THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 388/2019

In the matter between:

CARL FRANK HATTINGH	**APPELLANT**

and

DARREL FURMAN NO	**FIRST RESPONDENT**
GREGORY PAUL WEINBREN NO	**SECOND RESPONDENT**
DEAN ADAM WEINBREN NO	**THIRD RESPONDENT**
ROWAN FURMAN NO	**FOURTH RESPONDENT**

Neutral citation: *Hattingh v Furman and Others NNO* (Case no 388/2019) [2020] ZASCA 123 (5 October 2020)

Coram: PONNAN, VAN DER MERWE, MOLEMELA and MBATHA JJA and LEDWABA AJA

Heard: 11 May 2020

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 5 October 2020**.**

Summary: Contract – interpretation of - membership in a close corporation – buy and sell agreement – whether conclusion of addendum amounting to 'withdrawing from business' – whether addendum a simulated transaction.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Tsoka J, sitting as court of first instance): judgment reported *sub nom Furman and Others NNO v Hattingh* [2018] ZAGPJHC 649

The application for leave to appeal is dismissed with costs.

JUDGMENT

LEDWABA AJA

[1] This appeal concerns, principally, the validity and enforceability of the Buy and Sell Agreement (BSA) entered between Milton Lawrence Weinbren (Weinbren) and the appellant, Carl Frank Hattingh (Hattingh), in respect of the buying and selling of Weinbren's member's interest in Air and Allied Technologies Close Corporation (the CC), a close corporation incorporated in terms of the company laws of the Republic of South Africa.[1] An allied issue is the validity and impact of the Addendum to the Memorandum of Agreement (AMA) that was signed by Hattingh and Weinbren, the latter in both his personal capacity as well as in his representative capacity as member of the CC, on 29 August 2013 in order to cancel the Memorandum of Agreement (MOA) or

[1] Registration number CK1989/01123923.

acquisition agreement. It was in terms of the MOA that Hattingh purchased twenty-five percent of the interest in the CC. For convenience sake, the appellant will be referred to as the defendant or Hattingh. The first to fourth respondents, who are the duly appointed executors of Weinbren's deceased estate, will be referred to as the plaintiffs.

[2] Weinbren died on 31 October 2016. After his death, Hattingh claimed and thereafter received an amount of R15 829 833 from the insurance policy that he had taken on the life of Weinbren in terms of clause 4 of the BSA. In 2017 the plaintiffs, as executors of the estate of Weinbren, issued summons against Hattingh. Relying on the BSA, they claimed the proceeds of the life insurance on the basis that Hattingh was obliged to pay the proceeds to them as consideration for the interest of Weinbren. In terms of clause 5.2 of the BSA,[2] the premiums of each policy was payable by the policyholder.

[3] The court a quo granted judgment in favour of the plaintiffs with costs. Hattingh's application for leave to appeal was dismissed. Hattingh filed a special application for leave to appeal in this court, together with an application for the condonation of the late filing thereof. This court referred the application for oral argument in terms of s 17(2)*(d)* of the Superior Courts Act 10 of 2013. The application for leave to appeal and the merits of the case were argued together.

[4] Before the high court, Hattingh's defence was that the plaintiffs were not entitled to the proceeds of his policy on the life of Weinbren because the BSA was terminated on account of his withdrawal from the business. The plaintiffs replicated and stated that, notwithstanding the conclusion of the AMA, Hattingh in fact had twenty five percent interest in the CC and the BSA was not terminated

[2] Clause 5.2 provides that: 'The premium payable in respect of each respective Policy included in this Agreement shall be borne and paid by the Policyholders.'

by the AMA; alternatively that Hattingh did not withdraw from the CC and the BSA was not terminated; and, further alternatively, that Hattingh did not withdraw from the CC as contemplated in clause 13.1.3 of the BSA. Clause 13 provides as follows:

'Termination and Cession

13.1 This Agreement shall terminate on—

13.1.1 the written agreement of both Parties, or

13.1.2 the simultaneous death or disability of both Parties, or

13.1.3 one of the Parties withdrawing from the Business.'

The purported AMA was simulated and thus void.

[5] In my view the termination of the BSA depends on whether the AMA is a valid or simulated agreement. If the AMA is a legally valid agreement, it should be further determined whether it had the effect of cancelling the BSA and, furthermore, whether Hattingh withdrew from the business. Considering the complexity of the issues and the fact that there may be reasonable prospects of success, condonation and leave to appeal should be granted.

[6] Weinbren was the founder of the CC in 1989. He held a hundred percent of the interests in the CC. Hattingh was employed by the CC from 2002 as a sales manager and was promoted to the position of general manager in early 2008. Weinbren offered Hattingh twenty-five percent interest on certain terms and conditions. On 28 November 2008 the parties signed the MOA recording the sale. The parties also signed a Members Association Agreement (MAA) and the BSA, which stipulated that, on the death of either Weinbren or Hattingh, the survivor would be deemed to have purchased the interest of the other in the CC. Hattingh's twenty-five percent interest in the CC was recorded by the Companies and Intellectual Property Commission (CIPC) with effect from 1 March 2009.

[7] Hattingh's interest was retransferred to Weinbren in September 2013, after the AMA was signed and the CK2 form and amended founding statements were filed. According to the CIPC records, Hattingh ceased to be a member and Weinbren owned a hundred percent of the interest in the CC.

[8] To paint a fuller picture it is necessary, at this stage, to mention what the plaintiffs asserted as the reason for the signing of the AMA. Hattingh was married to Irma Blackburn (Blackburn) in community of property. When she died on 27 August 2012, she had a signed will/testament. Therein Blackburn bequeathed her half-share in the joint estate, which obviously included half the value of Hattingh's twenty-five percent member's interest in the CC, to her children born from her previous marriage.

[9] According to the plaintiffs' assertions, Weinbren and Hattingh were concerned that the heirs of Blackburn would own half of Hattingh's interest in the CC. They therefore held several meetings with Darryl Furman, their attorney, and Allen Narunsky, their accountant, seeking advice on how to resolve Hattingh's predicament of having to share his interest with his late wife's children. Some correspondence was exchanged between Weinbren, Hattingh and Furman on the issue. The plaintiffs in their particulars of claim refer to Hattingh's email dated 20 November 2012[3] and Weinbren's email dated 26 February 2013[4] to support their assertions.

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[3] The email reads as follows:
'Hi Alan/Rozana
That is not the issue, the issue is that the shares are paid for as per the handwritten [agreement] Milton and Alan did a few years ago. I need this made official on a letterhead that needs to be signed by Milton, myself and Alan. This has been going in circles for a while.'

[4] 'Hi Darryl
Am I correct in thinking that if Allen's valuation is correct, and Carl's shares are worth R3,5 million round figures, valued with the same formula as at the time of the sale of the shares, and they accept the valuation, Carl will have to fund R1,75 million to put in the estate? In fact he would have to fund R3,5 million of which half would be his plus half of whatever other assets would belong to Urma and Carl? If Urma has minimal assets, then Carl, and down the line, I will have to bear the brunt? But in fact on paper, Carl has never paid for his share, putting aside any private agreement we may have. So in effect Carl would owe what his shares are worth, and this would be the

[10] On 29 August 2013 Weinbren and Hattingh signed the AMA to immediately cancel the MOA. The apparent basis of the cancellation was that Hattingh failed to pay the purchase price in accordance with clause 4 of the MOA. Hattingh signed all of the necessary documentation to give effect to the change and transfer his interest to Weinbren. The CIPC made the relevant changes in its records to record that Weinbren owned a hundred percent of the interest in the CC.

