Reportable:	**YES** / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division)

Case number: **IT** 12399
Date delivered: 1 December 2008

In the Tax Court, Kimberley:

XXX TRUST **Appellant**

and

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

JUDGMENT

LACOCK J:

[1] On 16 March 1992 the testatrix and her husband executed a joint will in terms w hereof they disposed of their estate as follows:

> *"4. Ons bemaak vooraf by die afsterwe van die eers-sterwende van ons aan die langslewende, al ons persoonlike besittings, huisraad, ameublement, breekgoed, tafel- en kombuisgereedskap, boeke, skilderye en prente, huislinne en huishoudelike besittings, juwele vuurwapens en privaat motorvoertuig.*

*5. Die restant van die boedel van die eerssterwende nadat alle kostes betaal is, word deur die **XXX Trust** vererf, onderhewig egter aan die vruggebruik van die langslewende van ons tot met haar of sy dood en daarna vir een jaar aan ons seun **Mr XXX Jnr** waarna die vruggebruik verval.*

*6. Indien ons gelyktydig of binne dertig (30) dae na mekaar te sterwe kom, bepaal ons dat die nalatenskap van ons die testateure in geheel sal toekom aan die **XXX Trust.***

*7. Ons verleen hiermee aan die langslewende van ons en aan ons seun **Mr XXX Jnr** die reg om enige bates uit die boedel aan te koop."*

2. The testatrix died on 10 June 2003. Mr XXX Snr the surviving spouse, is still alive.

3. At the time of her death, the appellant, the XXX Trust, was indebted to the testatrix, on a loan account, the sum of R539 189.00. It is common cause that the executor in the estate did not demand and / or receive payment of this claim from the appellant for purposes of the winding up of the estate of the executrix. In the liquidation and distribution account this debt had been reflected as a "vordering toegeken" (claim awarded/allocated) to the appellant as the sole heir to the residue of the estate. The relevant portions of the L & D account read as follows:

"

BOEDELNOMMER $#@/ 2003

ROERENDE EIENDOM TOEGEKEN			
3 700 OU MUTUAL AANDELE	*1*	*43 068.00*	
203 ISCOR BPK AANDELE	*2*	*3 674.30*	
133 KUMBA RESOURCES LTD AANDELE	*3*	*4 495.40*	
TOEGEGEKEN EN OORGEDRA TE WORD SOOS VOLLEDIG IN DIE DISTRIBUSIEREKENING GETOON			
TOTAAL ONROERENDE EIENDOM TOEGEKEN		_____	*51 237.70*
ROERENDE EIENDOM VERKOOP			
1 391 SENWESBEL AANDELE	*4*	*695.50*	
2 782 SENWES AANDELE	*5*	*1 391.00*	
GEVORDER			
TOTAAL ROERENDE EIENDOM VERKOOP		_____	*2 086.50*
VORDERINGS TOEGEKEN			
LENINGSREKENING IN SPAARWATER GARAGE BK.	*6*	*1 299 840.00*	
LENINGSREKENING IN XXX TRUST	*7*	*539 189.00*	
AFKOOPWAARDE OU MUTUAL POLIS NOMMER	*8*	*6 992.00*	
TOEGEKEN EN OORGEDRA TE WORD SOOS VOLLEDIG IN DIE DISTRIBUSIEREKENING GETOON			
TOTAAL VORDERINGS TOEGEKEN		_____	*1 846 021.00*
VORDERINGS INGEVORDER			
ABSA TJEKREKENING NOMMER	*9*	*5 915.36*	
ABSA GELDMARKREKENING NOMMER.....	*10*	*97 872.96*	
ABSA VASTE DEPOSITO NOMMER	*11*	*17 887.84*	
OU MUTUAL POLIS NOMMER	*12*	*184 642.35*	
OU MUTUAL POLIS NOMMER	*13*	*113 537.28*	
OU MUTUAL POLIS NOMMER	*14*	*34 496.59*	
MOMENTUM POLIS NOMMER	*15*	*6 059.74*	
GEVORDER			
TOTAAL VORDERINGS INGEVORDER		_____	*460 412.12*
TOTALE BATES			*2 359 757.32*
LASTE			
ADMINISTRASIEKOSTE			
MEESTERSGELDE		*600.00*	
EKSEKUTEURSLOON			
ONS VERHAAL SLEGS 1.75% VAN			

