LACE PROPRIETARY MINES LTD v COMMISSIONER FOR INLAND REVENUE
9 SATC 349

Division:	Appellate
Judges:	STRATFORD CJ, DE VILLIERS, DE WET AND TINDALL JJA AND FEETHAM AJA
Date:	22 March 1938
Also cited as:	1938 AD 267

Income tax - Income - Sale of asset by company - Whether change of investment or realisation in scheme of profit making - Intention - Consideration in shares - Valuation - Effect of disposal of large blocks of shares - Relevance of market price on date of sale - Section 7(1), Act 40 of 1925.

Appeal from a decision of the Transvaal Provincial Division, answering certain questions of law submitted in a case stated under section 60 of the Income Tax Act, No 40 of 1925.

Appellant company, which was incorporated in the year 1904, had in 1918 acquired the mineral rights over the farm Spaarwater for the definite purpose of disposing of these rights to a company to be formed to carry on mining operations on that property. The rights were sold in accordance with this intention and appellant company acquired as consideration a large holding of shares in the new company.

In the year 1921, the new company was placed in liquidation, and appellant company re-acquired the mineral rights which it had previously sold, the purchase price on this re-acquisition being the discharge of its rights to participate in the distribution of the company's assets in liquidation.

In the beginning of the year 1933, the appellant company disposed of the farm Vlakfontein, the acquisition of which had been one of its original objects, to a company formed to develop it as a gold mining proposition. In the agreement governing this transaction, appellant company agreed to subscribe towards the share capital of this new company an amount equivalent to the consideration received by it in cash for the sale of the property. Under the agreement the appellant company had further rights to subscribe to the working capital of the new company.

Towards the close of the year 1933, by an agreement dated 29th November of that year, appellant company disposed of the mineral rights of the farm Spaarwater to an existing company. The consideration was expressed to be the sum of £250,000, to be paid and satisfied by the allotment of 1,000,000 fully paid up shares of the nominal value of 5s. in the purchasing company.

In the formation of the appellant company its objects, as set out in its Memorandum of Association, had been firstly, the acquisition of the farms Vlakfontein and Droogefontein, and certain other mining rights, which had been abandoned shortly after the formation of the company, secondly, to carry on mining operations and thirdly, with the usual powers of disposal of the assets of the company, to deal in the shares of companies having similar objects and to promote and be interested in such other companies.

Apart from certain boring operations on Droogefontein and Vlakfontein, which were abandoned owing to unsatisfactory results, the appellant company carried on no mining operations. The policy of the directorate, as indicated by statements made at annual meetings, was to await the results of operations on neighbouring properties before taking further action to deal with those held by the company.

In addition to these activities, the company derived a substantial income from letting the surface of its farms for agricultural purposes, while from the year 1923 onwards portions of the farm Droogefontein were leased or sold by the company as small holdings.

In his assessment of the appellant company for the year ended 30th June, 1935, the Commissioner for Inland Revenue treated the consideration received by the company for the farm Spaarwater as a receipt on income account, but placed upon the 1,000,000 shares so received, a value of 12s. per share. In fixing this valuation of the shares the Commissioner took into account the middle market value of the shares of the purchasing company on the date of the agreement of purchase and sale, which was 15s. 4 1/2d., and the middle market price at a date one month later, which was 15s. 1 1/2d.

The company appealed against this assessment, but its appeal was dismissed by the Special Court for hearing Income Tax Appeals, which confirmed the assessment.

Thereupon the company, being dissatisfied with this decision, as being erroneous in law, required the statement of a case to the Supreme Court, submitting for decision, the following questions: Was the Special Court correct in holding:-

1. (a) That the sale by the company of the mineral rights over the farm Spaarwater was not a realisation or change of investment, but part of a scheme of profit making;

   (b) that in terms of the agreement whereby the Company sold the mineral rights over the farm Spaarwater, the consideration payable to the company was not the sum of £250,000 in cash;

   (c) that the consideration payable to the company in terms of the said agreement was one million shares of the nominal value of 5s. in East Rand Consolidated, Limited;

   (d) that the value of the said shares to the company was not the nominal value of such shares, viz., 5s. each, but a value of at least 12s. per share.

