REPUBLIC OF SOUTH AFRICA

IN THE TAX COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: 24863

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

…………….. …………………
DATE SIGNATURE

In the matter between:

MR X APPELLANT ("THE ESTATE")

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE RESPONDENT ("SARS")

J U D G M E N T

SENEKE AJ

[A] INTRODUCTION

[1] The appellant is the deceased estate of Mr X ("the estate"), with Master's Ref. No. ZZZ/2015.

[2] Mr X ("the deceased") passed away on 18 August 2015 without leaving a Last Will and Testament and consequently died intestate.

[3] The deceased's only daughter, Ms B is the only heir and was also appointed as the executrix in the estate of the deceased on 29 October 2015.

[B] THE ISSUE IN DISPUTE

[4] The crisp issue in this matter is whether part of the F Investment (1673 Kruger Rands) should be valued in terms of section 5(1)(*a*) or section 5(1)(*g*) of the Estate Duty Act 45 of 1955 ("Estate Duty Act").

[5] Section 5(1)(*a*) is applicable if the 1673 Kruger Rands were sold "in the course of the liquidation of the estate". If the Kruger Rands were not sold in the course of the liquidation of the estate, its value must be determined at the date of death of the deceased, in terms of section 5(1)(*g*) of the Estate Duty Act.

[6] It is common cause that:

[6.1] The market value of the 1673 Kruger Rands on the date of the deceased's death (18 August 2015) was R24 593 116.73.[1]

[6.2] The 1673 Kruger Rands were sold in different tranches between 27 May 2016 and 25 November 2016, for R31 217 453.57.[2]

[C] THE APPELLANT'S CASE IN A NUTSHELL

[7] The appellant's case is that the disposal of the 1673 Kruger Rands was not "in the course of the liquidation of the estate", for the following reasons:

[7.1] The 1673 Kruger Rands were disposed of by Ms B in her capacity as the only heir of the deceased estate and therefore it was not done "in the course of the liquidation of the estate".

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1 Dossier – 037 – 103 (para 17) – P100.

2 Dossier – 037 – 103 (para 21) – P100; Dossier – 037 – 102 (para 12) p100.

[7.2] Alternatively, if it is found that Ms B disposed of the Kruger Rands in her capacity as executrix, such disposal was not "in the course of liquidation of the estate", but rather "during liquidation".

[8] If either of the above arguments is upheld, the Kruger Rands should be valued in terms of section 5(1)(*g*) of the Estate Duty Act at R24 593 116.73.

[9] The appellant contends that section 5(1)(*g*) of the Estate Duty Act is applicable whilst SARS contends that section 5(1)(*a*) of the Estate Duty Act is applicable. The relevant provisions are set out below.

[10] Section 5(1) states:

> "The value of any property for the purposes of the inclusion thereof in the estate of any person in terms of section 3 or the deduction thereof in terms of section 4, determined as at the date of death of that person, shall be—
>
> (*a*) In the case of property, other than such property as referred to in paragraph (*f*) *bis* or the proviso to paragraph (*g*), disposed of by a purchase and sale which in the opinion of the Commissioner is a bona fide purchase and sale in the course of the liquidation of the estate of the deceased, the price realized by such sale;
>
> ...
>
> (*g*) In the case of any other property, the fair market value of such property as at the date of death of the deceased person."

Section 5(1)(*g*)

[11] Section 5(1)(*g*) of the Estate Duty Act constitutes the norm. Commissioner, *SARS v Estate Late Kelly*[3] (Estate Late Kelly) the Court held:

> "The norm is that estate duty is based on the value of the estate assets as at the date of the deceased's death."

[12] The purpose of estate duty is to tax the estate on the value thereof at the date of death of the deceased. This is corroborated by the principle that the beneficiaries in the estate acquire their vested rights at the date of death of the deceased.

[13] In *De Leef Family Trust v CIR*[4] the Court held at 358D–E that:

> "Besides, according to our modern system of administration of deceased estates, the heir or legatee of an unconditional bequest obtains a vested right (*dies cedit*) to be entitled to the

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3 [2004] JOL 12754 (SCA) Para 21 P8.

4 1993 (3) SA 345 (AD).

