case (eg *Moosa* v *Duma and the Vereeniging Municipality* 1944 TPD 30 at 39) where a question of interpretation may be involved in having to ascertain whether the servant was, at the relevant time,

"improperly carrying out what he was employed to do; and not that he was acting out of personal malice or caprice."

Human's case seems to me to be a clear case of a legal interpretation relating to the nature of the contract entered into between employer and employee, particularly as regards week-end leave and the return therefrom to work. No such legal matter arose in the present case, where the court *a quo* found as a fact that the workman was injured "as a result of the larking", and that this fell outside the scope of his employment. In my opinion such a finding is purely one of fact, and accordingly a finding which is not and cannot now be held to be in dispute. In the phraseology of *Moosa's* case *supra*, appellant was found as a fact to have acted out of "caprice". His fall was found to have been directly attributable to such act. I do not think that the many cases quoted to us, relating in the main to cases where an innocent plaintiff was injured by a co-workman and where the inquiry was whether such co-workman was acting within or beyond the scope of his duty at the relevant time, are of much assistance to a decision in this case.

Mr *Hugo* has referred us to the evidence given by witnesses in this case and in particular to passages in such evidence which indicate that the appellant's "turn" referred to in para 1.6 of the findings may have been a manoeuvre executed by appellant in the performance of his work. It seems clear from the evidence that appellant had been engaged in making deliveries of documents at various offices, that he had completed a delivery at the office where the fall took place and that it was his duty to carry on making deliveries to other offices. It seems also to be common cause and not in dispute that appellant suffered from a disability consisting of a short right leg and a frail right arm. It is also not in dispute that in the interchange of playful teasing the appellant tapped Venter on the shoulder and then moved away during which manoeuvre he turned, stumbled, tried to catch at the door-frame, and fell. Miss De Vos, whose evidence was accepted by the court, said, *inter alia*:

"Nadat mnr Grobbelaar vir mnr Venter op die skouer getik het het hy probeer wegkom. Hy het omgedraai na die deur se kant toe, toe struikel hy. Toe wil hy die kosyn vang dat hy nie verder val nie en dit misgevang."

Mr *Hugo* has referred us to passages in Venter's evidence (evidence also accepted by the court *a quo*) which seems to indicate that the appellant had completed the horseplay, had turned to go out and, in the process of turning, stumbled and fell. Mr *Hugo's* argument is that on an acceptance of such evidence it then becomes a matter of interpretation as to whether appellant was injured in the course and scope of his duties. Such an argument, in my opinion, loses sight of the basic facts found proved. It is purely a question of fact as to what the circumstances were which caused appellant to fall. If this Court now has to decide this fact differently from the court *a quo* and hold that when he turned around he had completed his horseplay and had executed this manoeuvre in the performance of his duties, this Court would be entering into the realms of the disputes of fact and would be making its own findings in this regard. This Court is precluded from so doing.

Mr *Hugo* has argued that the finding under para 1.8 above is not really a finding of fact but is an inference drawn from facts and is accordingly a matter of law. While it may well be that in certain cases inferences drawn from proved facts may be questions of law, it is not so in every case. Each case has to be decided upon its own facts in order to determine whether or not an inference drawn from proved facts is a matter of law or not. As Lord DENNING says in *R* v *National Insurance Commissioner* (1977) 2 All ER at 420:

"Quite often the primary facts are not in dispute; or they are proved beyond question: but the inference from them is matter of law."

In my opinion the finding under para 1.8 is purely one of fact. The finding relates directly to the circumstances of the fall. Even if portion of such finding is inferential, it nevertheless, in the circumstances of this case, remains one of fact. What the court *a quo* has found is that the workman's conduct was, on the facts, outside the scope of his duties. These facts cannot be challenged in this Court and in my opinion the appeal must accordingly fail.

I would like to add that I arrive at this conclusion with some regret. If regard is had to the evidence before the court *a quo*, particularly the evidence of Venter (which the court *a quo* accepted), then it is my view that the weight of the evidence supports the view that appellant had completed his joking and had turned to leave – as his work required him to do – when he stumbled and fell. This is in accordance with how I read Venter's evidence. It is certainly not against the probabilities, especially if one has regard to appellant's disabilities. But I am precluded by the provisions of s 25 of the Act from any analysis of or consideration of such facts in this appeal. Right or wrong, the facts found by the court *a quo* stand and cannot be challenged.

In the circumstances, the appeal is dismissed with costs.

VAN REENEN J concurred.

Appellant's Attorneys: *John & Kernick*. Respondent's Attorney: *State Attorney*.

OGUS v SECRETARY FOR INLAND REVENUE

(TRANSVAAL PROVINCIAL DIVISION)

1978 *February* 1; *April* 17 BOSHOFF AJP, MARGO J and PHILIPS AJ

Revenue—Donations tax—"Deemed to be" in s 62 (1) of Income Tax Act 58 of 1962—Such meaning "considered" or "regarded"—Section 62 (1) (d) *of Act—Such concerned with conditions which reduce the value of the property donated and not with the value of the donation.*

Revenue—Donations tax—"Consideration" in s 58 of Act 58 of 1962—Such used in the sense of a "quid pro quo", *compensation or reward having some value.*

Revenue—Donations tax—Donor, in terms of a trust deed, donating R100 000—Clause in trust deed providing that it was "an express condition of the donation . . . that the trust shall be liable for and shall indemnify him against all liability for donations tax in respect of the donation . . ."—Nature and effect of clause—Section 62 (1) (d) *of Act 58 of 1962 not applicable thereto—Section 56 (1)* (h) *also not applicable—Cannot be said that portion of R100 000 to be used for payment of donations tax was not a donation at all, but a means of procuring payment of a legal obligation of donor—Clause not tantamount to payment of donations tax by the donor by his own cheque—Nothing in trust deed warranting view that donor disposed of R100 000 to the trustees for a consideration of the kind contemplated in s 58 of Act—Donor liable for donations tax on amount of R100 000 and not on that amount less amount provided for payment of such tax.*

In its context the expression "deemed to be" in s 62 (1) of the Income Tax Act 58 of 1962 is to be taken not in any special sense, but in the ordinary sense of "considered" or "regarded".