[11] After Hattingh ceased to own any interest in the CC, he continued to be an employee of the CC until resigning in December 2016.

[12] The MOA records the sale of the sale of twenty-five percent of Weinbren's interest in the CC to Hattingh. The purchase price, subject to certain terms and conditions, was R3 750 000.[5]

[13] The MAA was signed on 28 November 2008. It records the member's interests of Weinbren and Hattingh as seventy-five percent and twenty five percent, respectively. It further notes how the business would be governed, for

actual, legal position? So in fact, Carl's shares are then protected? Or do I become another creditor in the estate? As another point, if Allen brought in the terrible year we had in 2010 because of the lack of business in the market, or product being an absolute grudge purchase, the shares could be valued at less. This would make Carl's exposure less. Please do not discuss this with Carl till I am back as I just want clarification in my own mind. I don't want another outburst as I had today.
Milton.'

[5] Clause 4 reads as follows in relevant part:
'4 THE PURCHASE PRICE
…
4 2 Payment of the purchase price shall be payable as follows:
4.2.1 Upon the Effective date hereof the Purchaser shall purchase the purchasing members interest which percentage members interest shall be equivalent to R3 750 000 (three million seven hundred and fifty thousand rand) and which shall be payable by the Purchaser to the Seller from the proceeds of the dividends declared by the Close Corporation from time to time, over a period of 5 years from the Effective date hereof. It is furthermore recorded that the purchase price shall be subject to an increase of 8% (eight percent) per annum on the nett balance of the price. For avoidance of doubt this shall mean a capital increase of 8% (eight percent) per annum calculated annually in arrears on the purchase price less dividends paid to date.'

example, how member's interest would be dealt with in the future and the solutions if Hattingh ceased to hold an interest in the CC.[6]

[14] The BSA was also signed on 27 November 2008. Clause 1.1 clearly states that '[t]he parties are members in a close corporation…'.[7] It further deals with the obligation for the purchase and sale of each other's member's interests in the business, in the event of one of them dying or becoming disabled.[8]

[15] In terms of clause 5.1 of the BSA, the parties applied for life insurance policies. The values of each policy depended on the values of each member's interest in the CC. Weinbren insured the life of Hattingh for about R3 750 000. Hattingh insured the life of Weinbren for R11 250 000. In terms of clause 5.2 of the BSA,[9] the premiums of each policy were payable by each policyholder. The proceeds payable in the event of a successful claim escalated annually.

[16] Clause 13.1 and 13.2 of the BSA read as follows:

'13. Termination and Cession

13.1 This Agreement shall terminate on —

13.1.1 the written agreement of both Parties, or

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[6] Clause 10.2 states:
'It is recorded herein that Hattingh is employed by the Corporation and shall be entitled to receive a gross salary in the sum of R100000,00 (one hundred thousand rand) per month. It is agreed between the members that in the event that Hattingh ceases to hold a members interest as contemplated in clauses 15 and 16 (save for clause 16 1 3) but continues to be employed by the Corporation, Hattingh's gross salary aforesaid shall be reasonably negotiated and determined by the remaining members.'

[7] The full clause provides: 'The parties are members in a close corporation carrying on business under the name and style of Air and Allied Technologies CC (registration number CK 1989/01123923)'.

[8] '1.3 On the death or disability of one of the Parties
1.3.1 The Business will continue in the manner and under the name mentioned in this Agreement, and
1.3.2 The sale of the deceased or disabled Party's Interest in the Business shall be implemented as provided for in this Agreement.'

[9] '5 Life Policies
5.1 The Parties hereby agree to apply for a Life Insurance Policy on the life of the other Party no later than 21 (twenty one) days from date of signature of this Agreement, as contemplated in the introduction to this Agreement.
5.2 The premium payable in respect of each respective Policy included in this Agreement shall be borne and paid by the Policyholders.'

13.1.2 the simultaneous death or disability of both Parties,

13.1.3 one of the Parties withdrawing from the Business.

13.2 On the termination of this Agreement, each Party shall have the option, exercisable in writing within 90 (ninety) days of such termination, to claim outright cession of such policy from the owner of the policy, subject to the following terms and conditions…'

[17] In 2013 Weinbren and Hattingh signed the AMA, wherein the following is recorded:

'WHEREAS

A The Purchaser has failed to make payment of any of the Purchase Price to the Seller in accordance with the provisions of clause 4 of the Agreement.

B The Seller and the Purchaser wish to cancel the Agreement with immediate effect.

C The parties wish to record their agreement of cancellation on the terms and conditions set forth in this Addendum to the Agreement.

THE PARTIES AGREE AS FOLLOWS:-

1. CANCELLATION

The Parties hereby agree to the cancellation of the Agreement with effect from the date of signature of this Addendum.'

[18] In 2013 the CC applied for the keyman policy on the life of Hattingh for R8 000 000. The policy was owned by the CC. In the questionnaire, the keyperson insurance records that the persons are people on whom the success and progress of the business depends; persons who make important decisions and contribute towards the profits of the business. Importantly, on the question if Hattingh was a co-owner of the business, the answer is 'No'.

[19] The MOA, the MAA and the BSA were signed on the same day. In my view the MOA is the foundation of both the MAA and the BSA. Neither the MAA nor the BSA can exist without the MOA. However, the MOA can remain as a selfstanding agreement to transfer interest in the CC between members without the existence of the MAA and the BSA. The cancellation of the MAA will

therefore not have an impact on the MOA and the BSA. But the policy holders of the life policies applied for in terms of the BSA would still remain owners of those policies unless cession had occurred.

[20] It should be noted that clause 2 of the AMA was rectified by way of an amended pleading. The corrected and amended version reads as follows:

'2. RISK AND BENEFITS

The risk and benefit in and to the 25% of the members' interest in the Close Corporation shall pass from the Seller to the Purchaser on the signature of this Addendum.'

[21] In terms of s 29(3)*(a)* of the Close Corporations Act 69 of 1984 (the Act): 'The membership of any person qualified therefor in terms of subsection (2) shall commence on the date of the registration of a founding statement of the corporation containing the particulars required by section 12 in regard to such person and his or her member's interest.'[10] membership of a CC commences on the date of registration of the founding statement showing the full names, identity number, size of member's interest and the contribution made. You cannot claim to have a member's interest in a CC unless same has been registered. The exception is in respect of certain legal

[10] Section 12 of the Act regulates the founding provision and provides as follows:
'Any person qualified for membership in terms of section 29 … shall draw up a founding statement in the prescribed form in one of the official languages of the Republic, which shall be signed by or on behalf of every person who is to become a member of the corporation upon its registration and which shall, subject to the provisions of this Act, contain the following particulars:
(a) The full name of the corporation: Provided that a literal translation of that name into any one other official language of the Republic, or a shortened form of that name or such translation thereof, may in addition be given;
(b) the principal business to be carried on by the corporation;
(c) (i) a postal address for the corporation; and
(ii) the address (not being the number of a post office box) of the office of the corporation referred to in section 25 (1);
(d) the full name of each member, his or her identity number or, if he or she has no such number, the date of his or her birth, and his or her residential address;
(e) the size, expressed as a percentage, of each member's interest in the corporation;
(f) particulars of the contribution of each member to the corporation in accordance with section 24 (1), including—
(i) any amounts of money; and
(ii) a description, and statement of the fair value, of any property (whether corporeal or incorporeal) or any service referred to in section 24(1);
(g) (i) the name and postal address of a qualified person who or firm which has consented in writing to his or her or its appointment as accounting officer of the corporation; and
(ii) the date of the end of the financial year of the corporation.'

representatives, such as executors in respect of deceased members, who may hold a member's interest only if the deceased held a member's interest at the time of his death. The said interest should be registered at the CIPC within ten (10) days. See s 29(2)*(c)*.