> 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 an enforceable right to claim payment, delivery or transfer of his bequest …"

[14] If a person dies intestate, his estate vests on the date of his death when his intestate heirs have to be determined.[5]

Section 5(1)(*a*)

[15] Section 5(1)(*a*) of the Estate Duty Act is the exception to the norm, namely that assets are valued at the date of death of a deceased person, as envisaged in section 5(1)(g) of the Estate Duty Act. In order for section 5(1)(*a*) to apply, the property must have been disposed of "in the course of the liquidation of the estate". The meaning of "in the course of the liquidation of the estate" needs to be determined.

[D] IN THE COURSE OF LIQUIDATION OF THE ESTATE

[16] Section 5(1)(*a*) of the Estate Duty Act requires that there must be a bona fide purchase and sale "in the course of the liquidation of the estate".

[17] The meaning of this term was considered in Estate Late Kelly.

[18] The facts in the Estate Kelly matter can be summarised as follows:

[18.1] Ms Kelly died in 1981 and was married out of community of property to Mr D Kelly.

[18.2] The sole executor in the estate was her surviving spouse and husband, Mr D Kelly – the Court for convenience sake refers to him as "the respondent" in the judgment.

[18.3] The assets in the estate included ten units of Karoo land on which *bona fide* farming operations were carried on. The respondent (who was also the sole executor) was the owner of an undivided half share of five of the units.

[18.4] The deceased bequeathed the land which she owned outright to her son, J Kelly and her undivided half share of the jointly owned land to their son, F Kelly. In both instances she bequeathed a *usufruct* to the respondent.

[18.5] In 1983 the respondent and J Kelly entered into a redistribution agreement involving five of the units, in terms of which, subject to the bequest price provision, they were to become the property of the respondent.

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5 *Harris v Assumed Administrator Estate Late Macgregor* 1987 (3) SA 563 (AD) at 575 B–D.

[18.6] The first and final liquidation and distribution account was submitted to the Master in Cape Town on 15 April 1985. In the account, lodged by the respondent, the five units that were the subject of the redistribution agreement, were awarded, and to be transferred, to the respondent and an undivided half share in each of the other five were awarded, and to be transferred, to F Kelly.

[18.7] The value attributed to each unit in the account was determined in accordance with a valuation by the Landbank. The total value of all ten units was shown in the account as two hundred and eighty nine thousand one hundred and seventy seven rand and fifty cents (R289 177.50)

[18.8] In 1997 the appellant (SARS) received information that the land in question had been sold in May 1984 for one million seven hundred and fifty thousand rand (R1 750 000.00). SARS then issued an assessment in terms of which estate duty of four hundred and thirty six thousand five hundred and two rand and sixty eight cents (R436 502.68) was payable.

[18.9] All ten units were sold in May 1984. They were sold, as one, for R1 750 000.00. The sellers were stated in the relevant agreement to be the respondent in his personal capacity and as *usufruct* and F Kelly as "blote eienaar". The buyer was a Mr P. Occupation was given on 1 August 1984.

[19] In paragraphs 15, 16, 17, 19, 20, 22, 23 and 25 of the judgment the Court held:

"[15] As to whether it is a matter for the appellant's opinion whether a sale is in the course of the liquidation of an estate, this question was left open in *Holden's Estate v Commissioner for Inland Revenue* 1960 (3) SA 497 (A) at 502A-B. It will be noted that the court would appear to have thought that the answer was in the affirmative. However, that can only have been its view in relation to the Commissioner's opinion as to the facts relevant to the issue of 'course of liquidation'. I say that because the meaning of the expression 'within the course of the liquidation of the estate' is clearly not a matter of fact but of law. Therefore, although constraints limit or even bar judicial interference with the exercise of a discretionary opinion, plainly it is for this Court, as it was for the court below, to interfere if the appellant took a wrong view of what the true meaning of the expression is in law. The nature and extent of such interference is another matter. I shall deal with it below.