Section 62 (1) (*d*) of Act 58 of 1962 deals with property which has a fair market value and the proviso deals with such property, the market value of which can be reduced in consequence of the donation because of conditions imposed by the donor. It is concerned with conditions which reduce the value of the property and not of the donation. Whatever meaning is assigned to the word "conditions" in s 62 (1) (*d*), in its present context it can only relate to a stipulation or provision annexed to or included in the contract of donation which can reduce the fair market value of the property.

In the context of s 58 of Act 58 of 1962 the word "consideration" is used in the sense of a "*quid pro quo*", compensation or reward having some value. Otherwise no reduction in the value of the donation can be made in respect thereof.

In terms of a deed of trust signed by the appellant, the appellant donated to the trustees of the trust the sum of R100 000 in cash on certain conditions. Clause 20 of the deed of trust provided that it was "an express condition of the donation by the donor that the trust shall be liable for and shall indemnify him against all liability for donations tax in respect of the donation made in terms of this deed". The respondent, in his determination of the appellant's liability for donations tax, determined that the subject-matter of the donation was the gross sum of R100 000 and disregarded the effect of clause 20 of the deed of trust. Appellant's liability was accordingly assessed on the basis of a donation of R100 000. Appellant objected on the ground that the donation was not of R100 000 but, because of clause 20, R100 000 less the donations tax which the appellant stated to be R20 000. The objection was overruled and in an appeal to the Special Court the respondent's decision was confirmed, the Court holding that s 62 (1) (*d*) of the Income Act 58 of 1962 applied. In a further appeal,

Held, that, in the context of clause 20, the word "condition" was not used in the strict legal sense of the word: it simply meant and implied nothing more than a term in the sense that its fulfilment could be enforced; it certainly did not mean that there was to be no donation or trust unless the trust was liable for or indemnified the donor against all liability for donations tax in respect of the donation.

Held, further, that a clause such as clause 20, in its special context, was in the nature of a modal clause (*modus*): it imposed a charge on the trustees and had no suspensive effect; with the handing over of the R100 000 to the trustees, the trustees became owners of the money and the donor merely retained a *jus in personam* by virtue of clause 20 against the trustees for performance of the term.

Held, further, that clause 20 was not a condition of the kind that could reduce the value of the money, which was the property donated in the deed of trust.

Held, accordingly, that there was no room for the application of the provisions of s 62 (1) (*d*) of the Act and that the Special Court had incorrectly relied thereon in upholding the assessment of the respondent.

Held, further, that, since no donation had been made to the Government, s 56 (1) (*h*) of the Act had no application to the facts of the case.

Held, further, as there was no question of a handing over of an amount of money with an instruction or direction that it should be applied for the purposes of tax and as no sum of money had been identified for purposes of tax, that it could not be said, on a proper construction of the deed of trust, that a portion of the R100 000 was not a donation at all, but a means of procuring payment of a legal obligation of the appellant and that it was therefore not a gratuitous disposal of property either as defined in s 55 (1) or at common law making the trustees donees as defined in s 55 (1).

Held, further, that the contention that, on a proper construction of the deed of trust, the term making the trust liable for the donations tax and indemnifying appellant against liability for such tax was tantamount to payment of the tax by the appellant by his own cheque, could not be supported.

Held, further, that there was nothing in the deed of trust that warranted the view that the appellant disposed of the R100 000 to the trustees for a consideration of the kind contemplated in s 58 of the Act, and, least of all, for a reciprocal obligation.

Held, accordingly, that the respondent was correct in his assessment of the donations tax and in disallowing the objection. Appeal dismissed with costs.

Appeal on a stated case in terms of s 86 of Act 58 of 1962 from a decision in a Special Income Tax Court. The facts appear from the reasons for judgment.

E B Broomberg for the appellant.
E L Goldstein for the respondent.

Cur adv vult.

Postea (April 17).

BOSHOFF AJP: This is an appeal on a question of law from the judgment of the Special Court on a case stated under the provisions of s 86 of the Income Tax Act 58 of 1962, hereinafter referred to as the Act, and concerns the question whether the Secretary for Inland Revenue, now the respondent, in his determination of the amount of donations tax payable, should have included in the cumulative taxable value of all property disposed of by the appellant, under donations, the sum of R100 000 purported to have been donated under a deed of trust, or R100 000 less the donations tax, because of the provisions in the deed of trust.

The appellant is an attorney who practises his profession in Pretoria and is ordinarily resident in the Republic. On 8 January 1976 the appellant donated R160 000 to his son and R10 000 to his daughter, making a total of R170 000. The donations tax payable on this sum, less the amount of R20 000 exempted from tax in terms of s 56 (2) (*b*) of the Act, came to R29 440. This tax was duly paid by the appellant on 19 March 1976.

In terms of a deed of trust signed by the appellant on 26 January 1976 the appellant irrevocably gave and donated to the trustees of the Shannon Trust upon trust the sum of R100 000 in cash on certain conditions, of which para 20 is relevant and reads as follows:

"20. It is an express condition of the donation by the donor that the trust shall be liable for and shall indemnify him against all liability for donations tax in respect of the donation made in terms of this deed."