2. (a) That in determining the value to be placed upon the said shares consideration must be given to the possible price which could have been obtained by selling the same over a period from the 29th November, 1933, onwards;

   (b) that the correct method of ascertaining the value of the said shares was not to take the possible price which might have been obtained by the sale of the whole of the said one million shares on the date of the signing of the said agreement, namely, the 29th November, 1933.

The Transvaal Provincial Division (MURRAY and MARITZ, JJ.) in answering the questions submitted in favour of the Crown and confirming the decision of the Special Court, held that whatever might have been the original purpose with which the appellant company had been formed, the course of its business operations over a long period prior to the transaction under consideration indicated that it was prepared to employ and did employ its capital productively in terms of its objects, but not by mining the sale of the mineral rights on Spaarwater was accordingly a profit-making scheme and the consideration received was income. The Court further held that the consideration received by the company was not cash but the allotment of shares, as neither seller nor purchaser could elect to discharge the obligation by a payment of cash, and that the method of calculating the value of those shares adopted by the Commissioner was reasonable in the absence of more definite evidence as to their value.

On appeal:

Held, dismissing the appeal and confirming the decision of the Transvaal Provincial Division, that as the initial intention with which the mineral rights on the farm Spaarwater had been acquired was their resale at a profit and there was no evidence of any change of intention on their re-acquisition from the company which had purchased them, their ultimate sale concluded a business operation in carrying out a scheme of profit making and the resulting profit was taxable;

Held, further, that the true consideration for the sale of the rights was 1,000,000 shares in the purchasing company, as no cash consideration could be demanded from the purchaser, who was entitled and obliged to deliver these shares in fulfilment of its obligation;

Held, further, that the market quotation on the date of sale and that of a later date were relevant to the question of the value of the shares constituting the consideration and were rightly admitted in evidence and applied by the Special Court.

The Court further pointed out that the actual value of the shares making up the consideration was a question of fact, not law, and that question 1(d) should not, therefore, have been submitted.

STRATFORD CJ: The main question in this appeal is whether a profit made by the appellant company on the realisation of the mineral rights in the farm Spaarwater is income within the meaning of Act 40 of 1925. On 29th November, 1933, the appellant sold the said mineral rights to the East Rand Consolidated

Ltd., the purchase price being stated in the contract of sale to be "£250,000, to be paid and satisfied by the allotment and issue to the seller of 1,000,000 shares of 5s. each in the capital of the purchaser credited as fully paid-up," which the purchaser undertook to allot and issue within 30 days after the date of the sale. The respondent, the Commissioner for Inland Revenue, in arriving at the profit, placed a valuation of 12s. per share on the said shares and from the total so arrived at, namely £600,000 deducted £150,577, the cost to the appellant of the said mineral rights, leaving a balance of £449,423 which the Commissioner added to the appellant's income for the purpose of assessing Normal Tax for the year ended 30th June, 1935. The appellant appealed to the Special Court, contending, on the main issue in the dispute, that the primary object of the appellant was mining, that the

sale of the said mineral rights in 1933 was made with a view to reaping profits from the mining of the property and not with the mere intention of making a profit by the sale itself, and that the sale was not part of a scheme of profit making but a realisation or change of investment. The Special Court, by a majority, dismissed the appeal and that decision was upheld by the Transvaal Provincial Division.

The powers of the appellant company, which was incorporated in 1904, may be summarized in the following terms:-

(a) To acquire lands, mines and other premises and especially to acquire the freehold of the farm Vlakfontein, the freehold of the farm Droogefontein and a mining lease giving the option to buy the farm Strydpan and Stompiesfontein, all these properties being in the district of Heidelberg except Droogefontein which is in the District of Pretoria.