[16] The appellant's interpretation of that expression is evident from certain letters written on his behalf to representatives of the respondent during an exchange of correspondence preceding the hearing in the Special Court. In those letters the contention is advanced that s 5(1)(*a*) applies '(i)ndien bates van die oorlede verkoop word gedurende die likwidasieproses' and that '(i)n the course of the liquidation' means 'during' the liquidation

(My emphasis)

[17] I think that interpretation is incorrect. Generally, there is in law a difference between 'during' and 'in the course of'. This is illustrated by the many cases which deal with the respective phrases 'in the course of employment' and 'in the course of business', as employed in the various legislative enactments over the years providing for third party compensation for fatal and bodily injury in motor accidents and in the formulation of the principles of vicarious delictual liability.

[19] In *Ngubetole v Administrator, Cape and Another* 1975 (3) SA 1 (A) the primary question concerned the meaning of the phrase 'in the course of employment' in the then applicable motor accident compensation legislation. In the judgment, Corbett JA explained that those words would usually, but might not always, mean the same in relation to that legislation as they did in the sphere of vicarious liability. Subject to the need for a flexible approach that could result in a satisfactory casuistic determination of when, under the legislation, an act was done 'in the course of employment', it nevertheless appeared that such an act was one done in the exercise of the functions to which the employee was appointed.

[20] On the strength of the statements in Hennop and Ngubetole to which I have referred, and the many earlier authorities which those judgments cite, I conclude that a sale 'in the course of the liquidation of the estate' in s 5(1)(a) of the Estate Duty Act means a sale between which and the liquidation process there is some relationship. Put another way, it means a sale effected in the exercise of the functions involved in the liquidation. In short, the sale must be one in implementation of the liquidation process. It must therefore be by the executor or on behalf of the executor, in the latter's capacity as executor, not in the latter's personal capacity as beneficiary.

…

[22] In the present case, of course, the properties sold include the estate's erstwhile undivided half share in five of the units. An undivided half share is not an attractive purchasing proposition to someone totally unrelated to the holder of the other half share. But that negative feature was removed by the respondent's acquisition, via the distribution agreement, of sole ownership. In these circumstances, however, the realised price was no guide at all to the market value of the deceased's half share, or, for that matter, once all the properties were bundled together, of her solely owned units. Had the disposal been by the respondent qua executor it would have been necessary for him to have regard to section 5(1) and to the need, in contemplating disposal, to consider carefully whether the estate assets were being sold for acceptable prices.

[23] These considerations militate further against construing 'in the course of' as 'during' even if there can, in theory, be scope for interpreting the same wording in different statutes to mean different things.

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[25] Quite apart from the consideration that in selling to P the respondent did not purport to act as executor but only in his personal capacity as usufructuary, and as his son, F Kelly's,

representative, the following further facts demonstrate that the sale was not in the course of the liquidation:

[1] All the units of land were sold together as one. The merx included the respondent's undivided half share in five of the units. This property was not an estate asset, it was not part of the liquidation process to sell it.

[2] It was not necessary for any estate purpose to sell any of the immovable estate assets prior to finalisation of the account.

[3] The sale was consequent upon the decision by the respondent and F Kelly to sell, pursuant to the redistribution agreement, in advance of their receiving transfer from the estate."

The appellant's assessment of Ms B's evidence

[20] In the light of the *Estate Kelly* decision it is necessary to establish in what capacity Ms B disposed of the F Investment securities, that is whether in her capacity as the sole heir of the estate or in her capacity as the executrix of the estate.

[21] The relevant dates are demonstrated by the following chronology:

[21.1]	18 August 2015	–	Mr X passed away
[21.2]	29 October 2015	–	Ms B appointed as executrix[6]
[21.3]	11 November 2015	–	Mr C appointed as agent for Ms B in her capacity as executrix – C took over all the functions of the executrix[7]
[21.4]	27 May 2016 – 25 November 2016	–	Kruger Rands disposed of in seven tranches[8]
[21.5]	12 April 2017	–	First L&D account[9]
[21.6]	7 August 2017	–	Second L&D account[10]
[21.7]	23 August 2017	–	Third L&D account[11]

[22] Ms B testified that she studied Interior Architecture and is not familiar at all with the duties and functions of an executor and therefore she appointed Mr C as her agent within two weeks from being appointed as executrix. The reason for appointing Mr C was to transfer all

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6 Appellant's trial bundle ("TB") – 038–10 P4.
7 TB – 038–40 P34.
8 Dossier 037-58 (para 54) read with dossier 037–91 P88 (para 38).
9 TB – 038 – 11 P55 – 037–16 P10.
10 TB – 038 – 18 P12 – 038–23 P17.
11 TB – 038 – 25 P19 – 038–30 P24.

the duties and functions she had as executrix to him. Mr C was familiar to Ms B, as he also acted as agent for the executor in Ms B's mother's estate.

