



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case no: 2025-070166

In the matter between:

JAARMET HANDELAARS CC **Applicant**

and

VULCEN PROPERTIES (PTY) LTD **First Respondent**

JACOBUS ROUX POTGIETER **Second Respondent**
ATTORNEYS INC

THE REGISTRAR OF DEEDS **Third Respondent**

Coram : Nziweni, J
Heard : 18 July 2025
Delivered : 20 August 2025

Summary: Contract – specific performance- whether the second agreement was a simulated agreement – whether the applicant was entitled to specific performance in respect of the second agreement. The sufficiency of the consideration is not in all circumstances a determinative factor to the question whether a contract is simulated. Revenue - a sharp distinction should be drawn between the purpose of the agreement and its effect. - unjust anomaly of the law if the substantive reality of a

transaction does not determine its character and its tax implications. - Whether the second Agreement should be treated as an entirely separate step, independent from the original Agreement, or they should be treated as related phases in a unified transaction.

REASONS FOR THE ORDER DELIVERED ELECTRONICALLY

Introduction and background

[1] In this application, the applicant sought a relief to compel specific performance of a contract that the applicant avers was concluded between the applicant and the first respondent on 26 February 2025 ("the second Agreement"). In addition, the applicant sought an order directing the second respondent to perform the tasks necessary to ensure that transfer to the applicant of section 26, Vredeloof Centre is registered by the third respondent.

[2] The applicant is Jaarmet Handelaars CC, a close corporation. The first respondent is a company with limited liability, while the second respondent is a firm of attorneys that was jointly appointed as conveyancing attorneys to facilitate and ensure that the transfer of the property is effected. The third respondent is merely cited as a party with an interest, and no relief is sought against it.

[3] At this juncture it is necessary to elaborate on the relationships between the parties involved. The first respondent was the applicant's landlord on the Vredeloof premises ("the property"). The property comprises of the sectional title scheme, [comprises] a number of sections and exclusive use areas. The applicant operated the Vredeloof Spar and Vredeloof Tops ("the store") located on the Vredeloof premises. In 2024, the first respondent informed the applicant that it was willing to sell the entire premises.

[4] The applicant and the first respondent subsequently entered into the Agreement of Sale ("the original Agreement") on 22 May 2024. In terms of the original Agreement, the applicant purchased the Vredeloof Spar, measuring 1669 square metres as a going concern for R26 000 000. Nedbank, agreed to finance the purchase price.

[5] Pursuant to the original Agreement providing for the sale of the entire property, Nedbank conducted an evaluation of the sections it intended to finance. It is common cause between the parties that the Nedbank appointed valuers discovered a discrepancy in the size of the store. The discrepancy lay in the recorded extent in the original Agreement and the actual space occupied by the store. At the time the original agreement was concluded, the parcel of land sold to the applicant by the first respondent, did not correspond with the full extent of the section sold to the applicant. Consequently, there was a discrepancy between the extent reflected in the deed of sale and the actual extent of the property.

[6] It is common cause between the parties that the actual space occupied by the store is 1669 square metres. However, the original Agreement recorded the extent of the property as 1295 square metres. The extent of the property accounted for in the original Agreement included section 1, which has a floor area of 795 square metres; section 2, with floor area of 315 square metres; section 21 covering 89 square metres; and an exclusive use area [Y1] measuring 96 square metres.

[7] The original Agreement and the sectional title plan failed to accurately reflect the extent of the extensions that were made to the store. Consequently, 374 square meters of the store remained unregistered. Thus, [374 square meters] representing the extent that had not yet been transferred to the applicant on the hearing of the application.

[8] It is common cause that the transfer of the 1 295 square meters of the property [Sections 1, 2 and 21 and exclusive use of area Y1] was officially registered on 26 November 2024. The transfer of the unregistered extended section [374 square metres] could not take place on 26 November 2024, together with other sections.

[9] It is also common cause between the parties that there was to be an initial transfer of the 1 295 square metres of the store as outlined in terms of the original Agreement. It is also common cause that the applicant was to retain R6 000 000,00 in the conveyancing attorney's trust account until the transfer of the [remaining] unregistered 374 square metres of the property to the applicant. The applicant states that the second agreement was intended to facilitate the transfer of the remaining unregistered section of Vredeloof Spar to it.