The respondent in his determination of the appellant's liability for donations tax, determined that the subject-matter of the donation was

the gross sum of R100 000, and disregarded the effect of the provisions of para 20 of the deed of trust. On this basis the respondent assessed the donations tax at a figure of R25 000 arrived at as follows:

Cumulative value of previous donations ...		R170 000
Donation made on 26 January 1976		R100 000
Cumulative value of all donations to date ...		R270 000
Donations exempt in terms of s 56 (2) (*b*) ...		R20 000
Cumulative taxable value		R250 000
Tax thereon	R54 440	
Less amount previously paid		
receipt No 559651, 19 March 1976	R29 440	
	R25 000	

The basis for this method of computation is to be found in the following sections of the Act. The charging section is s 54 and imposes a donations tax on the cumulative taxable value of all property disposed of by donation from a fixed date. The material portion of the section provides that, subject to the provisions of s 56 (which provides for exemptions) there shall be paid for the benefit of the State Revenue Fund a tax (in the Act referred to as donations tax) on the cumulative taxable value of all property disposed of (whether directly or indirectly and whether in trust or not) under donations which take effect on or after 1 July 1962, by any person.

According to s 55 cumulative taxable value means, unless the context otherwise indicates, the sum of the values (excluding such values or such portions of such values, as the case may be, as are exempt from donations tax in terms of s 56) of all property disposed of by any person under donations which take effect on or after 1 July 1962.

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

In terms of s 60 (1) and (2) donations tax is payable within three months or such longer period as the Secretary may allow from the date upon which the donation in question takes effect and, where the donor has disposed of property under more than one donation in respect of which donations tax is payable, the tax payable in respect of each such donation must be calculated according to the order in which such donations take effect. To sum up then, since the donations tax is payable on the cumulative taxable value of donations, every time the donor makes a donation all his donations on or after 1 July 1962, including the current donation, must be aggregated and the tax must be determined on the cumulative value. From the tax so calculated there must be deducted the tax already paid on the cumulative taxable value determined when the last donation was made.

The assessing section is s 64. Sub-section (1) provides a rate of tax based on the cumulative taxable value of property disposed of under donations. If such value exceeds R90 000 the rate of tax is 25 per cent.

The method of computation employed by the respondent is not

challenged by the appellant. The appellant lodged objection and appeal substantially on the ground that the donation under the deed of trust was not R100 000 but, because of the provisions of para 20 thereof, R100 000 less the donations tax which the appellant stated to be R20 000, that is to say R80 000. Put differently, the substantial point was whether the amount which the trustees were directed to pay by way of donations tax, was or was not to be included in the cumulative taxable value of property disposed of by the appellant. Before the Special Court it was contended on behalf of the appellant that:

(1) the true effect of the donation was that the trust was enriched only to the extent of R80 000 and not R100 000, and that it was in fact the intention of the donor to benefit the donee only to the extent of the face value less tax liability for donations tax;

(2) in the alternative, the transaction was not a gratuitous disposal of money but an agreement with reciprocal obligations whereby the appellant handed over money to the trust against which the latter was obliged to pay donations tax arising from such transaction;

(3) in the further alternative, on a proper construction of s 58 of the Act, the value attributable to the assumption of liability for donations tax by the trust, in terms of the deed of trust, had to be taken into account in determining the amount of the donation for the purpose of determining the amount of the donations tax payable;

(4) in the further alternative, a donation, in terms of which the donee relieved the donor from liability for donations tax, could not, on a proper construction of Part V of the Act, be assessed for donations tax on the same basis as a donation in which the donor retained the statutory liability for payment of donations tax.

The Special Court rejected these contentions and relied on the provisions of s 62 (1) (*d*) in coming to the conclusion that the subject-matter of the donation was in fact R100 000. Section 62 (1) contains deeming provisions in respect of the value of property for the purposes of donations tax and the only paragraph seemingly appropriate to the kind of property we are concerned with is para (*d*), which the Special Court regarded as a paragraph dealing with the residual position not governed by the other paragraphs. This paragraph provides that the value of property, other than property dealt with in paras (*a*), (*b*) and (*c*), shall be deemed to be the fair market value of such property as at the date upon which the donation takes effect, subject, however, to the proviso that, in any case in which, as a result of conditions which in the opinion of the Secretary were imposed by or at the instance of the donor, the value of any property is reduced in consequence of the donation, the value of such property shall be determined as though the conditions, in terms of which the value of the property is reduced in consequence of the donation, had not been imposed. The Special Court held that the appellant had imposed a condition, the effect whereof is to place on the donee the sole liability – transferring the primary liability of the donor – for the payment of the donations tax arising from the donation. If the value of the property was reduced in consequence of the donation, the Secretary was obliged to value the property as if the condition had not been imposed. The Special Court consequently found

it unnecessary to decide whether or not the effect of the condition was to reduce the value of the donation for purposes of donations tax, and held that the respondent was correct in levying donations tax on the sum of R100 000 and in disallowing the objection of the appellant.

Mr *Broomberg*, for the appellant, is now challenging the correctness of the decision of the Special Court on the ground that the valuation provisions of s 62 (1) (*d*) do not apply to donations consisting exclusively of money and that the *ratio decidendi* of the Special Court was consequently insupportable. He is also attacking the assessment of the respondent on the grounds raised in the appellant's original objection and appeal.