R2 359 757.32			
BTW 14% VAN R41 295.75		*41 295.75*	
BANKKOSTE		*5 781.40*	
POSGELD EN DIVERSE UITGAWES		*271.74*	
ADVERTENSIEKOSTE DEBITEURE EN KREDITEURE		*150.00*	
STAATSKOERANT			
VOLKSBLAD		*18.00*	
ADVERTENSIEKOSTE VAN HIERDIE REKENING TER INSAE	*16*	*222.96*	
WAARDASIE B O E	*17*	*240.96*	*48 649.21*
	18	*68.40*	
EISE			
KIMBERLEY INGELYF	*19*	*2 565.00*	
Mr XXX SnrT	*20*	*700.00*	
SAFFAS VIR BEGRAFNISKOSTE	*21*	*6 203.28*	*9 468.28*
TOTALE LASTE			*58 117.49*
BOEDELBELASTING			*NUL*
BALANS IN DISTRIBUSIE			*2 301 639.83*
			2 359 757.32
REKAPITULASIE-OPGAWE			
BATES GEVORDER			*462 498.62*
TOTALE LASTE		*58 117.49*	
BOEDELBELASTING		*NUL*	
KONTANT SURPLUS		*404 381.13*	
		462 498.62	*462 498.62*
DISTRIBUSIEREKENING			
BALANS VIR VERDELING			*2 301 639.83*
AAN DIE XXX TRUST NOMMER T…., DIE HELE BALANS VIR VERDELING KRAGTENS DIE BEPALINGS VAN DIE GESAMTENLIKE TESTAMENT VAN DIE OORLEDENE EN NAGELATE EGGENOOT GEDATEER 16 MAART 1992 EN ONDERHEWIG AAN DIE VOORWAARDES DAARVAN			
DIE BEMARKING BESTAAN UIT			
ROERENDE EIENDOM R 51 237.70			
VORDERINGS TOEGEKEN R1 846 021.00			
OPGAWE ***R 404 381.13***			
		2 301 639.83	
		2 301 639.83	*2 301 639.83*

The account was finalised on 16 February 2004, and the estate was wound up in terms thereof shortly thereafter.

4. On 6 October 2005 the respondent issued a notice of assessment to the appellant in terms whereof he was taxed in terms of section 26A of the Income Tax Act, no 58 of 1962 (the Act) for capital gain on the aforesaid amount of R539 189. 00. The appellant's liability for payment of capital gains tax on this portion of its inheritance constitutes the subject of the appeal.

An appeal by the appellant to the Tax Board against this assessment failed.

5. Sec 26A of the Act provides as follows:

"***Inclusion of taxable capital gain in taxable income -***

There shall be included in the taxable income of a person for a year of assessment the taxable capital gain of that person for that year of assessment, as determined in terms of the Eighth Schedule."

The parties hereto are ad idem that the only relevant provisions of the Eighth Schedule (the schedule) to the Act, are the following:

5.1 The definition of "disposal" as defined in paragraph 1 of the schedule:

"means an event, act, forbearance or operation of law envisaged in paragraph 11 or an event, act, forbearance or operation of law which is in terms of this Schedule treated as the disposal of an asset, and ***"dispose"*** *must be construed accordingly;*

5.2 The following definition of "disposal" in paragraph 11 of the schedule,

"Disposals *- Any event, act, forbearance or operation of law which results in the creation, variation, transfer or extinction of an asset, and includes-*

(a) the sale, donation, expropriation, conversion, grant, cession, exchange or any other alienation or transfer of ownership of an asset;

(b) the forfeiture, termination, redemption, cancellation, surrender, discharge, relinquishment, release, waiver, renunciation, expiry of abandonment of an asset;"

5.3 The following portions of paragraph 12(5) of the schedule,

"(a) Subject to paragraph 67, this subparagraph applies where a debt owed by a person to a creditor has been reduced or discharged by that creditor –

(i) for no consideration; or
(ii) …….

(b) Where this subparagraph applies the person contemplated in item (a) shall be treated as having –

(i) *acquired a claim to so much of that debt as was reduced or discharged for no consideration*, and…"

5.4 Paragraph 40, in terms whereof a deceased person, a deceased estate, an heir or legatee are, subject to a number of exemptions and conditions, treated as having disposed of property or of acquiring property for purposes of the provisions of the schedule.

