61/92

CASE NO 349/90

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

COMMISSIONER FOR INLAND REVENUE — Appellant

and

PETER CLARK KUTTEL — Respondent

CORAM: CORBETT CJ, SMALBERGER, KUMLEBEN, GOLDSTONE JJA et HARMS AJA

DATE HEARD: 23 March 1992

DATE DELIVERED: 31 March 1992

J U D G M E N T

GOLDSTONE JA:

The Commissioner for Inland Revenue (the appellant) assessed Peter Clark Kuttel (the respondent) to income tax on interest and dividends earned by him during the tax years 1984, 1985 and 1986. The respondent successfully appealed to the Cape Income Tax Special Court. The assessments were set aside and the matter referred back to the appellant. The judgment of the Court a quo has been reported as ITC 1501, 53 SATC 314. The appellant now appeals directly to this Court pursuant to leave granted by the President of the Court a

quo in terms of section 86A (5) of the Income Tax Act 58 of 1962 ("the Act").

The point in issue in the appeal is whether the respondent was entitled to the exemptions then provided by s 10(1)(h)(i) and s 10(1)(k)(ii) of the Act. The former exempted from tax interest received by or accrued to -

> "any person (other than a company) not ordinarily resident nor carrying on business in the Republic".

In turn s 10(1)(k)(ii) exempted from tax dividends received by or accrued to or in favour of:

> "any person (other than a company) not ordinarily resident nor carrying on business in the Republic".

The Court a quo held that on the facts proved the respondent was not ordinarily resident in the

Republic at the relevant times and that he did not carry on business in the Republic. In this Court the appellant abandoned the contention that the respondent carried on business in the Republic. It was submitted, however, that during the relevant periods he was ordinarily resident in the Republic.

Shortly before the hearing in the Court a quo, the respondent gave evidence in another income tax appeal before the same Court constituted by the same members. In his judgment, the President of the Court a quo (Howie J) stated that it had been agreed between counsel that the facts found in the earlier case would be regarded as proved in the present matter. He then set out those facts many of which do not appear from the record of this appeal. They appear from the following passages from the judgment of Howie J:

> "During the 1970's, appellant was involved in a very successful fishing business operated by a

company named Atlantic Trawling (Pty) Ltd, in which he was a shareholder. In March 1980, due to various problems relative to trawling, this business was sold. It is not apparent what was done with the shares in that company, but the upshot was that appellant's share of the proceeds of the sale (or the liquidation of the company) amounted to R4,8 m. He and his former business associates then formed another company for the purposes of lobster and tuna fishing. This company was named Atlantic Fishing Enterprises ("AFE"). Appellant invested portion of the aforesaid sum in AFE and the balance in quoted shares and immovable property. He proceeded to earn his income from all these sources, his predominant business interest being his investment in AFE, in which he had 85% of the shareholding.

During 1982 appellant, a keen yachtsman, took part in a round-the-world race from which he returned in September. During his prolonged absence for this event, he had kept in touch with the affairs of AFE, but in the nature of things had had little to do with its day to day management in that period. On his return, he found that there was not much work for him in AFE's local operations, its management now

being essentially in the hands of a fellow shareholder, one Wolff. Appellant had, in the meantime, become associated with a man named Ingwal in the design and building of a racing yacht which, subject to sponsorship being obtained, they planned to race in the next round-the-world event. The vessel was owned by a company in which appellant held shares. To this project, work upon which started in early 1983, appellant gave considerable time, attention and money. This reduced even more the opportunity for his involvement in the day to day management of AFE. However, appellant had realised that AFE was profitably exporting increasing quantities of lobster and tuna to the United States and that, because the agent which AFE employed there was rendering less satisfactory service to AFE than that which appellant felt he himself could provide, he agreed with his fellow shareholders that he would proceed to New York to open an office of AFE there from which he could oversee AFE's American business.

In the course of the arrangements necessary for this purpose, appellant was advised by a New York attorney that his prospects of successfully conducting AFE's operation in the

United States would be greatly enhanced if he were to obtain a permanent resident's permit. Because appellant saw considerable scope for the operation and, in addition, the chance of extending it to include South African hake, he decided to apply for the permit. That was in September - October 1982.