(b), (c), (d), and(e) give powers relating to mining and disposing of gold.

(f) and(g) To assist any business which the company is authorised to carry on and to enter into partnership or co-operate with any person or company in such business.

(h) To acquire, sell, hold or deal in the shares of any other company having objects altogether or in part similar to the objects of the company.

(i) and(j) Give powers of amalgamation with and purchase of the assets of any other company carrying on any business which the company is authorized to carry on.

Page 353 of 9 SATC 349

(k) To sell the whole or any part of the assets of the company for such consideration as the company may deem fit and in particular for money and shares of any company having similar or partly similar objects or wholly for money or wholly for such shares.

(l) To promote and be interested in any other company and to transfer to such company the whole or any part of the property rights and assets of the company.

In 1906 the rights in regard to Strydpan and Stompiesfontein were allowed to lapse and from that time until 1918, when the appellant acquired the mineral rights in Spaarwater from one Pistorius for £143,707, the fixed property consisted of Vlakfontein and Droogefontein. Except for certain boring work on Droogefontein and Vlakfontein, the appellant never carried out any mining operations or shaft sinking on any of its properties. In 1909 the boring on Vlakfontein had reached a vertical depth of 5,073 ft. With the object of throwing light on the intention of the appellant the stated case mentions remarks made by the chairman at various annual meetings. It is unnecessary to mention the proceedings at these meetings in detail; they show that the directors in view of the lack of capital, adopted the policy of awaiting the results of operations on neighbouring properties, hoping that such results would assist in proving the appellant's property.

In 1910 the appellant acquired an interest in a syndicate formed for the purpose of boring on Spaarwater, which is in close proximity to Vlakfontein; but the boring operations proved unsatisfactory and in the following year or shortly afterwards the syndicate went into liquidation.

During the war period the directors of the appellant considered it useless to try to raise further capital. It is admitted that when the appellant acquired the mineral rights in Spaarwater in 1918 it did so for the purpose of immediately selling such rights to a proposed new company. This company, Spaarwater Gold Mines, Ltd., bought the mineral rights in Spaarwater from the appellant for £300,000, the consideration to be satisfied by the issue to the appellant of 252,000 shares of £1 in Spaarwater Gold Mines Ltd. and 48,000 like shares to J.D. Lace, the then chairman of the appellant. At this time the control of the appellant and of Spaarwater Gold Mines, Ltd., passed to the Johannesburg Consolidated Investment Company, Ltd., and the issued capital of the appellant

Page 354 of 9 SATC 349

was reduced to £127,500. Subsequently fresh shares were issued which eventually brought the issued capital of the appellant to £382,500. At the annual meeting of the appellant in 1919 the chairman stated that though the primary object of the company was mining, 9,000 morgen of its land were let at a rental of £2,710 per annum.

In 1921, owing to difficulty in finding the necessary capital Spaarwater Gold Mines, Ltd., went into liquidation and the directors of the appellant repurchased the mineral rights of Spaarwater, the price being the discharge of the appellant's rights to participate in the liquidation distribution. The case stated mentions that this amounted to the appellant taking back the mineral rights in Spaarwater for the same consideration as it received when it sold them to Spaarwater Gold Mines, Ltd., and that, as no work had been done on the property by the latter company, the transaction was fair. From 1921 till 1933 the waiting policy continued, and the directors kept themselves informed of the development values disclosed in mines in the vicinity such as Nigel Gold Mining Co. In 1933, when owing to the abandonment of the gold standard there was great activity in the development of gold bearing properties on the Reef, the appellant and 6 other companies co-operated in floating a new company to acquire the appellant's farm Vlakfontein. Among the said 6 companies were the Sub Nigel, Ltd., which held a mining lease over an adjoining farm. At the meeting of shareholders held on 21st April, 1933, to approve of the agreement between the promoting companies and the trustee for the new company to be formed, the Chairman of the appellant explained certain engineering advantages to be derived from the co-operation of the Sub Nigel Ltd. which would undertake to sink an inclined shaft into the Vlakfontein mining area from the bottom of a certain shaft on its own property. The new company, Vlakfontein Gold Mining Company, which was registered in November, 1934, bought Vlakfontein from the

appellant for £325,000 for which sum the appellant subscribed 650,00 shares. The appellant also got the right to subscribe 17 1/2 per cent. of the working capital, a right which, if exercised, would give it the control of the new company. The case stated mentions that in 1936 the appellant held 1,533,000 shares in the Vlakfontein Gold Mining Company, Ltd. Counsel for the appellant contended