[23] On the same day that C was appointed as an agent (11 November 2015[12]), Ms B addressed an email to Mr H at F Investment informing him that:

> "Mr C is acting as my agent on my behalf, so if needs be you are welcome to discuss things with him".

[24] The string of emails between Ms B and C demonstrates that C was fulfilling the functions of executor.

[25] The emails between Ms B and Mr C also demonstrate that the decision to sell some of the Kruger Rands was taken by Ms B in her personal capacity as heir and not as executrix. For instance, on 1 November 2016 C wrote to Ms B:

> "Is it not a good time for us to sell the Kruger rands in the estate to get cash to pay the taxes in future?"

Ms B's response on the same day was:

> "I'd rather wait until we need the money as the KRs are still moving up … I'll sell as we need the money."[13]

[26] The string of emails between Ms B and Mr H[14] demonstrates that Ms B was acting in her personal capacity when writing to Mr H. When she was acting in her capacity as executrix, she specifically mentioned that she was acting in that capacity. For instance, on 23 November 2016, Ms B sent an email[15] to Mr H stating:

> "As the executor of Mr X's estate, I request that this account 2222 be transferred to my account 3333."

(Own emphasis)

[27] Ms B's uncontested evidence was that when she instructed Mr H of F Investment to sell the Kruger Rands in issue, she acted in her capacity as heir and not as executrix. Furthermore, her uncontested evidence was that she was prepared, in her capacity as heir, to accept the liability for the estate's liabilities, including estate duty.

[28] Ms B, in her personal capacity as the only heir in her father's estate, acquired vested rights on 18 August 2015 to all the assets in the estate. Ms B, as the only heir in the estate, had vested rights to *inter alia* the 1673 Kruger Rands and these rights are transmissible, as

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[12] TB – 038–40 P35.
[13] TB – 038–45 P39.
[14] TB – 038–43 P37 – 038–67 P61.
[15] TB – 038–65 P59.

confirmed by the *De Leef Family Trust* case.[16] This was also confirmed in the *Estate V* matter.[17]

[29] In her capacity as heir, Ms B had the right to dispose of those rights.

[30] The facts demonstrate that Ms B acted in her personal capacity as heir when she gave instructions to dispose of a portion of the Kruger Rands in the period 27 June 2016 to 15 November 2016.

[31] Ms B testified that she was prepared to accept the liabilities of the estate and as the only heir, all the vested rights and assets in the estate vested in her upon her father's death. She therefore had the right to dispose of those vested rights in order to pay the estate duty.

The respondent's assessment of Ms B's evidence

[32] The appellant has repeatedly through the course of this dispute claimed that the assets were sold by Ms B in her personal capacity by virtue of her being the sole heir to estate. The appellant also repeatedly claimed that Ms B has taken over the debts of the estate for the same reason.

[33] The respondent has indicated that for Ms B to have sold the assets in her personal capacity, the assets would have to have been distributed to her through the administration of the estate. If no such distribution had taken place, the assets were never Ms B's property in her personal capacity and accordingly she had no authority to dispose of the assets in her personal capacity.

[34] The appellant has failed to provide any factual or legal grounds in support of its contentions in this regard in the Rule 32 Statement.

[35] The respondent has indicated numerous factual and legal grounds upon which the appellant's averments in this regard are proven to be without merit. These are summarised herein.

> [35.1] It is common cause that the sale of the assets took place between 27 May 2016 and 25 November 2016. It is further common cause the Final L&D Account of the estate was completed on 23 August 2017 and accepted by the Master on 5 September 2017.[18]

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[16] *De Leef Family Trust v CIR* 1993 (3) SA 345 (AD) at 358 D–E.

[17] At P287, para [21].

[18] Dossier P101.