In May 1983 he was advised that the permit had been granted and, not much later, he and his wife decided that they and their children would emigrate to the United States.

Pursuant to this decision, appellant realised a large number of his assets and invested the proceeds in Escom stock in order to secure the maximum personal income transmissible to him in America.

On 29 July 1983, he and his wife left South Africa to take up residence in the United States. As at that stage, apart from investments in Escom stock and the share-market, appellant's assets comprised his shareholding in AFE (which by then had a number of wholly-owned subsidiaries), 60% of the shares in Southern Ropes (Pty) Ltd, 9% of the shareholding in a private company owning a residence at Llandudno, (his wife was the other

shareholder), and shares in two private boat-owning companies: one owned the yacht referred to, the other owned a motor cruiser. Those vessels were at that stage still under construction, the building being funded by AFE by way, inter alia, of monies lent to AFE by appellant. Appellant was thus closely involved personally and financially in both these projects.

Appellant's children - three sons - remained in Cape Town to complete their schooling, they being then in Standard 10, 8 and 6, respectively.

Soon after arriving in America, appellant decided to establish home in Fort Lauderdale, Florida. Apart from the fact that AFE's business operations were based on the East Coast, he liked that part of the country and it gave him full scope for his yachting activities. Because property prices were extremely high and because he and his wife wanted first to assess if they would be happy there, he did not buy a house, but rented one. It was big enough for all five members of the family. He established church membership, opened banking accounts, acquired an office, bought a car and registered with social

security. He also obtained a settling-in allowance from the South African exchange control authorities.

Since then, apart from visits to South Africa and other countries, appellant has lived and worked in the United States."

Howie J also conveniently set out the details of the visits made by respondent to South Africa during the tax years in question:

"1. 18 September 1983 to 6 December 1983: He attended to the continuing liquidation of his assets and to his interest in AFE and the boat-building projects. Then he waited for the school term to end and took his sons back to America.

2. 30 January 1984 to 24 February 1984: He attended to his affairs and brought the younger boys back to school. The boat-building was by then reaching a very active and important stage.

3. 4 April 1984 to 29 April 1984: He, once more, came to see to his various investments and business interests.

4. 23 July 1984 to 18 September 1984: The reasons were the same as in paragraph 3 above.

5. 11 November 1984 to 12 January 1985: The reason here was predominantly his yachting interest. In this period the yacht, for which sponsorship had now been obtained, was launched and went through a series of trials in its commissioning period. When it came through those tests successfully, appellant raced it in the Rothman's Week regatta and then took part in the Cape to Uruguay race. He was absent for this event from 12 January 1985 until 14 March 1985. On return to Cape Town he spent a few days here and then left for the United States on 22 March 1985.

6. 20 April 1985 to 19 June 1985: Appellant came to take delivery of the cruiser on behalf of the American owners to whom it had been sold. The delivery date was due to be the end of April and appellant was then to sail it to Spain for the owners. Launching took place, but thereafter many mechanical problems arose. Solving them took much time, and delivery occurred only

in June 1985. Appellant then sailed for Spain and returned from there to America.

7. 3 September to 6 September 1985: Appellant's brother died and he came back to Cape Town for the funeral.

8. 2 November 1985 to 12 November 1985: Appellant arrived in Cape Town on the first leg of the round-the-world race in his yacht. The mast had broken on the journey and the vessel had to be put on the slipway for repairs. While they were being undertaken, appellant went to London to open an office for his own business which he had built up in the United States. By this stage he was no longer engaged in AFE's American business.

10. 16 November to 29 November 1985: He returned from London, continued with preparations for the remainder of the round-the-world race, and then departed on the next leg of this event."

During his visits to Cape Town, the respondent lived in the Llandudno house owned by the company in which he and his wife were the sole shareholders. At

no time was it let and consequently it was available whenever the respondent wanted to live in it. During 1985 the respondent effected substantial renovations and extensions to the house. He did so, according to his unchallenged testimony, because he wished portion of his South African capital to be invested in fixed property as a hedge against the falling value of the Rand in relation to the United States Dollar. The respondent also stated, and it must be accepted, that had he not been prohibited by the South African exchange control regulations from taking all his assets out of this country, he would certainly have done so.