[22] Plaintiffs submitted that South African law recognises the ability of a registered member to hold the membership on behalf of somebody else, the latter being a beneficial interest holder. For this proposition reliance was placed on *Nayager*.[11] In that matter the following appears at para 12:

'All that the first applicant has, on his version, is a right as against the second applicant to be reflected as a member of the close corporation and a right as against the close corporation in liquidation to be reflected as its member. He is therefore in the position of a beneficial shareholder who is not reflected as such in the share register of the company, who classically does not qualify to bring a winding-up application or pursue a remedy for oppression under s 252 of the old Companies Act. By parity of reasoning, a beneficial shareholder and accordingly a person in the position of the first applicant in relation to a member's interest has no standing to apply under s 354 to set aside a winding-up order.' (Citations omitted.)

[23] The high court said 'a beneficial shareholder has no standing to apply to set aside a winding up order'. In para 7 Tuchten J mentions the effect of failure to execute a form CK2 and to lodge it with the CIPC. The plaintiff's submission that the law supports a registered member to hold membership on behalf of another is incorrect. The facts in the present matter distinguish it from *Nayager's* case.

[24] An underhanded agreement to hold shares or member's interest contrary to what is in the records of the CIPC is not permissible. That would amount to misleading the public about one's member's interest in a CC. The power to bind the corporation in terms of s 54 of the Act is on the registered member.

[11] *Nayager and Another v Venter NO and Others, In re: Vorster NO v Erf 603 Benoni CC* [2017] ZAGPPHC 729.

[25] Importantly, the keyman policy is not mentioned in the BSA. It serves a different purpose to the life policies mentioned in the BSA. The keyman policy is a form of business insurance that protects the business from losses suffered as a result of the death or disability of an important member by closing the gap left by the services that were rendered by such an employee.

[26] If the keyperson dies the insurance would pay the proceeds to the CC, which is the holder of the insurance. Crucially Hattingh's executors would not be entitled to claim the benefits of the policy because the policy was issued to protect the services that Hattingh was rendering and had nothing to do with the BSA or the members' interest.

[27] When Hattingh dies the proceeds of the life policy purchased and owned by Weinbren in terms of the BSA would be paid to the estate of Weinbren. Hattingh's estate would not be entitled to such proceeds because Hattingh is not a registered member of the CC. There is no membership interest to be purchased. The BSA is not applicable.

[28] In the amended particulars of claim, the plaintiffs' claim for R15 829 833 is based on the BSA, the MAA and the MOA. The plaintiffs allege in para 17[12] that the alleged twenty five percent interest held by Hattingh appears in clause 5.2[13] of the last will and testament of Weinbren, Hattingh's email dated 20

[12] 'As at 31 October 2016:-
17.1 The deceased held 75% of the members' interest in A&AT.
17.2 The defendant held 25% of the members' interest in A&AT, as appears from *inter alia*:-
17.2.1 clause 5.2 of the last will and testament of the deceased, a copy of which is annexed hereto marked "POC5";
17.2.2 the email dated 20 November 2012 from the defendant a copy of which is annexed hereto marked "POC6"; and
17.2.3 the email from the deceased dated 26 February 2013, a copy of which is annexed hereto marked "POC7".'

[13] 'It is hereby recorded that CARL FRANK HATTINGH has made payment to me for 25% (twenty five percentum) of my members interest in Air and Allied Technologies CC. Although CARL FRANK HATTINGH may not yet have been registered as a member of Air and Allied Technologies CC on my passing, he shall be

November 2012[14] and Weinbren's email dated 26 February 2013.[15] It is interesting that the plaintiffs did not allege the existence of the AMA. This was, for the first time, raised in the defendant's plea.

[29] Hattingh's defence in the plea is that the BSA was terminated in terms of clause 13.1.3 on 29 August 2013 when the defendant withdrew from the business of the CC.

[30] Plaintiffs filed a replication to Hattingh's plea and alleged that, notwithstanding the purported conclusion of AMA, Hattingh held twenty five percent membership interest in the CC. They further stated that Hattingh contravened the provisions of s 13(1) of the Administration of Estates Act 66 of 1965.[16] The purported AMA was a simulated agreement and therefore void.

[31] Allen Narunsky, the plaintiffs' witness, testified that he is a chartered accountant and has been the accounting officer of the CC from 2008 to 2016. He mentioned the circumstances that gave rise to the execution of the AMA. He

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entitled to registration thereof without any charge therefor. I hereby bequeath a further 9% (nine percentum) of my members interest in Air and Allied Technologies CC to CARL FRANK HATTINGH.'

[14] 'Hi Alan/Rozana
That is not the issue, the issue is that the shares are paid for as per the handwritten [agreement] Milton and Alan did a few years ago. I need this made official on a letterhead that needs to be signed by Milton, myself and Alan. This has been going in circles for a while.'

[15] 'Hi Darryl
Am I correct in thinking that if Allen's valuation is correct, and Carl's shares are worth R3,5 million round figures, valued with the same formula as at the time of the sale of the shares, and they accept the valuation carl will have to fund R1,75 million to put in the estate? In fact he would have to fund R3,5 million of which half would be his plus half of whatever other assets would belong to Urma and Carl? If Urma has minimal assets, then Carl, and down the line, I will have to bear the brunt? But in fact on paper, Carl has never paid for his share, putting aside any private agreement we may have. So in effect Carl would owe what his shares are worth, and this would be the actual, legal position? So in fact, Carl's shares are then protected? Or do I become another creditor in the estate? As another point, if Allen brought in the terrible year we had in 2010 because of the lack of business in the market, or product being an absolute grudge purchase, the shares could be valued at less. This would make Carl's exposure less. Please do not discuss this with Carl till I am back as I just want clarification in my own mind. I don't want another outburst as I had today.
Milton.'

[16] Section 13(1) provides:
'No person shall liquidate or distribute the estate of any deceased person, except under letters of executorship granted or signed and sealed under this Act, or under an endorsement made under section fifteen, or in pursuance of a direction by a Master.'

confirmed that after the AMA was signed Hattingh continued to be the general manager of the CC.

[32] Regarding the email of Hattingh dated 20 November 2012, Narunsky said he was just an accounting officer and could not confirm or deny if Hattingh had paid for the member's interest. Weinbren was the person who could confirm the same. In about 2010/2011, the CC traded at a loss of R5 500 000. The purchase consideration of members' interest was to be adjusted to R1. Narunsky stated that Weinbren and Hattingh wanted to conceal from the executors of Blackburn that Hattingh had a member's interest in the CC. After Weinbren and Hattingh signed the AMA, the financial statements of the CC for each succeeding year were signed by Weinbren only.