Page 355 of 9 SATC 349

that it carried out a mining policy throughout in regard to Vlakfontein and that after 1921 it held Spaarwater in pursuance of a similar policy in regard to the latter farm until November, 1933, when the appellant, having fortuitously received an offer for Spaarwater too good to refuse, sold the mineral rights in Spaarwater as above mentioned. Since the latter date the sole business of the company has consisted of holding shares in other companies which it has acquired either by the sale of its own properties to these companies or by buying shares for speculative or investment purposes and either reselling them at a profit in the market or holding them for dividends. On 31st August, 1934, the value of the appellant's share investments stood at £523,137. The only interest in fixed property now held by the appellant is the mineral rights over portion of Droogefontein which are considered to be valueless.

In regard to the value of the 1,000,000 shares in East Rand Consolidated, Ltd., received for Spaarwater, the case stated shows that on 28th December, 1933, the date of allotment, the middle market price was 15s. 1 1/2d. per share, this price being 3d. less than the price on 29th November. Apart from these shares the appellant bought 37,500 East Rand Consolidated shares during 1934 at an average cost of £1 10s. per share and during the same period the appellant sold in various quantities and on various dates 230,000 of its holding at an average price of £1 9s. 2d. per share, totalling £335,857.

The effect of the decision of the Special Court appears from the following questions stated under section 60 of the Act for the decision of the Provincial Division, namely whether the Special Court was correct in holding (as it did):-

"(1) (a) That the sale by the company of the mineral rights over the farm Spaarwater was not a realisation or change of investment but part of a scheme of profit making.

(b) That in terms of the agreement whereby the company sold the mineral rights over the farm Spaarwater the consideration payable to the company was not the sum of £250,000 in cash.

(c) That the consideration payable to the company in terms of the said agreement was one million shares of

Page 356 of 9 SATC 349

the nominal value of 5s. in East Rand Consolidated Limited.

(d) That the value of the said shares to the company was not the nominal value of such shares, viz., 5s. each, but a value of at least 12s. per share.

(2) (a) That in determining the value to be placed upon the said shares consideration must be given to the possible price which could have been obtained by selling the same over a period from the 29th November, 1933, onwards.

(b) That the correct method of ascertaining the value of the said shares was not to take the possible price which might have been obtained by the sale of the whole of the said one million shares on the date of the signing of the said agreement, namely, the 29th November, 1933."

From these questions stated for the decision of the Transvaal Provincial Division it will be seen that they are reducible to two main questions, viz. (1) Was the Special Court right in holding that the profit made by the appellant company on the sale of these mineral rights was income within the meaning of the Income Tax Acts? (2) If so, was the Special Court right on the evidence in taking a value of 12s. per share for the purpose of arriving at the money value of the consideration received by the appellant company on the sale?

Both questions were answered by the Transvaal Provincial Division in favour of the Commissioner and the appellant company now appeals to this Court.

Question(1)(a) is a statement of the first question; all the other questions relate to what I have called the second main question.

As phrased the first question shows proper appreciation on the facts of the case of the only two ways of regarding such profit as the appellant company made on the transaction: was it the result of capital appreciation on a realisation of an investment, or was the profit the result of a scheme of profit making?

Bearing upon this question I must refer once again to the oft-quoted words of the CHIEF JUSTICE in *Overseas Trust Corporation Limited v Commissioner for Inland Revenue* (1926, A.D., p.