The problem with which we are dealing in this case in a large measure concerns the interpretation of the deed of trust in the light of the provisions of the Act. It is thus proper and convenient to turn our attention first of all to the trust deed. The deed of trust is basically a contract between the donor and the trustees for the benefit of the beneficiaries. The donor determined unilaterally what was to be subject to the trust, who the beneficiaries were to be, what each was to receive and the circumstances under which he was to receive it. What the donor asked the trustees to agree to was not the content of the terms decided upon by him, but the assumption of formal ownership and the duty to carry out those terms. The donor determined the regime governing the *corpus* of the trust and the trustees merely undertook to hold the *corpus* and apply that regime to it. In this respect the deed of trust agrees with the ordinary kind of case, cf *Crookes NO and Another* v *Watson and Others* 1956 (1) SA 277 (A). In the operative part of the deed of trust the donor expressly states that he "irrevocably gives and donates to the trustees upon trust the sum of R100 000 in cash on the following conditions"

The deed of trust then proceeds to set out the circumstances under which the trustees are to receive the sum of money. The circumstances include such matters as the name of the trust, a definition of words used in the deed of trust, the rights, duties, obligations, liabilities and power of the trustees, the identity, rights and obligations of the beneficiaries and also clauses 20 and 21. Clause 20 provides that it is an express condition of the donation by the donor that the trust shall be liable for and shall indemnify him against all liability for donations tax in respect of the donation made in terms of the deed. Clause 21 reads as follows:

"21. Should the donor become liable for any form of tax on or in respect of any of the trust income or assets or should any beneficiary become liable for any form of tax on or in respect of any of the trust income or assets not accruing to, vesting in or enjoyed by him, the trustees shall be entitled to refund to him out of the trust assets the amount of the tax for which he becomes so liable on the basis that the rate of tax payable by him on or in respect of such income or assets is the highest rate at which he pays tax and with the intent of affording him a full indemnity against the additional tax for which he becomes liable."

Stipulations or provisions in a contract dealing with terms of performance, are often loosely referred to as conditions, but they are not conditions in the narrow legal sense of the word, but merely terms of the contract. A condition affects the existence of an obligation and a term the nature of the obligation. A condition determines whether there is a contract or not and therefore whether there is liability or not, while a term does not relate to the existence of the contract or obligation but simply regulates or modifies the obligations of the parties to the concluded

contract. A condition is either fulfilled or not, according to whether a prescribed event does or does not take place. If the condition is fulfilled, it has an automatic effect, either creating or cancelling a contractual obligation. The fulfilment of a condition cannot be enforced. A term, on the other hand, imposes an obligation upon the party or parties concerned to make certain performances. If such party does not make the performance as prescribed by the term, the other party has an action for enforcement of the obligation, or for damages for breach of the term. See *MacDuff & Co Ltd (In Liquidation)* v *Johannesburg Consolidated Investment Co Ltd* 1924 AD 573 at 588-590.

What are referred to as conditions in the deed of trust are in their context only the circumstances under which the sum of money was donated to the trustees and received by the trustees. They are not conditions in the narrow legal sense of the word but rather the terms of the donation and the trust created in the deed of trust. This is apparent from the true nature of the provisions themselves. In the context of clause 20 the word "condition" is also not used in the strict legal sense of the word. It simply means and implies nothing more than a term in the sense that its fulfilment can be enforced. It certainly does not mean that there is to be no donation or trust unless the trust is liable for or indemnifies the donor against all liability for donations tax in respect of the donation. Cf *London Passenger Transport Board* v *Moscrop* (1942) 1 All ER 97 (HL) at 102; *S* v *H Friedman Motors (Pty) Ltd and Another* 1972 (3) SA 421 (A) at 425-426. The trust is created by the deed of trust and compliance with such legal formalities as may be necessary and becomes operative.

A clause such as clause 20 in its special context is in the nature of a modal clause (*modus*). It imposes a charge on the trustees. See *Ex parte Strümpfer NO* 1945 OPD 268 at 271-274; *Jewish Colonial Trust Ltd* v *Estate Nathan* 1940 AD 163 at 177; Wessels *Law of Contract in South Africa* 2nd ed vol 1 paras 1449-1452. It has no suspensive effect. With the handing over of the R100 000 to the trustees, the trustees became owners of the money. The donor merely retained a *jus in personam* by virtue of clause 20 against the trustees for performance of the term; *Holley* v *Commissioner for Inland Revenue* 1947 (3) SA 119 (A) at 131; *Estate Kemp and Others* v *McDonald's Trustees* 1915 AD 491 at 503, 510.

The reason for the existence of this clause in the deed of trust is not far to seek. In terms of s 59 of the Act the person liable for donations tax is the donor, and if he fails to pay the tax within the period prescribed in ss (1) of s 60 (that is within three months or such longer period as the Secretary may allow from the date upon which the donation takes effect) the donor and the donee are jointly and severally liable for the tax. In terms of s 60 (5) the Secretary may at any time assess either the donor or the donee or both for the amount of the donations tax, but in view of the provisions of s 59 the liability of the donee only arises after the expiration of the period referred to in s 60 (1). In clause 20 of the deed of trust, the appellant indemnifies himself against this liability. Indeed, in clause 21, he indemnifies himself against liability for any form of tax in respect of any of the trust income or assets.

We are now in a position to consider the grounds argued on behalf of the appellant. The first ground concerns the applicability of s 62 (1) (*d*) to

a cash donation. Relying on the case of *Pyott Ltd* v *Commissioner for Inland Revenue* 1945 AD 128 at 134-135, Mr *Broomberg* contended that money cannot be valued because it has no other value than its face value. Such value is immutable. Where a donation consists of a cash sum, the value of the donation can neither be more nor less than the nominal amount of the donation. Furthermore, he argues, conditions and obligations cannot attach to cash as such.

Mr *Goldstein*, for the respondent, argued that s 62 (1) (*d*) was a residual or catch-all section and included cash, and that, if the condition that the trustees pay the donations tax reduced the value of the donation, then it should be ignored and was correctly ignored by the Special Court.

The correctness of these contentions depends upon the true construction of s 62 (1) (*d*).