[33] Narunsky further stated that Weinbren and Hattingh discussed that after the estate of Blackburn was finalised, Hattingh would be able to claim back the twenty-five percent member's interest at any stage and Weinbren would transfer the member's interest back to him. He did not account to Hattingh regarding the finances of the CC because he was not a member of the CC at that stage. Prior to the death of Weinbren, Hattingh did not request the member's interest to be transferred back to him.

[34] He confirmed that after the AMA was signed, Weinbren took additional keyman insurance for them to be on par with their life policies. Weinbren and the CC held policies on the life of Hattingh to the total value of approximately R15 million. Hattingh had a policy on Weinbren's life for the value of approximately R15 million. The BSA is silent on the keyman policy. The CC is entitled to the proceeds of the keyman policy. The proceeds are not connected to the interest that Hattingh had in the CC and if he were to die his estate would not have a claim to the said proceeds.

[35] Rowan Jared Furman testified that the email dated 22 November 2012 (not 20 November, as recorded in the particulars of claim) states that Hattingh purchased twenty-five percent member's interest. In my view the letter does not assist with the issue of whether Hattingh did pay for the twenty-five percent member's interest in terms of the acquisition agreement. Furthermore, the amount in the letter differs from the amount in the MOA.

[36] In the heads of argument, plaintiffs submitted that the BSA does not require the member's interest in the business to be registered and does not state that the transfer of member's interest in terms of the Act terminates a member's interest. I disagree. The CC is regulated by the Act, so that the CK2 document cannot merely be ignored. Clause 3.1 of the BSA states that the relevant and appropriate documents and forms should be signed. This is what is required by the Act.

[37] Plaintiffs further submitted that despite the signing of AMA and the recordal of Weinbren as having a hundred percent member's interest, Hattingh in fact remained a member and did not withdraw from the business of the CC. The BSA explicitly states that it may be terminated by one of the parties withdrawing from the business. In the agreement 'party' or 'parties' is defined as 'a member, or the members of the close corporation, as the case may be'. 'Business' is defined as 'Air and Allied Technologies CC, a Close Corporation duly incorporated in accordance with the laws of the Republic of South Africa, with registration number CK 1989/01123923'. Accordingly, properly interpreted, clause 13.1.3 means that if one of the members withdraws from the CC, he has at the same time withdrawn from 'the business', whether or not remaining on its records as an employee. In my view, when membership terminates by law, the BSA will also

terminate. One of the important factors to determine whether membership has been terminated is the amended founding statement and the records of the CIPC.

[38] The trial court said the BSA was never cancelled, despite the fact that its very existence depended upon the acquisition agreement. The defendant's contention that the BSA was terminated in terms of Clause 13.1.3 is incorrect because Hattingh never withdrew as a member of the CC. In my view, the trial court misconstrued withdrawal as a member and withdrawal as an employee.

[39] In terms of clause 12.2[17] of the BSA, should a provision of the BSA conflict with a provision of the MAA, or any other agreement between the parties or with the Act in relation to their respective interest, the provisions of the MAA shall prevail. The plaintiffs' submission that the interest in the business need not be registered is not correct because clause 4.2 of the MAA states that the member's interest shall be registered.

[40] Plaintiffs' further argument was that the AMA is a simulated agreement because Hattingh used the AMA to hide his member's interest in Weinbren's name for his benefit. The purpose was to avoid disclosure of members' interest to the executors of Blackburn. There is evidence that Weinbren was also worried and concerned that the heirs of Blackburn would have an interest in the CC. Weinbren was involved in the construction of the AMA.

[41] The allegation that the member's interest would revert to Hattingh when Blackburn's estate had been finalised should be scrutinised properly. When

[17] Clause 12.2 states as follows:
'If any of the provisions of this Agreement conflict/s with the provisions of the Members Association Agreement or any other agreement between the Parties or with the Close Corporations Act, in relation to their respective Interest, then the provisions of the Members Association Agreement shall prevail. Any Party shall be entitled at any time to require the other (who shall then be obliged) to co-operate in doing whatever may be necessary to amend any such agreements or this Agreement for the time being so as to conform with the provisions of the Members Association Agreement and incorporate therein the appropriate provisions.'

summons was issued, Blackburn's estate had not yet been finalised. This implies that Hattingh could not claim back the twenty-five percent members' interest. The consequences of the AMA is that Weinbren would be registered as owning a hundred percent of the members' interest in the CC.

[42] It is important to mention that Hattingh was employed as a sales manager in 2002 and promoted to the position of general manager in 2008. That did not make him a member nor did it give him a member's interest in the CC. Membership or members' interest was acquired in terms of the MOA when the member's interest was registered at the CIPC.

[43] If membership in the CC is terminated, it does not follow that Hattingh can never continue to be a general manager or an employee and he should therefore leave the CC. He can still be the general manager without having a member's interest in the CC. There is a distinction between being an employee of a CC only; and being an employee who has a member's interest in a CC. In my view withdrawal in clause 13.1.3 refers to withdrawing or disposing of the member's interest that one had in the CC.

[44] Weinbren and Hattingh could have sought to prevent the heirs of Blackburn to have a member's interest in the CC. But their purpose and motive could only materialise after the estate of Blackburn had been finalised. The deceased's estate has not yet been finalised and the executors can still claim what is due to the heirs, including the member's interest owned by Hattingh at the time when Blackburn died. The AMA would not affect what the heirs are entitled to because it was signed after Blackburn's death.

[45] The other crucial issue to be considered is the effect of AMA between the Weinbren and Hattingh. It is common cause that after signing, the member's

interest of Hattingh was transferred to Weinbren in terms of the agreement. The parties took further steps to change the registration of members' interest at the CIPC. It should be determined if the AMA has an impact on the validity of the BSA or whether the BSA could still be enforced between the parties if they intentionally agreed that Weinbren would have a hundred percent of the member's interest in the CC. In my view the BSA is applicable if one of the registered members of the CC dies or becomes disabled. If there is no member's interest to be purchased, the BSA would have no meaning.

[46] The estate of Blackburn was not a party to the AMA and should not be prejudiced. In my view the estate of Weinbren is not entitled to the same rights to claim as Blackburn's estate, because Weinbren willingly signed the agreement. The fact that Blackburn's estate can still claim half the value of Hattingh's member's interest as at the time before she died does not give the plaintiffs the right to nullify what Hattingh and Weinbren intentionally agreed upon.

[47] Weinbren and Hattingh could have intended something that was not achievable. Blackburn's executors can still claim half of Hattingh's member's interest. Weinbren and Hattingh intended to cancel the MOA and registered the change accordingly, in my view. If the agreement is a simulation as plaintiffs allege, the plaintiffs should have applied for it to be so declared and it should be kept in mind that the *ex turpi causa non oritur actio* and the *in pari delicto* maxims are still part of our law. The parties cannot seek assistance from the court for an unlawful transaction they have performed.

[48] It is unfortunate that the trial court objected to Darryl Furman giving evidence after he had taken oath. Mr Furman is an officer of the court and I think his evidence could have assisted the trial court in determining exactly what the status of AMA was. The trial court held that the BSA was not terminated in terms

of clause 13.1.3, without having the benefit of the evidence of Darryl Furman so that it could examine the transaction as a whole, including the surrounding circumstances and the manner in which it would ultimately be implemented.