[35.2] On 13 September 2017, the Master confirmed in writing to the appellant that there were no objections to the account and that distribution may proceed.[19]

[35.3] In terms of section 35 of the Administration of Estates Act, distribution of inheritance to the heirs of an estate may only take place subsequent to the Master confirming that there are no objections to the final L&D Account.

[35.4] Accordingly, the assets in the estate of Mr X may only have been distributed to the heir, Ms B, after 13 September 2017.

[35.5] The Kruger Rands in question had been entirely disposed of by 25 November 2016 and ceased to be assets of the estate at the time of the Master's confirmation.

[35.6] Therefore, no distribution of the assets to Ms B could possibly have taken place, and the Kruger Rands themselves were never the personal property of Ms B. She at no stage had authority to dispose of them in her personal capacity and she had no ownership in her personal capacity.

[36] The respondent avers further that for Ms B to have been in position to dispose of the assets in her personal capacity, a disposal of the same assets from the estate to her must first have taken place.[20]

[37] Had such a disposal taken place, the provisions of paragraph 40(2) of the Eighth Schedule of the Income Tax Act would also apply. This paragraph states:

> "**40. Disposal to and from deceased estate—**(2) Where an asset is disposed of by a deceased estate to an heir or legatee (other than the surviving spouse of the deceased person as contemplated in paragraph 67(2)(*a*))—
>
> (*a*) the deceased estate must be treated as having disposed of that asset for proceeds equal to the base cost of the deceased estate in respect of that asset; and
>
> (*b*) the heir or legatee must be treated as having acquired that asset at a cost equal to the base cost of the deceased estate in respect of that asset, which cost must be treated as an amount of expenditure actually incurred for the purposes of paragraph 20(1)(*a*)."

[38] The respondent states that no such disposals as set out above ever took place with regard to the assets in question, and this is not denied by the appellant.

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[19] Bundle P108.

[20] Dossier P51.

[39] The conduct of the appellant with regard to its Capital Gains Tax declaration also does not support the claim that the assets were disposed of in Ms B's personal capacity.

[39.1] It is common cause that the sale of the assets took place between 27 May 2016 and 25 November 2016. The respondent submits that these sales fall within the 2017 Income Tax Year and the disposals of the assets would have to be declared in the relevant declarations for that tax period.

[39.2] On 24 April 2017, the appellant declared the amount in dispute of six million six hundred and twenty four thousand, three hundred and thirty seven rand (R6 624 337.00) to the respondent for CGT,[21] thereby confirming its belief that the capital gain from the sale of the Kruger Rands was received by the estate for the benefit of the estate, and not by and for the benefit of the heir in her personal capacity.

[39.3] The appellant was assessed for and accepted liability for CGT with regard to these transactions.[22]

[39.4] The appellant therefore admits that the disposal took place from the estate and not from the heir. Accordingly, the claim that the assets had been disposed of by Ms B in her personal capacity is without factual or legal support.

[40] Therefore, the appellant's contentions that Ms B sold the property in her personal capacity and took over the liabilities of the estate are unfounded.

[41] That Ms B had no right to dispose of the assets in her personal capacity is abundantly clear. What Ms B did have at all material times was:

[41.1] The custody and control over the assets of the estate in her capacity as executor in terms of section 26 of the Administration of Estates Act;

[41.2] The obligation to pay the creditors of the estate in her capacity as executor in terms of section 35(12) of the Administration of Estates Act; and;

[41.3] The authority to dispose of the assets to meet the obligation in her capacity as executor in terms of section 47 of the Administration of Estates Act.

[42] Consequently, the actions undertaken by Ms B could only have been performed in her capacity as executor.

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[21] Bundle P22 & P23.

[22] Dossier P18.

[43] The appellant states in its Rule 32 Statement as follows:

> "The executrix had no instructions or obligation to liquidate the assets of the estate. Therefore, there was no liquidation of the estate, i.e. selling all the assets in the estate and thereafter transferring the money to the beneficiaries. Even if the Kruger Rands were disposed of by Ms B in her capacity as executrix (which is denied), it was not done "in the course of the liquidation of the estate", as envisaged in section 5(1)(*a*) of the Estate Duty."

[44] The respondent submits that the appellant is incorrect in suggesting that an executor requires instructions to conduct his or her duties with regard to the administration of the estate.