At the outset it is necessary to draw attention to the fact that the donations tax was introduced to make up for loss of revenue by way of income tax and estate duty when certain types of donations are made. The mischief aimed at was the practice by taxpayers of reducing their assets by making donations and thereby reducing their income on which income tax is payable, reducing their assets on which estate duty would be payable at their death, and spreading the assets and the income derived therefrom over several taxpayers. The tax is consequently in terms levied in respect of the gratuitous disposal of property. Property, unless the context otherwise indicates, according to s 55 (1) (v) means any right in or to property movable or immovable, corporeal or incorporeal, wheresoever situated. A tax can only be computed on value, and value here does not mean intrinsic value, but value in terms of money value, the only value with which the Income Tax Act is concerned. Cf *Turnbull* v *Commissioner for Inland Revenue* 1953 (2) SA 573 (A) at 583. Money has face value, but property other than money must be valued in order to ascertain its value. Section 62 (1) purports to deal with that important aspect of the assessment of the tax. It stipulates what should be deemed to be the value of the various kinds of property referred to in paras (*a*), (*b*), (*c*) and (*d*). In its context the expression "deemed to be" is to be taken not in any special sense, but in the ordinary sense of "considered" or "regarded". Cf *Chotabhai* v *Union Government and Another* 1911 AD 13 at 33 and 43. Paras (*a*) and (*b*) deal with the value of rights to property and para (*c*) deals with the value of a right of ownership in property which is subject to a usufructuary or other like interest in favour of any person, that is to say an interest in the nature of a real right, or fragment of ownership. Para (*d*) deals with the value of any other property not dealt with in paras (*a*), (*b*) and (*c*). The value shall be deemed to be the fair market value. If, however, as a result of conditions which in the opinion of the Secretary were imposed by or at the instance of the donor, the value of the property is reduced in consequence of the donation, the value of such property shall be determined as though the conditions had not been imposed.

The paragraph deals with property which has a fair market value and the proviso deals with such property, the value of which can be reduced in consequence of the donation because of conditions imposed by the donor. The paragraph is concerned with conditions which reduce the value of the property and not of the donation. As has already been shown, in the

narrow legal sense a condition is a stipulation or provision in the nature of a qualification or limitation annexed to a contract by which the contract itself or rights and obligations in the contract may be continued, altered or rendered of no effect upon the performance or non-performance of something or the happening or not happening of an uncertain event. In its wider sense it is a term or a provision in a contract which relates to the performance of obligations under the contract. Whatever meaning is assigned to the word, in its present context it can only relate to a stipulation or provision annexed to or included in the contract of donation which can reduce the fair market value of the property.

The provisions of the Act relating to donations tax can be applied in respect of cash donations without the need to invoke the provisions of s 62 (1) (*d*) since cash has a face value and no other value and need not be valued. I am furthermore of the view that clause 20 in the deed of trust is not a condition of the kind that can reduce the value of the money, which is the property donated in the deed of trust. There is therefore no room for the application of the provisions of s 62 (1) (*d*). The Special Court consequently incorrectly relied on s 62 (1) (*d*) in upholding the assessment of the respondent.

I now turn to the remaining four grounds of appeal argued on behalf of the appellant and based on the alleged true juristic nature of clause 20. Each of these grounds is aimed at showing that the donor, by reason of the existence of clause 20, did not intend to and did not in fact donate R100 000 to the trustees in trust. On the first ground, Mr *Broomberg* relied on the case of *Holley* v *Commissioner for Inland Revenue* 1947 (3) SA 119 (A) and argued that the donor created a *fideicommissum* in clause 20 in favour of the respondent for the payment of the donations tax and directed that the donations tax be paid out of the sum of R100 000. Mr *Broomberg* stated that the donations tax on the R100 000 was in this case R20 000 and it consequently followed that this sum in respect of which the trustees were under a fiduciary duty to account to the Government was not property disposed of under a donation. In law, he argued, relying on *Estate Reynolds and Others* v *Commissioner for Inland Revenue* 1937 AD 57 at 64-66, the tax was as much paid by the appellant when it was paid directly by virtue of his direction under the trust, as if it had been paid by his own cheque. The appellant put a fund in the hands of the trustees for the purpose of paying the tax and the trustees applied that fund in paying the tax, acting on the mandate of the appellant and not on any mandate of the beneficiaries. This, in short, meant that the amount of the donations tax was not a donation at all but was meant to be a means of procuring the payment of a legal obligation of the appellant, and consequently did not form part of the cumulative taxable value of property disposed of under a donation by the appellant. In support of this contention, Mr *Broomberg* referred to the following arguments. The cumulative taxable value in terms of s 55 (1) (i) means the sum of all values (excluding such values or such portions of such values, as the case may be, as are exempt from donations tax in terms of s 56) of all property disposed of by any person. According to Mr *Broomberg* the amount paid over to the trustees for payment to the Government is exempt from donations tax in terms of s 56 (1) (*h*) read with s 10 (1) (*a*). This last argument can be disposed of

summarily. The material part of s 10 (1) (*a*) provides that the revenues of the Government are exempt from tax and the material part of s 56 (1) (*h*) provides that donations tax shall not be payable in respect of the value of any property which is disposed of under a donation to the Government. Section 56 (1) (*h*) has no application to the facts of this case since no donation was made to the Government. This point therefore lends no support to the contention.

He further argued that inasmuch as the appellant was under a legal obligation to pay the donations tax, the payment over of the sum of R20 000 in trust to the trustees for transmission to the respondent was not a gratuitous disposal of property either in terms of s 55 (1) (ii) or at common law. In fact and in law it was a payment by and on behalf of the appellant in discharge of his legal liability. Also, the amount paid to the trustees under an obligation to pay the donations tax to the State does not constitute property disposed of under a donation to any trustee to be administered by him for the benefit of a beneficiary. For fiscal purposes the trustees are considered not to have received the amount earmarked for payment of donations tax in a beneficial capacity at all. They are not donees as defined in s 55 (1) (iii).