The view of the facts adopted by the Court a quo, which was not challenged in this Court, was set out as follows by Howie J:

> "1. In May 1983, appellant decided to emigrate to the United States and left, pursuant to that decision, on 29 July 1983.

2. He became a United States citizen three weeks before this appeal hearing; he could not really do so any sooner; the process takes five years. Until then, he naturally used his South African passport as he was not entitled to an American one.

3. He could not take his assets with him. When he reduced them to cash to earn maximum transmissible income, the fall in the value of the Rand caused a considerable diminution of his estate. He, therefore, took reasonable steps to protect his capital one of which, by effecting renovations and extensions to the Llandudno house, was to invest more of his money in landed property.

4. The fact that he could not take his assets out of the country, and that such assets are varied and very substantial, is a perfectly natural and understandable reason for returning to South Africa from time to time to see to their proper management and preservation. It is also the self-evident reason why the bulk of his commercial interests are in South Africa. He has not yet had time to build

up an American estate of equivalent size.

5. Having regard to the need for such return visits, it was reasonable not to let the house at Llandudno and rather to use it himself.

6. Apart from business reasons for returning, the other reasons had to do with personal matters such as the schooling of his sons, the death of his brother and the pursuit of his yachting interests.

7. On arriving in America, appellant did not buy fixed property right away. He has only recently done so. He did not do so earlier because of the cost involved and because he and his wife wanted time in which to assess where in the United States the family would best feel disposed to settle.

8. The fact that his time outside South Africa during the 31 months in issue, was not all spent in the United States, is explicable by reference to his travelling on business and participating in transoceanic yacht racing.

9. Of the 31-month period referred to, appellant spent, on average, just over

> one-third of the time in South Africa, the duration of his visits becoming less towards the end of the period.

The words "residence" or "resident" are well known to lawyers. They are frequently used, for example, with regard to the question as to persons who may be subject to the jurisdiction of a court or tribunal and with regard to revenue laws. That a person may have more than one residence at any one time is clear. In the present case we are concerned with the words "ordinarily resident". That is something different and, in my opinion, narrower than just "resident". If there could be any doubt that in the context of the Act there is a difference, it is removed by a reference to s 9A of the Act. In ss (1) the words "resident of the Republic" are defined for the purposes of that section as meaning

> "a person (other than a company) who is ordinarily resident in the Republic or a domestic company and includes a person,

> wherever he is resident, who acts in a fiduciary capacity in respect of any direct or indirect interest of any beneficiary in any foreign investment company if such beneficiary is a resident of the Republic."

If there was no difference between "resident" and "ordinarily resident" that definition would have been unnecessary and, indeed, its terms would be nonsensical. There are a number of other provisions in the Act which appear to distinguish between "resident" and "ordinary resident".

In R v Barnet London Borough Council, ex parte Shah and other appeals [1982] 1 All ER 698 (CA), Lord Denning MR (at 704 c-d) said that the natural and ordinary meaning of "ordinarily resident" was

> "that the person must be habitually and normally resident here, apart from temporary or occasional absences of long or short duration."

That view of the natural and ordinary meaning of the words was approved by the House of Lords on appeal: Shah v Barnet London Borough Council and other appeals [1983] 1 All ER 226 (HL) at 234 b-c. After a reference to the meaning given to the words by Lord Denning, Lord Scarman said the following (at 234 d-f):

> "Strictly, my Lords, it is unnecessary to go further into such case law as there is in search of the natural and ordinary meaning of the words. In 1928 this House declared it in general terms which were not limited to the Income Tax Acts. Lord Denning MR has reaffirmed it in 1981, thus showing, if it were needed, that there has been no significant change in the common meaning of the words between 1928 and now. If further evidence of this fact is needed (for the meaning of ordinary words as a matter of common usage is a question of fact), the dictionaries provide it: see, for instance, Supplement to the Oxford English Dictionary vol 3 sv 'ordinarily' and 'resident'. I therefore accept the two tax cases as authoritive guidance, displaceable only by evidence (which does not exist) of a

> subsequent change in English usage. I agree with Lord Denning MR that in their natural and ordinary meaning the words mean 'that the person must be habitually and normally resident here, apart from temporary or occasional absences of long or short duration'. The significance of the adverb 'habitually' is that it recalls two necessary features mentioned by Lord Sumner in Lysaght's case, namely residence adopted voluntarily and for settled purposes."