[45] Section 47 of the Administration of Estates Act states as follows:

> "**47 Sales by executor—**Unless it is contrary to the will of the deceased, an executor shall sell property (other than property of a class ordinarily sold through a stock-broker or a bill of exchange or property sold in the ordinary course of any business or undertaking carried on by the executor) in the manner and subject to the conditions which the heirs who have an interest therein approve in writing…"

[46] The appellant has admitted that the sale of the Kruger Rands was undertaken to satisfy the liabilities of the estate and to cover the administration costs of the estate. The payment of estate liabilities is an obligation in the ordinary course of business carried on by the executor as stipulated in section 35(12) of the Administration of Estates Act, and accordingly, no approval from an heir is required.

[47] Ms B, with reference to her testimony and to her own documentation:

[47.1] indicated in cross examination that it was her decision to sell the assets in question;

[47.2] confirmed in writing in her emails her willingness to sell the Kruger Rands in the manner that they were; and

[47.3] stated categorically in her evidence that she regarded those emails to be sent by herself in her capacity as heir.

[48] It is therefore incorrect to state that the sale took place without instruction, though it is the respondent's position that no such instruction is required.

[49] The appellant is wrong in stating that there was no obligation on the executor to dispose of the assets in question.

[50] In terms of section 35(12) of the Administration of Estates Act, the executor is obliged to settle the liabilities of the estate.

[51] The heir, Ms B, did nothing in this matter to release the executor of this obligation, as it has been shown that she did not take over the liabilities of the estate, and did not pay into the estate an amount sufficient to allow the estate to pay its debt without liquidation of the assets concerned.

[52] The appellant has indicated no alternative means by which the obligation to pay the debts would have been met, and has admitted that the Kruger Rands were sold to pay the debts of the estate.

[53] Accordingly, the executor did have an obligation to liquidate assets, and the sales in question were undertaken in fulfilment of such obligation.

[54] The appellant has failed to prove that its pleaded claim that the executor was under no instruction or obligation to liquidate the assets of the estate is either relevant or true. However, even if the appellant had established this, it would still need to prove that the transaction itself falls outside section 5(1)(*a*) of the Estate Duty Act, and would have to prove that it does not meet the test provided in precedent.

[55] In doing so appellant has attempted to place reliance on the authoritative SCA Judgement of *C:SARS v Estate Late Kelly*, wherein a surviving spouse was both the executor of the deceased estate and was bequeathed a usufruct over estate property.

[56] The estate property was bundled with property of surviving spouse in Kelly and sold on to a third party. The revenue authority sought to assess the estate for Estate Duty on the proceeds of the sale in terms of section 5(1)(*a*) of the Estate Duty Act.

[57] The legal argument in Kelly centred on the whether there is a distinction between “in the course of the liquidation of the estate”, as worded in the statute, and “during” the liquidation. The revenue authority in that matter submitted that there was no distinction between these concepts.

[58] The Court, in determining whether the concepts are distinct, proceeded to provide a definition for “in the course of the liquidation of the estate” for the purpose of the application of section 5(1)(*a*) of the Estate Duty Act. The exercise in formulating this definition was said by the Court to be legal and not a factual exercise, and a comparison of the usage of the term “in the course of” as found in other pieces of legislation was undertaken.

[59] The SCA defined “in the course of the liquidation of the estate” for the purpose of the application of section 5(1)(*a*) of the Estate Duty Act as follows :

> “I conclude that a sale "in the course of the liquidation of the estate" in section 5(1)(*a*) of the Estate Duty Act means a sale between which and the liquidation process there is some

> relationship. Put another way, it means a sale effected in the exercise of the functions involved in the liquidation. In short, the sale must be one in implementation of the liquidation process. It must therefore be by the executor or on *C:SARS v Estate Late HE Kelly* (66 SATC 282) behalf of the executor, in the latter's capacity as executor, not in the latter's personal capacity as beneficiary."

[60] This legal conclusion above is of no benefit to the appellant in our case, as it does not confer upon the heir or the executor the right to prescribe the categorisation of the sale. It confirms that a sale in the course of the liquidation of an estate in terms of section 5(1)(*a*) must have taken place as a function of the executor and not in the personal capacity of beneficiary for it to be in the course of the liquidation of the estate.