Page 357 of 9 SATC 349

444 at p. 453):1 "Where an asset is realised at a profit as a mere change of investment there is no difference in character between the amount of enhancement and the balance of the proceeds. But where the profit is, in the words of an eminent Scotch Judge, see *Californian Copper Syndicate v Inland Revenue* (41 Sc. L.R., p. 694), 'a gain

made by an operation of business in carrying out a scheme for profit making,' then it is revenue derived from capital productively employed, and must be income." Another test mentioned in *Commissioner for Inland Revenue v Lydenburg Platinum Ltd*. (1929, A.D. at p. 147)2 and other cases is stated thus, "was the income derived from capital productively employed?" The reference to the necessity of ascertaining the taxpayer's "business" - a word which occurs in the English Income Tax Acts but not in ours - owes its origin to the decision in *Commissioner of Taxes v Booysen's Estates* (1918, A.D. 576). That case was decided on the Income Tax Law of 1914 in which the definition of "income" was the following: "'Income' shall, in relation to any person, mean any gains or profits, derived by, or accrued to, or in favour of such person for the year in which the assessment is made, from any source within the Union, and shall include profit, rents, gains, interest, salaries, stipends, wages, allowances, the estimated annual value of any quarters or board, or residence, or any other benefit or advantage of any kind, whether in money or otherwise, granted to him in respect of his employment, or any pension, stipend, charge or annuity." INNES, C.J., after quoting this said: "So that the section imposing a tax upon all incomes, read in the light of the wide definition of that word covers practically the whole ground. The definition makes no reference to trade or business; its scope is not expressly limited in that direction. Yet rightly regarded it will be found that there is little if any practical difference, in a transaction like the present, between the operation of our definition and the effect of the English Schedule. The expression 'any gains or profits' cannot be taken in its widest and most literal sense. The Act imposes a charge upon income only, not upon capital; and the definition cannot be read so as to cover accruals which are really capital. The gains and profits referred to must

Page 358 of 9 SATC 349

be gains and profits in the nature of income." Later the learned CHIEF JUSTICE is reported as follows: "As already remarked, it matters not, in this case, whether the rule founded on Schedule D of the English Act is adopted, or whether the company's liability is tested by reference to the definition of income in sec 49 of Act 28 of 1914. The result is the same. Whether the same conclusion would always be reached by an application of the two tests is a point upon which I desire to express no opinion, for it is unnecessary for present purposes to discuss it." In some of the subsequent decisions of this Court references are made to English decisions without attention being drawn to the difference of wording in the English Act as contrasted with our own. But none of the later cases, in my judgment, preclude this Court in a proper case from relying upon this difference of language for the purpose of arriving at a conclusion opposed to an English decision based upon the precise words of English Income Tax Acts. However, for the purpose of the decision in the present case it is unnecessary to pursue this matter further. The definition of "gross income" in Act 40 of 1925 is: " 'Gross income' means the total amount whether in cash or otherwise received by or accrued to or in favour of any person, other than receipts or accruals of a capital nature . . ."and income is defined as the amount of gross income after making certain deductions allowed by and specified in the Act. So that, admitting the fact of the accrual, the enquiry is whether it is an income accrual or a capital accrual and, except for the admonition that accruals must fall into one category or the other, the definition is of no assistance whatsoever. For guidance we must go back to what has been said in *Booysen's* case and subsequent cases. The tests one finds laid down differ slightly in wording but one test derived from the cases is the following: "Is the accrual the result of the productive use of capital employed to earn profits?" (See at p. 457 *Overseas Trust Corporation Limited v Commissioner for Inland Revenue*(*supra*).) If so, it is income within the meaning of the Act for it is not an accrual of a capital nature. In the present case the fact is that the profit accrued as a result of the sale of certain assets. If then the capital of the company was employed to acquire these mining rights with a view to working them, such employment would be in the nature of an investment and a subsequent