Mr *Broomberg* argued in the alternative on the authority of *Acton NO* v *Pretoria City Council and Another* 1962 (1) SA 115 (T) at 117-118 that clause 20 constituted the fisc an *adjectus solutionis gratia*, ie a person with a right restricted to the receipt of payment, and the result of this was that the appellant could not unilaterally revoke the appointment of the fisc as an *adjectus*. By assuming mutal obligations in terms of the deed of trust the appellant and the trustees became respectively creditor and debtor. This resulted in enriching the appellant to the extent that the appellant's liability to the respondent was to be extinguished by the trustees. In this sense the obligation assumed by the trustees can be seen to constitute a consideration for the disposition made by the appellant. In support of this submission he relied on the meaning of consideration as explained in *Barnett* v *Commissioner of Taxes* 1959 (2) SA 713 (FC) at 722 to include a reciprocal undertaking. He then referred to s 58 of the Act which provides as follows:

> "Where any property has been disposed of for a consideration which, in the opinion of the Secretary is not an adequate consideration, that property shall for the purposes of this part be deemed to have been disposed of under a donation: Provided that in the determination of the value of such property a reduction shall be made of an amount to the value of the said consideration."

His argument then was that because of the consideration the value of the donation should be reduced.

Mr *Broomberg* also argued in the alternative, relying on *Secretary for Inland Revenue* v *Sidley* 1977 (4) SA 913 (A) at 919-920 and *Commissioner for Inland Revenue* v *Saner* 1927 TPD 162 at 172-173, that in tax law the Court will give effect to the substance of the transaction and will apply the legislation according to the Court's interpretation of the intention of the Legislature. In the instant case, according to Mr *Broomberg*, the respondent erred in unduly stressing the form of clause 20 rather than the substance. The Courts do not accept the descriptions attached to a transaction by the parties, but will determine and give effect to the actual

rights and obligations created by the transaction. In the instant case the assets of the donor (that could yield income subject to tax, and which would be liable to estate duty) were diminished by R100 000 only and not by R125 000 which would have been the case if the donor had not expressly stipulated for the trust to pay the donations tax. It was the intention of the Legislature, so the argument ran, in respect of a transaction in which the assets of a donor at the top marginal rate were diminished by R100 000, to impose a donations tax of R20 000. This was the true substance of the transaction in the instant case and accordingly R20 000 is the proper amount of donations tax payable.

At the outset it is necessary to point out that there is no legal or factual basis for the contention that the tax on the R100 000 was to be R20 000 and not 25 per cent of the cumulative taxable value of all the property disposed of by the appellant since the specified date, the rate stipulated in s 64. No evidence was placed before the Special Court as to how the amount of R20 000 is arrived at. It transpired from the argument presented by Mr *Broomberg*, if I understand his argument correctly, that an algebraic formula is used to compute the donations tax where the tax is to be paid out of the sum of money given to the donee. The difficulty I have with the formula is not only that it is not explained and cannot be explained by Mr *Broomberg*, but that there is no legal basis for the use of such a formula. Moreover the tax is payable on the cumulative taxable value of the donations made by the appellant since the specified date. If I understand the formula correctly it can be used only to compute what portion of a single amount of money handed over is tax if the tax has to come out of such money. It does not appear that it can be used where the tax has to be computed on the aggregate value of several donations as is the case with the appellant.

The argument on behalf of the appellant places various constructions on the deed of trust and overlooks the fact that, although the donor is in the first place liable for the payment of the donations tax, the donee is equally liable if the tax is not paid by the donor within three months or such longer period as the Secretary may allow from the date upon which the donation takes effect. In fact the Secretary may at any time assess either the donor or the donee or both for the amount of donations tax payable. The value of the property donated could hardly be altered by the incidence of the tax. Whether the respondent looks to the donor or to the donee the value of the property which is donated remains unchanged and the same applies if, as between donor and donee, one or the other agrees to pay the tax. If the argument of Mr *Broomberg* is taken to its logical conclusion it would mean that, in the event of a donor donating a sum of money and also paying the donations tax thereon, he would be out of pocket in an amount equal to the total of the two amounts, and the effective value of the donation would be equal to this total. This might be the position in substance but not under the Act because the donations tax is to be assessed on the basis of the value of the donation and for purposes of the Act the donation cannot be regarded as being the value of the property disposed of under the donation together with the tax paid thereon. This reasoning applies with equal force to the case where the donee pays the donations tax. In that event the donee undertakes the liability of the donor and the donation

by the donor in substance is only the original sum less the amount of the tax.

The subject-matter of the donation and the tax which it attracts are two separate things. They are dealt with separately under the deed of trust. The argument on behalf of the appellant also overlooks this fact.