The reference to "Lysaght's case" is to Commissioner of Inland Revenue v Lysaght [1928] AC 234(HL) where at 243 Viscount Sumner said:

> "I think the converse to 'ordinarily' is 'extraordinarily' and that part of the regular order of a man's life, adopted voluntarily and for settled purposes, is not 'extraordinarily'."

In Cohen v Commissioner for Inland Revenue 1946 AD 174 Schreiner JA, in the course of an obiter dictum

(at 185) gave a very similar meaning to the words "ordinary residence":

> "... his ordinary residence would be the country to which he would naturally and as a matter of course return from his wanderings; as contrasted with other lands it might be called his usual or principal residence and it would be described more aptly than other countries as his real home."

It is unnecessary in this case to decide whether, as was also suggested by Schreiner JA, a person may not be held to be ordinarily resident in more than one country at the same time.

In my judgment it is neither necessary nor helpful to discuss other English decisions in which the words "ordinarily resident" were considered and interpreted with reference to English income tax legislation. I can find no reason for not applying their natural and ordinary meaning to the provisions now under

consideration. The policy of the legislature in providing these exemptions from taxation in s 10 of the Act is to encourage investors from outside the Republic to invest their money in the Republic: per Davis AJA in Cohen's case, supra at 188. That it remains the policy of the legislature was conceded by counsel on behalf of the appellant. Having regard to that policy there is certainly no warrant for giving an extended meaning to the words. I would respectfully adopt the formulation of Schreiner JA and hold that a person is "ordinarily resident" where he has his usual or principal residence, ie what may be described as his real home.

If one applies that meaning to the words, there can be no doubt that at the relevant times the respondent was not ordinarily resident in the Republic. He had decided during 1983 that he and his family would emigrate to the United States. Pursuant to that decision he and his wife set up their home first in Florida and later in

California. Such assets as he could take with him to the United States he transferred there. But for the provisions of the exchange control regulations he would have taken all of his South African assets to the United States. That he could not do, and he had no choice but to make the most advantageous arrangements in the circumstances for the substantial assets he retained in this country. As soon they were able to do so, the respondent and the members of his family become United States citizens.

Counsel for the appellant did not refer us to any evidence which indicated that the respondent did not set up his usual or principal residence, ie his home, in the United States of America. When his three children completed their schooling in Cape Town they permanently joined the respondent and his wife in their home in the United States. The respondent's visits to South Africa were not for purposes which one would normally associate

with a "return home". They were primarily for business purposes relating to his companies and the building of the yacht which began prior to his decision to emigrate. In the beginning those visits were for comparatively lengthy periods. During 1984 they came to about five months in aggregate. In the subsequent years, as one would expect, they became less frequent and of shorter duration.

The fact that the respondent kept his house at Llandudno is in no way inconsistent with his usual or principal residence or home having been in the United States. He had sound financial reasons for retaining an interest in immovable property and he required a place to live when he visited Cape Town. In other words, he retained a residence in Cape Town and that was quite consistent with his ordinary residence being in the United States.

Counsel submitted that it would be more difficult to establish that a person who had been domiciled and permanently resident in the Republic had ceased to be ordinarily resident here than it would be to establish that a person who had never lived in South Africa was not ordinarily resident here. I agree. That, however, is relevant to the discharge of the burden of proof which, in this kind of case, rests upon the taxpayer. It is not relevant at all to the meaning to be given to the relevant provisions of the Act.

It follows, in my judgment, that the Court a quo correctly came to the conclusion that the respondent, at the relevant times, was not ordinarily resident in the Republic.

The appeal is dismissed with costs. Such costs

are to include those consequent upon the employment of two counsel.

R J GOLDSTONE
JUDGE OF APPEAL

CORBETT CJ
SMALBERGER JA
KUMLEBEN JA CONCUR
HARMS AJA