[49] The termination of the MOA does not obligate the parties to cancel the life insurance policies that they own. The life insurance policy remains valid but clause 4 of the BSA will not be enforceable. Weinbren's estate owns the policy on the life of Hattingh and the CC of which Weinbren has a hundred percent member's interest owns the keyman policy. If Weinbren's estate continues to pay for the life policies purchased in terms of the BSA and the keyperson policy, it will benefit financially when Hattingh dies. The parties did not exercise the option to cede in terms of clause 13.2[18] of the BSA.

[50] The Plaintiffs alleged that the AMA is illegal, contrary to public policy and a simulated agreement. Weinbren and Hattingh could have intended to deceive Blackburn's estate about the member's interest that Hattingh had in the CC. It is important to mention that Weinbren benefited from the AMA because his membership interest was increased. Now the Plaintiffs want to renege on the agreement and to benefit in terms of the BSA. In *Roshcon*,[19] this court said the following (para 37):

'The notion that *NWK*[20] transforms our law in relation to simulated transactions, or requires more of a court faced with a contention that a transaction is simulated than a careful analysis

[18] '13.2 On the termination of this Agreement, each Party shall have the option, exercisable in writing within 90 (ninety) days of such termination, to claim outright cession of such policy from the owner of the policy, subject to the following terms and conditions-
13.2.1 the Parties shall sign the necessary cession forms and shall submit the cession documentation to the Insurer within 30 (thirty) days of notification of termination, for registration with effect from the date upon which this Agreement is terminated,
13.2.2 the purchase price in respect of the Policies shall be an amount equal to the surrender value of the Policy on the life of each Party as determined by the Insurer as at the date of termination of this Agreement net of any taxes payable thereon, and
13.2.3 payment shall be in cash against cession, as set out in this clause, of all the owner's right, title and interest in and to the Policies.'
[19] *Roshcon (Pty) Ltd v Anchor Auto Body Builders CC and Others* [2014] ZASCA 40; 2014 (4) SA 319 (SCA).
[20] *Commissioner for the South African Revenue Service v NWK Ltd* [2010] ZASCA 168; 2011 (2) SA 67 (SCA).

of all matters surrounding the transaction, including its commercial purpose, if any, is incorrect. The position remains that the court examines the transaction as a whole, including all surrounding circumstances, any unusual features of the transaction and the manner in which the parties intend to implement it, before determining in any particular case whether the transaction is simulated.' (Citations omitted.)

[51] In para 14 of the *Roshcon* case the court further quoted from *Dadoo,*[21] where Innes CJ reasoned that:

'[P]arties may genuinely arrange their transactions so as to remain outside its provisions. Such a procedure is, in the nature of things, perfectly legitimate. There is nothing in the authorities, as I understand them, to forbid it. Nor can it be rendered illegitimate by the mere fact that parties intend to avoid the operation of the law, and the selected course is as convenient in its result as another which would have brought them within it. An attempted evasion, however, may proceed along other lines. The transaction contemplated may in truth be within the provisions of the statue, but the parties may call it by a name or cloak it in a guise, calculated to escape these provisions. Such a transaction would be *in fraudem legis*; the court would strip off its form and disclose its real nature, and the law would operate.'

[52] Also, in *Commissioner of Customs and Excise v Randles Brothers & Hudson Ltd* 1941 AD 369 at 395-396, Watermeyer JA said:

'A transaction devised for that purpose, if the parties honestly intend it to have effect according to its tenor, is interpreted by the Courts according to its tenor, and then the only question is whether, so interpreted, it falls within or without the prohibition or tax.

A disguised transaction in the sense in which the words are used above is something different. In essence it is a dishonest transaction: dishonest, in as much as the parties to it do not really intend it to have, *inter partes,* the legal effect which its terms convey to the outside world. The purpose of the disguise is to deceive by concealing what is the real agreement or transaction between the parties. The parties wish to hide the fact that their real agreement or transaction falls within the prohibition or is subject to the tax, and so they dress it up in a guise which conveys the impression that it is outside of the prohibition or not subject to the tax. Such a

[21] *Dadoo and others v Krugersdorp Municipal Council* 1920 AD 530 at 548.

transaction is said to be *in fraudem legis*, and is interpreted by the Courts in accordance with what is found to be the real agreement or transaction between the parties.'

[53] In my view there is nothing unusual about the transferring back of Hattingh's member's interest and changing the registration of interest at the CIPC especially because this happened after the death of Blackburn. The transaction that was implemented, has not been reversed. Plaintiffs now want to benefit again from the transaction which had an impact on the BSA. Plaintiffs cannot raise simulation as their defence.

[54] The law should give effect to the real transaction between the parties. Weinbren and Hattingh, between themselves intended that Weinbren should own hundred percent member's interest and that was implemented. The fact that it was not claimed back and the record of the CIPC still reflect Weinbren as the sole owner of member's interest should not benefit Weinbren who was a party to the agreement.

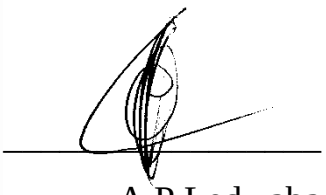
[55] The AMA is a genuine agreement and that is what the parties intended. The plaintiffs, in my view, did not prove that there was simulation and that the AMA contract, accordingly, is void.

[56] In conclusion plaintiffs still own a hundred percent member's interest on the CC on behalf of the deceased. The BSA policies regulated the purchasing of existing and registered members' interest. Weinbren and Hattingh intended to cancel the MOA. The BSA cannot be enforced against a party who is not a member of the CC. Hattingh is still the holder of the policy on Weinbren's life and Weinbren's estate is still the holder of the policy on Hattingh's life.

[57] I would make following order:

1. Condonation for the late filing of the special application for leave to appeal is granted.
2. Leave to appeal is granted.
3. The appeal is upheld with costs.
4. The order of the High Court is set aside and replaced with the following:

   'The plaintiffs' claim is dismissed with costs, including the costs of two counsel'



A P Ledwaba
Acting Judge of Appeal

PONNAN JA (MBATHA JA concurring)

[58] This is an application for leave to appeal and, if granted, the determination of the appeal itself. The two judges who considered the application referred it for oral argument in terms of the provisions of s 17(2)(d) of the Superior Courts Act 10 of 2013. Ledwaba AJA is inclined to grant the application and allow the appeal. I do not agree with my learned colleague.

[59] Different considerations come into play when considering an application for leave to appeal as compared to adjudicating the appeal itself. As to the former, it is for an applicant to convince the court that there are reasonable prospects of success on appeal. Success in an application for leave to appeal does not necessarily lead to success in the appeal. Because the success of the application for leave to appeal depends, *inter alia*, on the prospects of eventual success of the appeal itself, at the hearing of the matter, the argument on the application addressed the merits of the appeal.[22]

[60] The application arises for consideration against the following backdrop: On 28 November 2008 Mr Milton Weinbren, the sole member of Air and Allied Technologies CC (A & AT), sold to the applicant, Mr Carl Frank Hattingh, a 25% interest in A & AT. The ultimate intention was that Mr Hattingh would in due course acquire a 45% interest in A & AT. Simultaneously with the conclusion of the Memorandum of Agreement (the MOA) recording the sale, the parties concluded two further agreements - a Members' Association Agreement (the MAA) and a Buy-and-Sell Agreement (the BSA).