6. The respondent contends that, in terms of the will, the debt owed by the appellant to the testatrix had been discharged for no consideration and that the appellant had acquired that claim for no consideration as contemplated in paragraph 12(5) of the schedule. Therefore, according to the respondent, the appellant is liable for payment of capital gains tax on the value of such claim.

In support of its aforesaid argument the respondent relied heavily on the judgement in Income Tax Case No. 1793 (Gauteng Tax Court) in which matter **Bertelsman J** found in favour of South African Revenue Service that a trust was liable for payment of capital gains tax on a bequest made to it by a testatrix in her will reading:

"1. Erfgename

Ek bemaak my boedel soos volg:

1.1 Enige bedrag wat die ABC Familie Trust onder leningsrekening aan my verskuldig mag wees, aan gemelde trust".

7. Mr Muller on behalf of the appellant argues that the wording of the will in this matter differs fundamentally from the wording of the will in the aforesaid matter, and that that case is therefore to be distinguished from the present matter. It is further submitted that the solution to the issue at hand is to be found in the wording of the will and not in the method employed by the executor in wounding up the estate.

8. Mr Stevens for the respondent conceded that, had the executor demanded and received payment of the debt due by the appellant to the estate, capital gains tax would not be payable on the amount of R539 189.00 inherited by the appellant as part of the residue of the estate. He however submitted that, in terms of the wording of the will, the executor correctly elected not to collect the debt from the appellant, but to award the loan account to the appellant, thereby rendering the appellant liable for payment of capital gains tax on the value thereof.

9. Mr Stevens as well as Mr Muller for the appellant were ad idem that the intention of the testatrix as expressed in the will, is to be regarded as the decisive factor for the solution to the issue under consideration. There can be no doubt that a court in construing a will is to ascertain the intention of the testator/testatrix from the words used in the will. See **Greenberg & Others v Estate Greenberg** 1955 (3) SA 361 (A) at 365H; **Cuming v Cuming & Others**, 1945 AD 201 at 206; **Dison NO and Others v Hoffman & Others NNO**, 1979 (4) S.A. 1004 (AD) at 1028 H to 1029 A:

> *"In view of the linguistic imperfections of this will which I have pointed out, it seems to me that it would be dangerous to construe this will by a process of painstakingly endeavouring to assign a meaning to every word or of attaching special significance to the use of the plural or singular number or to a particular expression used in the will. From a linguistic point of view the proper approach to adopt in the present case would be, in my view, to take a broad view of all the provisions in the will, to eschew a meticulously literal approach to every word or expression used and to determine the general scheme of the will. After all, the cardinal rule of construction is to ascertain the intention of the testator. It is true that, basically, the duty of the Court is to ascertain, not what the testator meant to do when he made his will, but what his intention was as expressed in his will."*

Furthermore, a court is not to consider the wording of a will in vacuo, but is to consider the wording thereof whilst placing itself as far as possible in the position of the testator/testatrix at the time of the execution

thereof. **See ex parte Sadie**, 1940 AD at 26 at 31; **Ex parte van Zyl**, 1974 (4) S.A. 798 (C) and the authorities cited at 801 H to 802 E.

10. To my mind the wordin g of the will is clear and unambiguous. I n pa ragraph 4 t hereof certain p ersonal items are bequeathed to the surviving spouse. The contents of t his para graph pose no dif ficulty a nd t he intention of the testators as expressed herein, is clear.

10.1 So too i s the w ording of paragraph 5. It may be said that the word "d eur" should be read as "aan", alternatively that the word "vererf" should be read as "geërf" to grammatically make more sense,

(See Campbell v Daly and Others, 1988 (4) S.A. 714 (TPD) AT 719 I : *"If the testator's intention is poorly expressed it may be ascribable to poor draftsmanship. In such cases our Courts have adopted a benevolent approach with a view to lending validity to testamentary dispositions rather than to have them struck down as invalid because of vagueness or uncertainty)"*,

but to my mind the intention of the testators is clear, viz that the resi due of the estate is bequeathed to the appe llant as the sole heir thereof, subject to the usufruct in favour of the surviving spouse and the son.