In the deed of trust the donor unequivocally gives and donates to the trustees upon trust the sum of R100 000 in cash. It is merely a term of the donation that the donations tax is to come out of the trust as is provided in clause 20, in the same way as any form of tax on or in respect of any of the trust income or assets for which the donor may become liable, as is provided in clause 21. There does not appear to be any significance in the fact that clause 20 is couched in the way it is. Whether it creates a *fidei-commissum* or is merely a modal clause, it creates no more than a *jus in personam;* also see *British South Africa Company* v *Bulawayo Municipality* 1919 AD 84 at 95-97. The ownership of the R100 000 passed to the trustees when it was handed over to the trustees under the deed of trust. The appellant retained a mere *jus in personam* to compel the trustees to pay the donations tax or to indemnify him should he himself pay the tax. There was no question of a handing over of an amount of money with an instruction or direction that it should be applied for the purposes of tax. No sum of money was identified for purposes of tax; the tax obviously still had to be assessed. Indeed the trust had to indemnify the appellant against liability for donations tax. It certainly cannot be said, on a proper construction of the deed of trust, that a portion of the R100 000 was not a donation at all, but a means of procuring payment of a legal obligation of the appellant and therefore not a gratuitous disposal of property either as defined in s 55 (1) or at common law making the trustees donees as defined in s 55 (1). The case of *Estate Reynolds* v *Commissioner of Inland Revenue* 1937 AD 57 does not seem to have any application to the facts of this case and does not support the contentions on behalf of the appellant that payment of the donations tax by the trustees was by virtue of a direction under the trust and therefore as if it had been paid by his own cheque. That case was concerned with the payment of estate duty on insurance policies on the life of the deceased which were transferred to trustees under a deed of trust. The decision of the Court turned on the construction of a sub-section of Act 29 of 1922. The material facts are that in pursuance of a deed of trust the deceased had ceded insurance policies on his life and transferred the amount of R120 000 to the trustees and the trustees had thereafter paid the premiums as they fell due. Two beneficiaries, the son and daughter of the deceased, survived him. In an action brought by the Commissioner for Inland Revenue against the executors, the trustees of the trust, the son and others, the first question to be decided was whether estate duty was payable on the proceeds of the life insurance policies which had been ceded to the trustees. According to ss 2 and 3 of Act 29 of 1922, estate duty was charged on the dutiable amount of the estate of a deceased person and the estate of such person was defined to consist of all property of that person which passed on his death and all property which, in accordance with s 3, was deemed to pass on his death. Sub-section (4) of s 3, in defining what property was deemed to pass on the death of any person, dealt specially with policies of insurance and stated

that such property shall include,

"any amount due and receivable under any policy of insurance effected by such person upon his own life when the policy has been wholly kept up by him; or a part of that amount in proportion to the aggregate of the premiums paid by him, when the policy has been partly kept up by him."

The Court held that the question entirely depended upon a proper construction of ss (4) (*a*) of s 3. The deceased "kept up" the policies within the meaning of the sub-section after their assignment to the trustees by reason of the commands imposed upon them in the trust deed. He supplied the funds and directed their application to payment of premiums on the policies. He was the only author of these payments. Neither the trustees nor the beneficiaries had any say in the matter. The Act was there concerned with the payer and not with the manner of payment. Since the Court was in that case dealing with the construction of a particular section which has no bearing on the problem we are called upon to consider in this case, the finding of the Court, that the deceased kept up the payment of the premiums within the meaning of that sub-section because he supplied the funds and directed the payment of the premiums, does not support the contention that, on a proper construction of the deed of trust under consideration, the term making the trust liable for the donations tax and indemnifying the appellant against liability for such tax, was tantamount to payment of the tax by the appellant by his own cheque.

I have some difficulty in following the argument that, because clause 20 constitutes the fisc an *adjectus solutionis gratia*, mutual obligations come into being between the appellant and the trustees and, because of the obligation of the trustees to pay the fisc and relieve the appellant of a liability for tax, the appellant receives a consideration for the donation made to the trustees, and, because he receives a consideration, s 58 applies and the value of the donation must be reduced by the value of the consideration.

As has already been indicated, clause 20 is merely a term in the deed of trust dealing with the liability for the donations tax. It is in its context no more than a circumstance under which the trust was created by the appellant. It is certainly not in the nature of a reciprocal obligation. A reciprocal obligation is found in a synallagmatic contract, that is a contract which contains mutual reciprocal engagements by each of the two parties towards the other to perform his portion of the contract, and this performance must take place *pari passu;* see *Maserowitz* v *Little* 1911 TPD 1061 at 1063. In the context of s 58 the word "consideration" is used in the sense of a "*quid pro quo*", compensation or reward having some value. Otherwise no reduction can be made in respect thereof.

There is nothing in the deed of trust that warrants the view that the appellant disposed of the R100 000 to the trustees for a consideration of the kind contemplated in s 58, and least of all, for a reciprocal obligation.

The arguments advanced on behalf of the appellant can in the circumstances not be sustained. The respondent was accordingly entitled to regard the subject-matter of the donation in the deed of trust as R100 000 in arriving at the cumulative taxable value of the property disposed of by the appellant. The respondent was thus correct in his assessment of the

donations tax and in disallowing the objection. The appeal is dismissed with costs.

MARGO J and PHILIPS AJ concurred.

Appellant's Attorneys: *Edward Nathan, Friedland, Mansel & Lewis*, Johannesburg; *Getz, Behr, Ogus & Mendel Cohen*, Pretoria. Respondent's Attorney: *State Attorney*.

SENTRAALWES PERSONEEL ONDERNEMINGS (EDMS) BPK v WALLIS

(TRANSVAALSE PROVINSIALE AFDELING)

1978 *Januarie* 16; *April* 6 MOLL en NESTADT RR

**Verkoop—Van grond—Erf in 'n dorpsaanleg—Erf 'n deel van 'n stuk landbougrond soos omskryf in Wet 70 van 1970—Grond in 'n munisipale gebied ingelyf—Stigtingsvoorwaardes van dorpsgebied het bepaal dat geen erf daarin "shall be sold, transferred . . . until the owner has provided services to full municipal standards . . ."—Bepalings in ooreenkoms dat "verkoping opgeskort (is) en onderworpe aan die behoorlike proklamering van die dorpsgebied" en "indien die dorpsgebied . . . nie aldus geproklameer word nie, word hierdie ooreenkoms van koop van die begin af as nietig beskou . . ."—Hangende vervulling van opskortende voorwaarde het geen verkoping tot stand gekom nie—"Verkoop" in art 3* (e) *van Wet—Betekenis van.*

Grond—Landbougrond—Onderverdeling van—Wet op die Onderverdeling van Landbougrond 70 van 1970—Toepaslikheid van art 3 (e)*—Grond "verkoop" onderhewig aan opskortende voorwaarde dat transport nie gegee sal word "indien die dorpsgebied" waarin grond geleë was "nie . . . geproklameer word nie"—Nie 'n "verkoop" van grond soos in art 3* (e) *bedoel nie—Art 3* (e) *nie van toepassing nie—"Verkoop"—Betekenis van in art 3* (e).