[22] *Body Corporate of Marine Sands v Extra Dimensions 121 (Pty) Ltd* [2019] ZASCA 161; 2020 (2) SA 61 (SCA) paras 1 and 2.

[61] Mr Weinbren committed suicide on 31 October 2016. The executors in his estate, who are the present respondents, instituted proceedings against Mr Hattingh in terms of the BSA, which provided that on the death of either Mr Weinbren or Mr Hattingh, the survivor would be deemed to have purchased the member's interest of the other in A & AT. The purchase was to be funded from the proceeds of life insurance policies that each would procure on the life of the other. In terms of clause 6.1 of the BSA, the purchase price of the deceased party's interest in A & AT would be the greater of the net proceeds of such policy or a valuation of the member's interest of such party.[23] Clause 6.2 provided that:

'The Buyer shall, on receipt of the policy proceeds . . . pay the full amount thereof to the Seller in reduction of the purchase price . . .'

[62] Mr Hattingh had taken out a policy in accordance with the aforesaid provisions. The premiums on the policy were paid by A & AT and debited to his loan account. After Mr Weinbren's death, Mr Hattingh claimed on the policy and received the amount of R 15 829 833. The executors alleged that he was obliged to pay those monies to them. Mr Hattingh pleaded in answer to the executors' claim that:

'the [BSA] was terminated in terms of clause 13.1.3 on or about 29 August 2013 on the occasion of [him] withdrawing from the business of [A & AT], and in consequence of the conclusion of the Addendum to the [MOA] (the Addendum).'

In other words, he denied that the BSA was still in existence as at 31 October 2016, the date of Mr Weinbren's death. Although somewhat confusing, the executors' replication to Mr Hattingh's plea, was to the effect that, notwithstanding the execution of these documents, Mr Hattingh did not 'as

[23] Clause 6.1 of the BSA provided: 'The purchase price of the deceased . . . Party's interest shall be the greater of:-
6.1 The net proceeds (after providing for the payment of any taxes, duties, levies and/or interest) of the Life Insurance Policy/ies . . .
6.2 the valuation of a Party's members interest and loan account in the close corporation . . .'

contemplated in terms of clause 13.1.3 of the BSA in fact withdraw from A & AT' and in the circumstances the BSA was not terminated.

[63] What has bedevilled the case is the fact that on 27 August 2012 Mr Hattingh's wife, Ms Urma Blackburn, died. As they had been married in community of property, they accordingly had a joint interest in Mr Hattingh's 25% member's interest in A & AT. The replication thus contended that the conclusion of the Addendum was contrary to Mr Hattingh's obligations in terms of s 11(1)(*a)* of the Administration of Estates Act 66 of 1965 and hence void, alternatively that it was concluded for the simulated purpose of avoiding an accounting in the estate of the Late Ms Blackburn and was thus invalid.

[64] The conclusion of the various agreements, including the Addendum were all common cause. Accordingly, the real issue in the case, in my view, was whether the conclusion and implementation of the Addendum amounted to Mr Hattingh 'withdrawing from the Business' within the meaning of that expression, thereby bringing about the termination of the BSA. Instead, the focus at the trial was on whether the Addendum was a simulated transaction. But, the question of the illegality in terms of the Administration of Estates Act or simulation could only arise if the factual position was that the execution and implementation of the Addendum amounted to Mr Hattingh withdrawing from the business.

[65] At no stage during the trial was any attempt made to address the meaning of the expression 'withdrawing from the business'. Nor is it addressed in the judgment of the court below. However, a proper understanding of the meaning of this expression in accordance with the ordinary principles of contractual interpretation is essential to the outcome of the appeal.

[66] Clause 13.1 of the BSA provides that:

'This Agreement shall terminate on:

13.1.1 the written agreement of both Parties; or

13.1.2 the simultaneous death or disability of both Parties,

13.1.3 one of the Parties withdrawing from the Business.'

The first two instances are fairly straightforward. In the first (clause 13.1.1), the parties will have decided, for whatever reason, not to go ahead with the BSA. In the second (clause 13.1.2), there will be no point in the continuation of the agreement. The third (clause 13.1.3), which occupies our attention in this appeal, is less straightforward. It does not refer to one of the parties disposing of their interest in the business. Nor does it refer to one of them disposing of their interest in A & AT. It refers to them withdrawing from the business. It may well be that if Mr Hattingh took up a better job opportunity elsewhere, he may perhaps, as well, have had to dispose of his interest in A & AT. But, that is a far cry from saying that his disposal of that interest, without more, amounts to him withdrawing from the business.

[67] Although the BSA defines 'Business' as A & AT, that is far from helpful. The Shorter Oxford English Dictionary (6ed, 2007) provides a number of different meanings for the word 'withdraw'. All of the relevant meanings convey the notion of drawing back or departing from a place or position. The following examples are apposite:

'Draw back or remove (a thing) from its place or position . . .

Remove oneself from a place or position . . .

Remove oneself or retire from a society or community, from public life, etc; abandoned participation (in an enterprise etc).'

It thus seems that this is the most natural sense in which to understand the expression 'withdrawing from the business'.

[68] Whether a person has indeed withdrawn would have to be assessed by having regard to all of the facts in the matter. If, for example, a person had retired or resigned their job and gone to work elsewhere, it would be appropriate to say that they had withdrawn from the business. But, the mere disposal of an interest in a company or close corporation may not necessarily constitute a withdrawal from the business of that company or close corporation. Contextually, such an approach makes sense. Mr Hattingh was brought into the business as a general manager when Mr Weinbren was contemplating emigrating to Australia, where all of his children had settled. To attract a competent manager to run the business, he offered Mr Hattingh an incentive in the form of an interest in A & AT, hence the conclusion of the MOA, under which Mr Hattingh initially acquired the 25% interest. The parties took out insurance policies in order to fund that acquisition and the premiums were debited to their loan accounts.

[69] Nothing changed after the conclusion of the Addendum. Mr Hattingh's work and work-related duties remained unchanged. Nor was there any change in his relationship to Mr Weinbren or A & AT. On 8 August 2013, and at the very time when the conclusion of the Addendum was under discussion, Mr Weinbren addressed a memorandum to Mr Hattingh, the introductory paragraph of which stated:

'It has been agreed between us that it is now time for me to hand over completely, the operation of the company to you. This is the right time for this change as the staff need one leader whose personality becomes the credo of the organization. I have been at it for 45 years. I think I have earned the right to hand over the reins completely. . . From hence forward, I will not be involved in any way with the daily running of the organisation, but only as a "consultant" on technical issues when needed.'

The memorandum went on to state:

'**Your Position in the Organisation**

You will take full charge and responsibility for A & AT as of immediate effect, which will include Macro and Micro Management. The whole ambit of operation will be left to you and your management team.

. . .

Outstanding Matters

Some outstanding matters that need to form subject of our meeting is the tie up with Gert and Arno, and BEE requirements . . .

Further Insurance.