10.2 The meaning of the word "residue" ("restant") is well known when used in the context of a testamentary disposition. It generally connotes that portion of an estate that remains after provision had been made for direct bequests and legacies, as well as the payment of estate liabilities and administration costs. See Pace et al; "Wills and Trusts" at A38; and **Lockhat's Estate v North British and Mercantile Ins. Co. Ltd.** 1959 (3) S.A. 295 (AD) at 302 F.

10.3 What is therefore clear from the wording of the will, is that it was the intention of the testatrix that her claim against the appellant (her loan account) was to form part of the residue in the estate. This claim was not separately bequeathed to the appellant as a legacy.

11. Besides the unambiguous wording of the will, there are probabilities indicative thereof that it was not the intention of the testatrix to specially bequeath the debt represented by her loan account to the appellant as a legatee.

11.1 Mr Heyns, a chartered accountant, who was for approximately 10 years the auditor of both the appellant and the testators, testified that, as reflected in the financial statements of the

appellant, the loan in question was payable to the testatrix on demand. He further testified that the appellant was at all times financially able and in a liquid position to repay the loan had the testatrix demanded payment thereof before her death.

This evidence was tendered not to interpret the will, but as circumstantial evidence relevant for the Court to be placed "in the arm-chair of the testatrix". The admissibility of such evidence is trite. See **Cuming v Cuming and Others** (supra) at 210; **Ex parte Loest**, 1960 (1) S.A. 688 (CPD) at 689 E – H; **Ex parte Van Zyl**, (supra) at 801B to 802E; and the authorities cited in **Will N.O. v The Master & Others**; 1991(1) S.A. 206 (CPD) at 210.

The testatrix was therefore, before her death, entitled to demand payment of the loan or a portion thereof. There is nothing indicative thereof that the indebtedness of the appellant was to remain a definite or fixed sum of money or could not be recovered. It could have varied from time to time, or could even be settled.

11.2 It is unknown whether the debt was *in esse* at the time of the execution of the will. However,

if one is to accept that it existed at the time and that the testatrix intended to bequeath same to the appellant, one would have expected her to have explicitly provided for this in the will.

On the other hand, if the debt was not *in esse* at the time of the execution of the will, *cadet quaestio*.

11.3 The will was a joint will of the testatrix and her husband. The relevant debt was due by the appellant to the testatrix and not to her husband. (This much is borne out by the financial statements of the appellant). The testators jointly disposed of the residue of their estates in this joint will. This is indicative thereof that they had no bequeaths in mind of any of their individual or separate assets to either the appellant or any other person, other than those referred to in paragraph 4 of the will.

11.4 If it was the intention of the testatrix to relinquish the claim in favour of the appellant, she could easily have expressed that intention in the will. This, however, she failed to do.

11.5 In paragraph 4 of the will, in dealing with specific assets, the testators employed the

words "Ons bemaak vooraf" (my emphasis) whereas in paragraph 5 where they dealt with the residue, the word "vererf" is employed. This, to my mind, is a further indication that they did not intend to specially bequeath the relevant claim to the appellant.

12. By reason of the aforesaid, I am satisfied that it was not the intention of the testatrix to specially bequeath the claim in question to the appellant. I therefore conclude that the claim of the testatrix under her loan account formed part of the residue of the estate, and that it was not her intention to dispose of this claim in favour of the appellant for no consideration as contemplated in paragraph 12(5) of the Eighth Schedule to the Act. The judgement in Tax Case No. 1793 (supra) therefore finds no application to the facts in this matter.

13. What remains to be considered in this matter is whether the method employed by the executor in the winding up of the estate whereby the relevant claim was not recovered from the appellant, but merely awarded to the appellant as the sole residuary heir to the estate, brings this "award" within the purview of paragraph 12(5) of the schedule.

13.1 It had been conceded by Mr Stevens that, had the executor recovered the claim and the

proceeds thereof deposi ted in the estate account, the de bt woul d have become settled and no que stion of a di scharge of t he debt f or no conside ration woul d have ari sen. H e however submit ted that the executor was not authorised in the will to recover the debt, and had no choice but to award the claim to the appellant for no consideration as contemplated in paragraph 12 (5) of the schedule.

To my mind, this subm ission is void of any substance.