Page 359 of 9 SATC 349

sale at an enhanced amount would be a realization of an investment and the resulting profit would be a capital accrual. But if the object of the original acquisition was to resell at a profit and that object is achieved the profit obtained is the result of the productive use of capital employed for the purpose of making such profits; the profit is then income. Both counsel quite correctly in my view approached the present problem in that way. It will be seen that, framing the question as I have, the ascertainment of design or intention at the time of purchasing the assets subsequently sold is all-important. For the purposes of the present case, and indeed, in general that is so. But having due regard to the decision in the *Lydenburg Platinum* case(*supra*) it cannot be said that it is an essential element of the test that the intention must be clearly antecedent to, or present at, the time of acquisition. In delivering the judgment of the Court in the *Lydenburg Platinum* Case (*Supra* at p. 147) I said: "Whether at the date of purchase, the Board had definitely formed the intention to secure those profits by resale or by mining is not necessary to say, for the facts of the case convince me that a profitable resale or resales were certainly in their contemplation. There were these two methods of turning the valuable acquisitions to profitable account; both were business methods of making gains authorised by the company's memorandum." The inference from this statement, read in relation to the facts of that case, is that a company may not have decided at the time of acquisition to which of two operations it will devote its energies and resources, and that a definite election made shortly afterwards can be made to relate to the acquisition. In the present case it is admitted that the mineral rights in question were originally acquired for the purpose of resale at a profit and that they were indeed sold in fulfilment of that purpose. It is denied, however, that the repurchase in 1921 from the Spaarwater Gold Mines was for the purpose of holding for resale. Indeed it is boldly argued by Mr *Blakeway* that the intention of the company thenceforth was to carry on mining operations on the property and not to resell it. It was submitted that to determine whether this sale was effected in pursuance of a pre-existing scheme of profit making it was permissible to consider the following matters: (1) the name of the company; (2) its objects; (3) its activities; (4) its policy; (5) the

circumstances of acquisition of the asset in question and(6) the circumstances of its realization. No objection can be made to the relevance of an enquiry on those lines. But there is literally nothing to be inferred in favour of the appellant company in considering the first four matters. In my judgment the name is colourless; the objects clearly included a scheme of profit making by buying and selling mining rights; this scheme it actually attempted to carry out; and it was, therefore, its policy, or to state the matter perhaps more accurately, one of its policies, in regard to some of its assets. A review of the activities of the appellant company detailed above seems strongly to support my conclusion up to this point. The real subject of controversy concerns the intention of the company when it re-acquired these mining rights in 1921. Previous to the first sale they were admittedly held for resale. On the facts of the case it is clear that they were thrown back into the hands of the appellant company because of the collapse of the buyer - a forced re-acquisition the motive for the acceptance of which was, apparently, that this was the best way out of an unprofitable bargain. *Prima facie*, it appears to me, when so reacquired they again fell into the category in which they were previously put by the policy of the appellant company, namely the category of assets held for the purpose of resale. But Mr *Blakeway* contends that they were put into the category of property held for the purpose of mining. One answer to this is that there was no such category. The appellant company never carried on mining operations except to test value, on any of its properties; since its inception it has never carried on mining operations with the object of profitable extraction of gold. Counsel refers to the dealing with Vlakfontein as an example of so dealing with its mineral properties. Vlakfontein was disposed of for shares in another company floated for the purpose of working it, and it is argued that the effect of holding shares in that company was to make the appellant company a partner in the working company; in other words that the operations of the buying company were the operations of the appellant company *pro tanto* to its holding of shares. I disagree entirely that this is the proper legal light in which to look at this transaction. The disposal to the Vlakfontein Company was simply a sale to another legal *persona* and in law it matters not whether the appellant

company by reason of its large shareholding retained control of it or not.