**Sale—Of land—Erf in township—Erf a portion of a piece of agricultural land as defined in Act 70 of 1970—Land incorporated in a municipal area—Conditions of establishment of township providing that no erf therein "shall be sold, transferred . . . until the owner has provided services to full municipal standards . . ."—Provisions in agreement that "sale (is) suspended and subject to the proper proclamation of the township" and "if the township . . . is not so proclaimed, this agreement of sale will be regarded as void from its inception . . ."—Pending fulfilment of suspensive condition, no sale having come into existence—"Sold" in s 3* (e) *of Act—Meaning of.*

Land—Agricultural land—Subdivision of—Subdivision of Agricultural Land Act 70 of 1970—Applicability of s 3 (e) *—Land "sold" subject to suspensive condition that transfer not to be given "if the township" in which the land was situated "is not . . . proclaimed"—Not a "sale" of land as intended in s 3* (e)*—"Sold"—Meaning of s 3* (e).

Kragtens 'n skriftelik kontrak het appellant 'n erf aan respondent "verkoop". Die erf het deel uitgemaak van 'n groter stuk grond wat "landbougrond" was soos omskryf in die Wet op die Onderverdeling van Landbougrond 70 van 1970. Die grond was in die munisipale gebied van Mosselbaai ingelyf. Kragtens die ooreenkoms tussen appellant en respondent was die "verkoping . . . opgeskort en onderworpe aan die behoorlike proklamering van die dorpsgebied. Indien die dorpsgebied om enige rede wat ook al . . . nie aldus geproklameer word nie, word hierdie ooreenkoms van koop van die begin af as nietig beskou . . ." Verder het die stigtingsvoorwaardes van die betrokke dorpsgebied bepaal dat: "No erf except reserved erven shall be sold, transferred . . . until the owner has provided services to full municipal standards . . ." Die erf wat aan respondent "verkoop" was, was nie 'n gereserveerde erf nie. In 'n aksie in 'n landdroshof waarin appellant betaling van die deposito betaalbaar ingevolge die ooreenkoms geëis het, het respondent twee spesiale pleite opgewerp. In die eerste spesiale pleit het respondent beweer dat ten tye van kontraksluiting die appellant geen skriftelike toestemming van die betrokke Minister gehad het om die gemelde erf te verkoop nie soos vereis word deur art 3 (*e*) van Wet 70 van 1970 en dat die ooreenkoms of "koopkontrak" wat die partye aangegaan het derhalwe *ab initio* nietig en van nul en gener waarde was nie. In die tweede spesiale pleit het respondent beweer dat appellant nie die munisipale dienste verskaf het nie soos vereis deur die stigtingsvoorwaardes van die dorpsgebied en dat die "koopkontrak" derhalwe *ab initio* nietig en van nul en gener waarde was nie. Die landdros het die respondent se eerste spesiale pleit gehandhaaf. Geen beslissing is op die tweede spesiale pleit gegee nie. In hoër beroep,

Beslis, dat dit wesenlik aan albei die spesiale pleite was dat dit bevind word dat die erf kragtens die skriftelike ooreenkoms aan die respondent "verkoop" was, want, as dit nie die geval was nie, dan was daar klaarblyklik nie gehandel in weerwil van die bepalings van art 3 (*e*) van Wet 70 van 1970 of die gemelde bepaling van die stigtingsvoorwaardes nie.

Beslis, verder, dat 'n behoorlike vertolking van die betrokke klousules van die ooreenkoms meegebring het dat hier te make was met 'n bepaling waarkragtens die verpligting van die verkoper (appellant) om transport of lewering van die saak

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In terms of a written contract the appellant "sold" an erf to respondent. The erf formed part of a larger piece of land which was "agricultural land" as defined in the Subdivision of Agricultural Land Act 70 of 1970. The land had been incorporated in the municipal area of Mossel Bay. In terms of the agreement between appellant and respondent the "sale is suspended and subject to the proper proclamation of the township. If the township for any reason whatever . . . is not so proclaimed, this agreement of sale will be regarded as void from its inception . . ." The conditions of establishment of the township concerned provided further that: "No erf except reserved erven shall be sold, transferred . . . until the owner has provided services to full municipal standards . . ." The erf which was "sold" to respondent was not a reserved erf. In an action in a magistrate's court in which the appellant claimed payment of the deposit payable in terms of the agreement, the respondent raised two special pleas. In the first special plea respondent alleged that at the time of the conclusion of the contract the appellant had no written consent from the Minister concerned to sell the erf as was required by s 3 (*e*) of Act 70 of 1970 and that the agreement or "deed of sale" entered into by the parties was accordingly *ab initio* void and of no force and effect. In the second special plea the respondent alleged that appellant had not provided the municipal services as was required by the conditions of establishment of the township and that the "deed of sale" was accordingly *ab initio* void and of no force and effect. The magistrate upheld the respondent's first special plea. No decision was given on the second special plea. In an appeal,

Held, that it was material to both of the special pleas that it should be found that the erf was "sold" to respondent in terms of the written agreement, as, if that was not the case, then the parties had obviously not acted contrary to the provisions of s 3 (*e*) of Act 70 of 1970 or of the said provision of the conditions of establishment.

Held, further, that a proper construction of the relevant clauses of the agreement entailed that here one had to do with a provision in terms of which the obligation of the seller (appellant) to pass transfer of or deliver the thing which was the object