[10] The basic substance of the of the second Agreement is at the heart of this matter. Therefore, the key issue in this matter, involves the accurate characterisation of the second Agreement. The impugned deed of sale [second Agreement], recites amongst other things that:

"The Seller sells to the PURCHASER, who hereby purchases

The following PROPERTY:

Section 26 VREDEKLOOF CENTRE 16 square meters as evident from the SG No. D 528/2024

...

2 PURCHASE PRICE

The purchase price is the sum of R1000-000 (incl VAT) payable by the PURCHASER as follows:

2.1 In cash upon demand from the conveyancers.

3 SUSPENSIVE CONDITIONS

3.1 This transaction is subject to the successful registration of the sectional plans of the subdivision.

4 ...

[11] The parties also executed an addendum to the second Agreement; inter alia, the addendum stipulates the following:

"The property: SECTION 26, VREDEKLOOF CENTRE

Whereas the parties have agreed to delete clause 2 and replacing same with:

2. PURCHASE PRICE

The Purchase Price payable by the Purchaser to the seller is R1 000-00 (One Thousand Rand) including VAT at zero rated for VAT purposes and shall be paid in cash upon demand by the conveyancer as both the Seller and Purchaser are registered for VAT, and the property forms part of an income generating business enterprise which is sold as a going concern . . .”

[12] Thus, this dispute relates to the sale of a unit and exclusive use area within a sectional title scheme, which was not included as part of a transfer and still needed to be conveyed or transferred. The unit is referred to or described as section 26.

[13] The applicant therefore seeks to obtain a specific performance with the terms of agreement of sale concluded between itself and the first respondent on 28 February 2025 [second Agreement] in relation the transfer of section 26 of Vredeklloof Spar.

[14] On 18 July 2025, I granted an order in favour of the applicant, directing the first and the second respondents to comply with the provision of Sale Agreement for immovable property concluded between the applicant and the first respondent. I made an order directing amongst others; that the first and the second respondents take all necessary steps to ensure that the transfer to the applicant of section 26 Vredeklloof Centre is registered by the third respondent. I have also ordered that the power of attorney of the second respondent be reinstated to effect the transfer from the first respondent to the applicant in terms of the written deed of sale concluded between the applicant and the first respondent on 26 February 2025, is reinstated.

[15] I now give reasons for allowing the applicant’s motion. In this case, it is necessary to set forth the parties’ submissions in detail.

Parties’ submissions

[16] According to the applicant, although the first respondent had extended the Vredeklloof Spar retail store, located on section 1,2 and 21 of the Vredeklloof Centre and into exclusive use area Y 1, [the first respondent] neglected to amend the Sectional Title Register for the Vredeklloof Centre Sectional Title Scheme to reflect

these extensions. Consequently, the applicant continues, the transfer of all the necessary sections could not take place in November. The applicant further contends that the parties agreed that the first respondent shall subdivide Section 5 of Vredeklloof Centre into sections 25 and 26, for purposes of transferring the balance of Vredeklloof Spar retail Store as contemplated initially by the 22 May 2024 Sale Agreement.

[17] Therefore, the extended section and exclusive use area were not depicted in the sectional plan. According to the applicant, the unregistered [sections] extensions were included in the sections purchased by the applicant. The original [deed of sale] Agreement made provision for the purchase and transfer of Sections 1, 2 and 21 along with exclusive use of area Y1. The transfer was registered on 26 November 2024, as such, the transfer of the unregistered extended section could not take place on 26 November 2024, together with other sections.

[18] The first respondent and the applicant reached an agreement regarding the unregistered portion, stipulating that the first respondent shall subdivide section 5 of Vredeklloof Centre into sections 25 and 26. This subdivision is necessary to facilitate the transfer of the remaining portion of the Vredeklloof Spar store as outlined in the original Agreement.

[19] Due to the failure to register the extensions, the extent and boundaries of the sectional title unit, as outlined in the registered sectional title plan, differed from the physical structure that has been extended. According to the applicant, Nedbank required the amended sectional title plans before authorising financing for the extended portion.

[20] The applicant asserts that it seeks to obtain specific performance with the terms of the agreement of sale concluded between itself and the first respondent on 28 February 2025 [second Agreement] in relation the transfer of section 26 of Vredeklloof Spar.