[61] The appellant in our case has admitted that the sale of the Kruger Rands was undertaken to pay the liabilities of the estate and to cover the administration costs of the estate.

[62] The respondent submits that the management of the liabilities and administration of the estate is inherently the function of the executor[23] and not the responsibility of an heir.

[63] The appellant's reliance on Kelly therefore falls at the first hurdle of the legal requirement, as the sales in question were fundamentally in the function of the executor and could not have been undertaken in the personal capacity of the beneficiary.

[64] On the application of its own definition set out above to the particular circumstances of the case before it, the SCA in Kelly thereafter undertook a factual analysis of the matter to determine if the definition was met.

[65] In finding that the definition was not met and that the sale was not one in course of the liquidation of the estate, the Court relied *inter alia* on two relevant facts pronounced on as follows:

> "…the following further facts demonstrate that the sale was not in the course of the liquidation:
>
> 1. All the units of land were sold together as one. The merx included the respondent's undivided half share in five of the units. His property was not an estate asset. It was not part of the liquidation process to sell it.
>
> 2. It was not necessary for any estate purpose to sell any of the immovable estate assets prior to finalisation of the account…"

[66] In our case at hand, all disposed assets in question in these proceedings were estate property and were not at any time or in any manner the property of Ms B in her personal capacity.

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[23] Administration of Estate Act 66 of 1965 Sections 26 & 29.

[67] Further, in our case at hand, the appellant has admitted that the sale was necessary to pay the taxes and administrative costs of the estate.

[68] The appellant's case therefore fails to find support in Kelly on a factual basis.

[69] In the absence of any legal or factual congruence between the appellant's case and the authority, there is no basis on which the appellant can rely on Kelly.

[70] The case of Kelly confirms that SARS opinion that the sale was in course of the liquidation of the estate is correct, in that:

[70.1] The sale could only have been undertaken by an executor;

[70.2] The sale only involved estate assets which the heir had no ownership over; and;

[70.3] The sale was necessary to cover the debts of the estate.

The Court's assessment of Ms B's evidence

[71] In the circumstances of this case I agree with the analysis and approach of the respondent that the sale of the Kruger Rands to pay off the administration costs took place in the course of the liquidation of the estate.

[72] The case of Kelly is distinguishable from the current case as stated by the respondent. The Kruger Rands were assets of the estate and were not at any time or in any manner the property of Ms B in her personal capacity.

[73] The capital gains tax (CGT) in the disputed amount of R6 624 337.00 from the sale of the Kruger Rands which was declared by the appellant to the respondent was received by the estate for the benefit of the estate, and not by and for the benefit of Ms B of her personal capacity.

[74] The objective facts, overall context and assessment of this case point towards one outcome and conclusion that Ms B acted in her official capacity as an executrix in disposing of the Kruger Rands to settle the debts and liabilities of the appellant. Ms B's attempt to split her role as an executrix and as an heir is not based on sound factual and legal basis and no evidential weight can be accorded to what amount to the obfuscation of the objective facts.

[75] I accordingly come to the conclusion that the appeal must be dismissed with costs.

Costs

[76] Section 130(1) of the Tax Administration Act (TAA), which states as follows:

"**130. Order for costs by tax court—**(1) The tax court may, in dealing with an appeal under this Chapter and on application by an aggrieved party, grant an order for costs in favour of the party, if—

(*a*) The SARS grounds of assessment or "decision" are held to be unreasonable;

(*b*) The "appellant's" grounds of appeal are held to be unreasonable;

(*c*) The tax board's decision is substantially confirmed;

(*d*) The hearing of the appeal is postponed at the request of the other party; or

(*e*) The appeal is withdrawn or conceded by the other party after the "registrar" allocates a date of hearing."

Order

1. The appeal is dismissed;
2. The Estate Duty assessment is confirmed;
3. The appellant is to pay costs in terms of section 130 of the TAA.

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TD SENEKE AJ

Acting Judge of the High Court

Gauteng Division, Pretoria

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Isaac Nkama (Assessor)

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Thulisile Njapa Mashanda (Assessor)

Date of delivery: 11 December 2020