But even if counsel were correct in his contention in regard to the Vlakfontein sale, it would not be sufficient, in my judgment, to indicate a change of policy in regard to the Spaarwater mining rights when they fell back into the hands of the appellant company. In his very careful argument Mr *Blakeway* referred to other minor matters as indications of this change of policy, but I deem it sufficient to say that in my judgment the facts of the case, paying due regard to the company's policy as disclosed in the minutes, afford strong support to the finding of the Special Court, affirmed by the Transvaal Provincial Division, that the intention of the company on the re-acquisition of these mining rights was to hold them for the purpose of resale at a profit. They were so sold and this concluded a business operation in carrying out a scheme of profit making. The resulting profit was, therefore, rightly held to be taxable.

The next question concerns the valuation of the share consideration; what monetary amount was on the 29th November, 1933 (the agreed date) received by appellant company for the Spaarwater mining rights? This question is made the subject of a number of so-called questions of law submitted to the Transvaal Provincial Division. Questions 1(b) and(c) may perhaps be described as questions of law inasmuch as they raise a question of construction of clause 1 of the agreement of sale. The reference in that clause to the sum of £250,000 and to the nominal value of the shares (five shillings) cannot override the true intention of the parties which was that the true consideration was 1,000,000 shares in the purchasing company. No cash consideration could be demanded from the purchaser who was entitled and obliged to deliver these shares in fulfilment of its obligation to pay for the assets bought. Thus the consideration must be valued and such valuation cannot be affected by the reference to £250,000 or to the nominal value of the shares. These two questions must be answered in favour of the respondent. The question asked under 1(d) is a pure question of fact and in that form should not have been submitted and therefore, calls for no answer.

The questions raised under 2(a) and(b) give rise to some slight difficulty owing to the form in which they are couched. The

ascertainment of the value of the shares was a question of fact; that question with others, was taken to appeal to the Special Court. The Special Court in affirming the valuation of the Commissioner referred to the evidence it relied on in support of its conclusion. It is a question of law whether or not such evidence was legally relevant to the question. I read these two questions, therefore, as challenging the correctness of the Special Court's application of the evidence. I do not read question 2(a) as one based on the supposition that the Special Court affirmed the valuation of 12s. solely by reference to the market price subsequent to the 29th November, for it did not so restrict the enquiry. I read the question to raise merely the relevance of subsequent market quotation to the ascertainment of the value on the 29th November. Such evidence, in my judgment, was admissible and pertinent to the question of value. The market price on the agreed date was admittedly relevant, but it might have been fictitious and momentary. The stability of the market quotation and its approximation to value is properly tested to some extent by reference to the market quotation before and after that date. Reading the question as I think it should be read it must be answered in favour of the respondent.

The exact point intended to be raised by question 2(b) is again not too clear. The value of the shares on the 29th November must, of course, be ascertained by enquiring what price could have been obtained for them, by adopting some reasonable method of sale on that date.

To throw the whole 1,000,000 shares on the Johannesburg market on a given date would obviously be the worst possible way of gauging their value. Both common sense and the evidence suggest that the quotation would become fictitious or nil long before the major portion of the shares were sold. If then the question was intended to refer to this method of ascertaining value, I answer it in favour of the respondent. But there are obviously other methods of effecting a selling of shares wholesale than by throwing them all on the open market. What has to be looked for is a person who is willing to buy wholesale at a price under the retail price of the Stock Exchange quotation. He would get his profit over a period by retail sales. Such a buyer would certainly be influenced by the stability and firmness of the Stock Exchange

daily quotation and would normally buy at something under that quotation. Now I think, on a fair reading of the judgment, the Court was influenced by the proper considerations I have mentioned and I also think the question was merely intended to raise the question of the correctness of the test of value by throwing the 1,000,000 shares on the Stock Exchange. That question I have already answered.

The conclusion is that the questions were rightly answered by the Transvaal Provincial Division and the appeal must be dismissed with costs.

DE VILLIERS, DE WET and TINDALL, J.J.A., and FEETHAM, A.J.A., concurred.

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Footnotes

1 2 SATC 71 at p. 75.
2 4 SATC 8 at p. 19.