[21] The deponent reviewed the second respondent's files regarding the Vredeklloof Spar retail store transaction as well as the second Agreement. He

concluded that the second Agreement was a simulated transaction. It did not accurately reflect the actual agreement intended by the applicant and first respondent for transferring the remaining interest of the Vredenkloof Spar retail store to the applicant.

[22] The first respondent admits the terms of the second Agreement. However, the first respondent submits that they do not reflect the true facts. It is further the first respondent's assertion that no written agreement of amendment to the original Agreement was concluded, save for the simulated transaction.

[23] In the light of the circumstances, the deponent to the answering affidavit indicated that he drafted a rectification agreement for the sale in relations to the transfer of section 26. It is the view of the deponent to the answering affidavit that the rectification agreement correctly recorded the causa of the transaction, and it mirrors the agreement of sale dated 22 May 2024.

[24] It is further contended in the answering affidavit that the second respondent was advised that SARS was more inclined to issue a transfer duty receipt on a factual transaction as opposed to a simulated one that records a peculiar causa of the sale of commercial property for the purchase price of R1 000.00.

[25] According to the first respondent, clause 17.2 applies to the unpaid R6,000,000 retained by the applicant. This amount relates to the transfer of 1 295 square metres of the Vredenkloof Spar retail store on sections 1, 2, 21 and exclusive use area Y1. The applicant retained full occupation and possession of the entire 1 669 square metres of the extended store. The applicant paid no compensation to the first respondent for either the unpaid R6 000 000 or the benefit of occupying the unregistered 374 square metres of the extended store. (1 295 + 374 = 1 669)

[26] It is the contention of the deponent of the answering affidavit that the first respondent failed to seek independent advice regarding the transfer of the extended Spar retail store, measuring 1669 square metres to the applicant. the first respondent further contends that the second respondent acted solely in the

applicant's interest throughout. The first respondent asserts that there appears to be a collusion between the applicant and the second respondent.

[27] It is further asserted in the answering affidavit that the first respondent was not properly advised by the second respondent, who was acting on behalf of the first respondent in terms of the original Agreement.

[28] The first respondent further contends that the second respondent failed to provide advice on the first respondent's entitlement to the interest on the unpaid R6 000 000,00, nor was any guidance provided on the applicant's continued possession and occupation of the unregistered 374 square metres of the extended store.

[29] The deponent to the answering affidavit raises a question regarding the rightful entitlement to the R6 000 000,00 held in the conveyancing attorney trust account. According to the first respondent, the fundamental problem in this case is that the applicant refuses to compensate the first respondent for the interest due on the amount of R6 000 000,00. It is further submitted in the answering affidavit that that the first respondent would have had no objection to the transfer going through if the applicant had fulfilled its obligations.

[30] Nedbank, then put a condition that R6 000 000,00, be retained in the conveyancing attorney's trust account until the Sectional Title Register has been rectified and the balance of the property has been transferred to the applicant. This application is about the acquisition of the balance of the property, section 26. selling a sectional title property especially when the extent of the unit reflected on the Deeds Office search in their opinion differs considerably from the extent according to the seller.

[31] However, the first respondent asserts that the second agreement is an unenforceable sham designed to achieve the rectification of the first agreement entered into between the applicant and the first respondent on 22 May 2024.

[32] In its founding affidavit, the respondent addressed the assertion made by the applicant, stating that it denies the contents of the paragraph, as the date of sale was 26 February 2025 and not “28” February 2025.

[33] The applicant further asserts that the first respondent, late last year, indicated a willingness to sell the entirety property to him, as a result they concluded a written agreement of sale on 22 May 2024. In response to this assertion, the first respondent stated that this did not happen late last year, as the applicant provided him with an instruction to draft an agreement of sale of the entire property on 09 May 2024.

[34] The applicant avers that in terms of the agreement of sale dated 22 May 2024, the applicant purchased the Vredeloof Spar retail store, measuring 1669 square metres, as a going concern for R26 000 000.00. The applicant further asserts that, the sale agreement made provision for the purchase and transfer of sections 1,2 and 21 and exclusive use area Y1, with transfer registered on 26 November 2024. In response to this, the first respondent asserts that nowhere in the agreement of sale dated 22 May 2024 does the dimension of 1 669 square metres appear. According to the first respondent, the extent of Vredeloof Spar retail store purchased by the applicant as a going concern per clause 1.20 of the sale agreement, is 1 295 square metres.