We need to consider cross insurance increases in the short term'

[70] According to the evidence, Mr Hattingh continued thereafter to run the business as best he could, subject to Mr Weinbren's continued participation. Importantly, there was never any suggestion that the BSA had fallen by the wayside or that the insurance policies were being maintained for the private advantage of Messrs Weinbren and Hattingh.

[71] Indeed, there are several examples of this. First, one of the items referred to in Mr Weinbren's memorandum of 8 August 2013 was the need to tie-up agreements with Mr Gert Fourie and Mr Arno van Wyk. To this end draft agreements were prepared on 15 August 2013. Those agreements reflect Messrs Weinbren and Hattingh 'as the owners of 75% and 25% respectively of the member's interest in [A & AT]'. Clause 6 thereof headed 'Recordal and Acknowledgment', provided:

'6.1 Carl and Milton hereby record the existence of a Member's Association Agreement concluded between them in relation to the corporation, during November 2008. Arno hereby acknowledges the existence of such Agreement and that he is fully aware of the terms and conditions therein contained.

6.2 Carl and Milton hereby record the existence of a Buy/Sell Agreement on occluded between them in relation to their members' interest in the Corporation, which Buy/Sell

Agreement was concluded during November 2008. Arno hereby acknowledges the existence of such Agreement and is fully aware of the terms and conditions therein contained'.

[72] Second, in an application dated 14 August 2015 to Standard Bank for credit facilities on behalf of A & AT it is recorded that:

'Milton Weinbren (Sole Member looking after the Sales and Admin) . . .

Carl Hattingh (General and Technical Manager and Project Management) . . . is the general manager of the company dealing with all aspects of the corporation . . .

Milton Weinbren and Carl Hattingh . . . are involved in the day-to-day running of the business . . .

Succession planning is well catered for . . . Carl is still young and can buy Mr Weinbren's shares should be decide to retire, they have a [BSA] in place, including key man insurance for staff members. Decision making is taken by the relevant team leaders in department depending on the nature of the decision to be made, however, Milton Weinbren and Carl Hattingh have a final say in strategic decisions.

[73] Third, when Mr Weinbren took out a further 'Key person/Employment replacement' insurance policy on Mr Hattingh's life, the latter completed a questionnaire dated 18 November 2013, in which he described himself as the 'General manager' of A & AT. And, in response to the question, whether the lives of all key persons were insured, he replied: 'M.L. Weinbren - owner, insured through buy and sell'.

[74] Fourth, in 2016 when serious financial problems were emerging with the business and a rift developed between them, Mr Hattingh addressed several lengthy emails to Mr Weinbren expressing his frustration at the way in which the business was being conducted and setting out his views as to what needed to be done to rescue A & AT financially. In one of those emails dated 20 September 2016 Mr Hattingh suggested various cost-cutting measures. He alluded to the

need to 'restructure the company' and stated 'I have offered to leave and I am prepared to take a voluntary retrenchment in order to reduce the company overheads further'. After posing a string of questions, he added:

'I need these questions answered as you do not answer emails . . .

So we stagnate and stall while we wait for some form of response that generally does not materialise. Repeated requests are made and yet still no clear direction. I can't approve new orders as I don't know what your capability is in paying these suppliers . . .

The fact that you appear unconcerned and with the lack of action and financial input it appears that you may be preparing to leave the country and the company in the state that it is.'

When that email went unanswered, Mr Hattingh despatched a further email to Mr Weinbren on 31 October 2016, the very day that he took his life, imploring the latter to furnish answers to the questions raised.

[75] It is so that the Addendum recorded in paragraph 1 that they had agreed to the cancellation of the MOA and in paragraph 2 that: 'the risk and benefit in and to the 25% of the members' interest in the Close Corporation shall pass from the Seller to the Purchaser on the signature of this Addendum'. Moreover, pursuant to the addendum, A & AT's accountant, Mr Allen Nuransky, completed and lodged with the Companies and Intellectual Property Commission the requisite documentation to reflect the transfer of Mr Hattingh's interest in A & AT to Mr Weinbren. That change was also reflected in the 2013 and 2014 annual financial statements.

[76] But, the Addendum was directed at something entirely different. It was an endeavour to protect Mr Hattingh's interest in A & AT from the executors of his late wife's estate. And, when one has regard to all of the evidence it is difficult to see why the mere transfer of a 25% member's interest in A & AT should amount to withdrawing from the business.

[77] Overall it is difficult to comprehend on what basis Mr Hattingh can contend that he withdrew from the business as a result of the execution of the Addendum. Given the examples that I have alluded to, which are by no means exhaustive, he was actively involved in the business right up until Mr Weinbren's death. It follows that Mr Hattingh's foundational hypothesis, namely to equate the disposal of his interest with a withdrawal from the business, is logically fallacious. Plainly, therefore, his contention that he withdrew from the business as contemplated by clause 3.3.1 of the BSA, falls to be rejected. This conclusion renders it unnecessary to consider the further points raised in the appeal.

[78] It follows that as the envisaged appeal lacks prospects of success, the application for leave to appeal must fail.

[79] In the result the application for leave to appeal is dismissed with costs.

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V M Ponnan

Judge of Appeal

VAN DER MERWE JA (MOLEMELA and MBATHA JJA concurring)

[80] I have had the benefit of reading the judgments prepared by Ponnan JA and Ledwaba AJA respectively. I agree that the application for condonation should be granted. Save for this, I find myself in respectful disagreement with the reasoning and conclusion of Ledwaba AJA. I agree with Ponnan JA that the application for leave to appeal falls to be dismissed. However, I reach this conclusion by a somewhat different route, hence this judgment.

[81] I do not intend to repeat the facts of the matter and shall refer only to those facts that are necessary for a proper understanding of this judgment. I adopt the nomenclature used by Ponnan JA. The respondents' claim for payment of the proceeds of the policy on the life of Mr Weinbren, was based on the provisions of the BSA. The central issue is whether the BSA was terminated in terms of clause 13.1.3 thereof. That clause provided for the termination of the BSA on 'one of the Parties withdrawing from the Business.'

[82] I am prepared to accept that the applicant's interpretation of clause 13.1.3 is correct. I therefore accept, without deciding, that the phrase 'withdrawing from the Business' means ceasing to be a member of A & AT. It follows that had the Addendum been a genuine agreement, Mr Hattingh would have withdrawn from A & AT and the respondents' claim had to fail. If, however, it had been a simulated transaction, as the respondents contended and the trial court held, the application for leave to appeal would have no prospect of success. I therefore turn to consider whether there is a reasonable prospect of a finding on appeal that the trial court erred in this regard.

[83] The law in respect of simulated or disguised transactions is clear. The *locus classicus* on the subject is the judgment of Innes JA in *Zandberg v Van Zyl* 1910 AD 302, where he said at 309:

'Now, as a general rule, the parties to a contract express themselves in language calculated without subterfuge or concealment to embody the agreement at which they have arrived. They intend the contract to be exactly what it purports; and the shape which it assumes is what they meant it should have. Not infrequently, however (either to secure some advantage which otherwise the law would not give, or to escape some disability which otherwise the law would impose), the parties to a transaction endeavour to conceal its real character. They call it by a name, or give it a shape, intended not to express but to disguise its true nature. And when a Court is asked to decide any rights under such an agreement, it can only do so by giving effect to what the transaction really is: not what in form it purports to be. The maxim then applies *plus valet quod agitur quam quod simulate concipitur*. But the words of the rule indicate its limitations. The Court must be satisfied that there is a real intention, definitely ascertainable, which differs from the simulated intention. For if the parties in fact mean that a contract shall have effect in accordance with its tenor, the circumstances that the same object might have been attained in another way will not necessarily make the arrangement other than it purports to be. The inquiry, therefore, is in each case one of fact, for the right solution of which no general rule can be laid down.'