13.2 It is the duty of an executor to wind up an estate in accordance w ith the will of a testator or testatrix. This duty requires an executor to inter alia recover debts due t o t he de ceased, t o pay all debts due by the deceased and to defray all administration costs and duties. (See sectio n 35 of the Administration of Estates Act, No. 66 of 1965). In the exercise of his/her duties, an executor ha s a wide d iscretion rega rding t he manner of windi ng up a n estate. See **Veltman & Others V Cooksey**, 1969(3) S.A. 163 (R), at 166H; and **Bramwell and Lazar**, **NNO v Laub**, 1978 (1) S.A. 380 (WLD),

> "*It is to be remembered that an executor has a wide discretion, with which the Court will not*

lightly interfere, as to the manner in which he handles an estate" (at 385H).

To suggest that an executor is only entitled to fulfil his/her duties in a manner as prescribed in the will, is simply untenable. It goes without saying that an executor is obliged to carry out the wishes of a testator as expressed in the will, but he enjoys a discretion regarding the manner of carrying out those wishes.

In casu it is evident from the liquidation and distribution account that the executor had sufficient funds in the estate to meet all claims and to pay all administration costs. It was therefore not necessary for the executor to recover the relevant debt for purposes of paying estate debts or costs. Since the appellant was the sole heir to the residue in the estate, it appears from the liquidation and distribution account that the executor merely awarded the claim under the loan account to the appellant, instead of following the more expensive route of recovering same, only to repay it to the appellant again. The end result would have been exactly the same.

The executor was entitl ed not to realise this asset since the proceeds thereof was not necessary to meet estate liabilities.

> *"…there is no duty imposed upon the executor to turn all the assets into money. It is merely his duty to liquidate the estate, and an estate is liquidated when it is reduced into possession cleared of debts and other immediate outgoings and so left free for enjoyment by the heirs". (**Ex Parte Olivier, N.O.** 1928 S.W.A. 123 at 124)*

> *"The duty of an executor who has been appointed to administer the estate of a deceased person is to obtain possession of the estate of that person, including rights of action, to realise such of the assets as may be necessary for the payment of the debts of the deceased, taxes, and the costs of administering and winding up the estate, to make those payments, and to distribute the assets and money that remain after the debts and expenses have been paid among the legatees under the will or among the intestate heirs on a intestacy."* ***(*Lockhat's Estate v North British & Mercantile Insurance (supra) at 302 F) (my emphasis).**

If however it was necessary for the executor to recover the debt for purposes of defraying estate liabilities and/or costs, he would be duty bound to recover same, since this claim formed part of the residue in the estate and the residue had to be utilised for this purpose before any legacies can be realised for payment of liabilities.

13.3 The crisp answer to whether the manner in which the executor administered the estate could be decisive for the question whether capital gains tax is payable on an award such as the one in question, is however to be found in the wording of paragraph 12(5) of the schedule itself. What is required in terms of this paragraph is an act by a creditor whereby he/she consciously intended to discharge a debt for no consideration. The determining factor is the intention of the creditor whereby he/she disposed of a debt or an asset, and not the subsequent manner in which that creditor's estate may be administered. I have already dealt with what the intention of the testatrix was as unambiguously expressed in the will.
(Cf **CIR v Malcomes Properties,** 1991 (2) S.A. 27 (AD))

14. Mr Muller submitted that the respondent should be ordered to pay the appellant's costs, since, so Mr Muller argues, the opposition, to the appeal was unreasonable and unwarranted. I do not agree. The matter is not a clear cut one, and I do not regard the opposition thereto as unreasonable. To my mind the distinction between this matter and the aforesaid Tax Court Case No. 1793 is marginal and the respondent can not be regarded as unreasonable in its approach to rely on that case. The respondent furthermore, and on reasonable grounds, relied on the structuring of the liquidation and distribution account of the executor, which lend support to its stance taken herein. I am therefore not prepared to accede to Mr Muller's request.

15. Wherefore the following order is made:

15.1. THE APPEAL SUCCEEDS, AND THE FINDING OF THE TAX BOARD IS SET ASIDE.

15.2. THE ASSESSMENT OF THE RESPONDENT WHEREBY THE APPELLANT WAS ASSESSED FOR PAYMENT OF CAPITAL GAINS TAX ON THE AMOUNT OF
R539 189-00, IS SET ASIDE.