upon to do so because – so the argument went – the trustees bear the burden of proving that the disposals are exempt[8] and they have not discharged that burden. The Commissioner's reliance upon the burden of proof is misplaced. The material facts in this matter are not in dispute. The question under consideration is a matter for construction of the trust deed and on that question the burden of proof does not come into play.

[20] I will assume in favour of the Commissioner that the exemption, properly construed, applies only to a donation that the trustees were authorised by the trust

[8] Section 82 of the Act.

deed to make – which was the submission that was made on his behalf. If that construction of the section were to be correct it would seem to follow implicitly that the legislature intended the tax court to be competent to pronounce upon that question (if only for tax purposes). Once more I have assumed in favour of the Commissioner that it is indeed competent for the tax court (and thus this court) to pronounce on the issue – which is also what his counsel submitted. With that in mind I turn to the construction of the trust deed.

[21] The parties seem at first to have applied their minds to the effect of clause 21 of the deed but that clause is not exhaustive of the enquiry. Clause 12.1 confers upon the trustees a discretion to dispose of capital of the trust in the following terms:
'The trustees shall have the right, if they in their sole and absolute discretion deem it necessary, to apply and utilize any portion of the capital of the trusts towards the purposes set out in 11.1, for the benefit of the child for whom the trust has been established and should they in their discretion deem fit, for the benefit of any of the other children, should circumstances in their opinion so warrant'.

[22] The first part of clause 11.1 provides as follows:
'The income of the trusts shall be applied by the trustees in such amounts and in such manner, for the benefit of the children and for their maintenance, well being, education, upbringing and reasonable pleasures, as the trustees may determine in their absolute discretion'.

[23] The conjunction 'and' signifies that the purpose to which income may be applied is not confined to the maintenance etc. of the children and that is not disputed by the Commissioner. Thus on the face of it clause 12.1, read with clause 11.1, could not be clearer: capital of the trust may be applied for the benefit of the children in the manner that the trustees may determine in their absolute discretion.

[24] But the Commissioner points out that clause 11.1 goes on to provide that until a child has attained the age of 21 years no income may be paid to any of the children but may be paid for their benefit. And he points out that clause 11.2 provides that 'should the trustees resolve in terms of 11.1 to pay or apply any of the income of the trusts for the benefit of any of the children' then the income 'shall accrue to the

beneficiary concerned', but the trustees may nonetheless, at their discretion, administer the funds 'as agents for the beneficiary', and may '[pay the income over to the beneficiary] from time to time … as the trustees may determine'. He also draws attention to clause 11.3, which permits the trustees to make an allowance from time to time to the guardian of the child.

[25] Thus it was submitted for the Commissioner (I use the words of counsel in his written reply to our questions) that 'what is envisaged by the application of income "for the benefit of the children" in paragraph 11.1 is either the payment of such income to a child who had attained the age of 21 years or the awarding of such income to a child in circumstances where such awarded income accrued to and vested in such child but was administered by the trustees in the name of such child, the trustees [of the trust] acting as agents for such child'. The only exception to the application of the income in that way, so it was submitted, was to pay an allowance under clause 11.3.

[26] On that basis, it was submitted for the Commissioner, so far as clause 12.1 permitted the trustees to apply capital 'towards the purposes set out in 11.1', they were permitted only to pay it to a child who had reached the age of 21 years (the second part of clause 11.1), or to award capital to a child to be administered by the trustees as his or her agent (clause 11.2), or to pay an allowance to his or her guardian (clause 11.3).

[27] In my view there is no merit in that submission. The various clauses relied upon for the submission do not relate to the purpose for which it may be used – which is 'for the benefit of the children' – but to how the income is to be dealt with if it is applied to that purpose. Clearly the donor intended those portions to apply only to the application of income and not to the application of capital as well. Had he intended them to apply to capital under clause 12.1 he would not have confined himself to a reference-back to clause 11.1 alone. Indeed, had his intention been as contended for by the Commissioner, that could have been achieved by referring in clause 11 both to income and capital and not having clause 12.1 at all.

[28] Counsel for the Commissioner also submitted that the construction of clause 12.1 that I suggested earlier is inconsistent with clause 12.2. I do not think it is necessary to elaborate on the submission. In my view it is founded upon a contorted construction of clause 12.2 that is not justified.

[29] In my view the language of clause 12.1 is clear and I see no reason to strain it – it permits the trustees in their discretion to apply capital for the benefit of the children. There is no dispute that the disposals in this case indeed benefited the children and thus the trustees were authorised to make them. It follows that the premise upon which the assessment was made was unsound and thus the decision of the Commissioner was wrong. The Commissioner advanced no other grounds for opposing the appeal. The cross appeal also falls away.

[30] The appeal is upheld, and the cross appeal is dismissed, in both cases with costs that include the costs of two counsel. The order of the tax court is set aside and substituted by an order setting the assessment aside.

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R W NUGENT
JUDGE OF APPEAL

APPEARANCES:

For appellant:	P A Solomon SC J T Boltar Instructed by: Werksmans Incorporating Jan S de Villiers, Sandton Matsepes Inc, Bloemfontein
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