[84] In the majority judgment in *Commissioner of Customs and Excise v Randles, Brothers & Hudson, Limited* 1941 AD 369 at 395-396 Watermeyer JA explained that a transaction is not necessarily a disguised one because it is devised for the purpose of evading a statutory prohibition or liability and proceeded to say:

'A disguised transaction in the sense in which the words are used above is something different. In essence it is a dishonest transaction: dishonest, in as much as the parties to it do not really intend it to have, *inter partes*, the legal effect which its terms convey to the outside world. The purpose of the disguise is to deceive by concealing what is the real agreement or transaction between the parties. The parties wish to hide the fact that their real agreement or transaction falls within the prohibition or is subject to the tax, and so they dress it up in a guise which conveys the impression that it is outside of the prohibition or not subject to the tax. Such a

transaction is said to be *in fraudem legis*, and is interpreted by the Courts in accordance with what is found to be the real agreement or transaction between the parties.
Of course, before the Court can find that a transaction is *in fraudem legis* in the above sense, it must be satisfied that there is some unexpressed agreement or tacit understanding between the parties.'

[85] These principles have been affirmed in many judgments of this court. See, for instance, *Vasco Dry Cleaners v Twycross* 1979 (1) SA 603 (A); *Skjelbreds Rederi A/S and Others v Hartless (Pty) Ltd* 1982 (2) SA 710 (A) at 732G-733E; *Erf 3183/1 Ladysmith (Pty) Ltd and Another v Commissioner for Inland Revenue* 1996 (3) SA 942 (A) at 952C-953D; *Michau v Maize Board* 2003 (6) SA 459 (SCA) para 4 and *Commissioner for the South African Revenue Service v NWK Ltd* [2010] ZASCA 168*;* 2011 (2) SA 67 (SCA) paras 42-51. In essence, the law disregards simulation and gives effect to what the transaction really is.

[86] In the nature of things direct evidence of such simulation is seldom available. Whether or not the parties to an agreement actually intended that their agreement would *inter partes* have effect according to its tenor, is ordinarily determined on an analysis of the features of the transaction in question in all the relevant circumstances. In this matter, as I shall show, the position is quite different.

[87] Mr Hattingh was married to Ms Blackburn in community of property. Therefore, when she passed away on 27 August 2012, an undivided half share of Mr Hattingh's member's interest in A & AT fell within her deceased estate. She had bequeathed her estate to her children of a previous marriage. It is common cause that Mr Weinbren and Mr Hattingh were intent on preventing the estate of Ms Blackburn from laying any claim to Mr Hattingh's member's interest.

[88] Mr Allan Narunsky is a chartered accountant and during the relevant period he was the accounting officer of A & AT. He testified that various meetings were held to address this problem. The meetings were attended by Mr Narunsky, Mr Weinbren, Mr Hattingh and the first respondent (as Mr Weinbren's attorney).These meetings led to the conclusion and execution of the Addendum. Importantly, Mr Narunsky testified that even though Mr Hattingh's 25 per cent member's interest had been transferred to Mr Weinbren, 'Mr Hattingh would always be able to call back his 25 percent at whatever stage he requested. It would merely be (that) Milton couldn't deal with those shares because they really belonged to Carl as and when he needed them or wanted them.'

[89] The trial court accepted the evidence of Mr Narunsky. There is no basis for interference with this finding. On the contrary, Mr Narunsky's evidence was strongly supported by the probabilities.

[90] It will be recalled that the apparent reason for the Addendum was the failure of Mr Hattingh to pay the purchase price in respect of the 25 per cent member's interest. This was recorded in the Addendum in the following terms:

'**WHEREAS**

A. The Purchaser has failed to make payment of any of the Purchase Price to the Seller in accordance with the provisions of clause 4 of the Agreement.

B. The Seller and the Purchaser wish to cancel the Agreement with immediate effect.'

[91] But it was not true that Mr Hattingh had failed to make payment in terms of the MOA. In terms of clause 4 of the MOA the purchase price of R3 750 000 was payable by Mr Hattingh to Mr Weinbren 'from the proceeds of the dividends' declared by A & AT from time to time over a period of five years from 1 March 2009. Clause 6.5 thereof, however, provided:

'It is specifically recorded herein that in the event that dividends, for any reason whatsoever, are not declared by the Close Corporation from time to time, which dividends are to be paid by

the Purchaser to the Seller in settlement of the purchase price in accordance with clause 4 above, this shall not be deemed to be a breach by the Purchaser of this agreement.'

[92] In addition, both Mr Narunsky and Mr Hattingh testified that because of significant historical losses suffered by A & AT, Mr Weinbren and Mr Hattingh agreed during 2010 that Mr Hattingh had acquired the 25 per cent member's interest for the nominal sum of R1. Although the non-variation clause in the MOA may have rendered this agreement unenforceable, it strongly indicated the absence of any intention to cancel the MOA. The matter of non-payment was put beyond doubt by Mr Weinbren's last will, which provided in this regard:

'It is hereby recorded that **CARL FRANK HATTINGH** has made payment to me for 25% (TWENTY-FIVE PERCENTUM) of my members' interest in Air and Allied technologies CC. Although **CARL FRANK HATTINGH** may not yet have been registered as a member of Air and Allied Technologies CC on my passing, he shall be entitled to registration thereof without any charge therefor.'

[93] The first point on the probabilities, therefore, is that what the Addendum conveyed to have been the very reason for its existence, was a pretence. Second, as Ponnan JA clearly demonstrated, nothing had changed in respect of Mr Hattingh's involvement in A & AT. The position was quite the contrary; at the time of the Addendum it was envisaged that Mr Hattingh would take 'full charge and responsibility' in respect of A & AT. Finally, there is the overwhelming improbability that Mr Hattingh would relinquish his 25 per cent member's interest for no *quid pro quo*, only to prevent a claim to half of it.

[94] In these circumstances the real purpose and effect of the Addendum was not to divest Mr Hattingh of his member's interest. It was to hide it from Ms Blackburn's executor and heirs by having Mr Weinbren hold it for Mr Hattingh until the coast had cleared, as it were. That the parties performed in terms of the Addendum is of no moment: the charade of performance was meant to give

credence to their simulation (see *CSARS v NWK supra* para 55). And the re-transfer thereof would be a mere formality. In sum, Mr Weinbren and Mr Hattingh did not intend the legal effect that the Addendum conveyed to the outside world to operate *inter partes*. As between them, 25 per cent of the members' interest belonged to Mr Hattingh.

[95] Even on Mr Hattingh's interpretation of clause 13.1.3 of the BSA, therefore, he did not withdraw from A & AT. It follows that the BSA remained extant and that the application for leave to appeal should be dismissed.

[96] For these reasons I would grant the application for condonation, direct the applicant to pay the costs of the application for condonation and dismiss the application for leave to appeal with costs.

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C H G Van Der Merwe

Judge of Appeal

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