[35] The first respondent further asserts that the extension of Vredeloof Spar encroached upon 358 square metres of the common property of the Vredeloof Sectional Title Scheme.

Evaluation

[36] There is a rationale for the differentiation between the real transaction and a disguised transaction. The case law generally supports this approach as well. For instance, in *Commissioner of Customs & Excise v Randles, Brothers and Hudson Ltd* 1941 AD 369, at pages 395-396, Watermeyer J.A. draws a tight distinction between a disguised agreement and a real agreement as the following:

"A disguised transaction in the sense in which the words are used above is something different. In essence it is a dishonest transaction: dishonest, inasmuch 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."

[37] The fundamental goal of an agreement construction is to ascertain and effectuate the intention of the parties. In this matter, one party contends that the second Agreement is a sham, whereas the other party states that it is valid and enforceable. Accordingly, the first respondent would like this Court to view the second Agreement as a simulated agreement. Accordingly, this Court has to determine as to what was the real intention between the parties and not what they characterise it to be.

[38] I find the history leading to the second Agreement to be illuminating. As a matter of fact, the papers of the first respondent do not deny the terms of the second Agreement but simply asserts that it is a simulation.

[39] The starting point, of course, is that it is common sensical that the sectional plan and the actual extent of the section must always correspond. By a parity of reasoning, therefore, it follows that the extensions done to the store effectively altered the boundaries of that sectional title unit.

[40] I remain mindful of what was said by Watermeyer JA in *Randles, Brothers and Hudson, Ltd* supra when he stated that before a court can find that a transaction is in

fraudem legis, it must be satisfied that there is some unexpressed agreement or tacit understanding between the parties.

[41] The evidence in this matter establishes the following facts: (1) the first respondent is not happy with the role that was played by the second respondent as far as the transfer of the property and where his loyalties lied; (2) that the first respondent is of the firm view that it is owed interest from the R6 000 000,00 [held in the trust account, pending transfer of the extended section] ; (3) the first respondent in its answering affidavit admitted that the fundamental problem in this matter is that the applicant refuses to compensate [the first respondent] for the interest due on the amount of R6 000 000,00; (4) the applicant, in the original Agreement, was purchasing the entire Vredeloof Spar retail store measuring 1669 square metres; (5) that the 1669 square metres is made out of 1297 square metres [already transferred in terms of the original Agreement] and 374 [the unregistered extended section] square metres.

[42] The second Agreement reflects that property is sold by the first respondent to the applicant, for an amount substantially less than its fair market value. Consequently, the first respondent maintains that the second Agreement records a peculiar clause of the sale of commercial property for the purchase price of R1 000.00. It is plain that the first respondent, amongst others, latches on the amount upon which the property is sold. The first respondent maintains that when this aspect [purchase price of the second Agreement] and other mentioned considerations, are taken together, it becomes evident that the second Agreement is a simulation.

[43] The reasoning of the first respondent in this regard, violates a basic rule of contract construction, namely, that in construing a contract the court is not permitted to isolate single phrases but must consider them in the context in which they are found.

[44] It is important to keep in mind what was said in *Fujitsu Services Core (Pty) Limited v Schenker South Africa (Pty) Limited* (CCT 32/22) [2023] ZACC 20; 2023 (9)

Commented [SA1]: See also *Fujitsu Services Core (Pty) Limited v Schenker South Africa (Pty) Limited* (CCT 32/22) [2023] ZACC 20; 2023 (9) BCLR 1054 (CC); (2023) 44 ILJ 2391 (CC); 2023 (6) SA 327 (CC) (28 June 2023)

BCLR 1054 (CC); (2023) 44 ILJ 2391 (CC); 2023 (6) SA 327 (CC) (28 June 2023), when the Constitutional Court stated the following in paragraphs 48, 49 and 52:

“As I understand *Endumeni*, the language used in the document should be given its grammatical and ordinary meaning unless this would result in some absurdity, repugnancy or inconsistency with the rest of the instrument. The mode of construction, however, should never be to interpret the particular word or phrase in isolation. It is remiss to focus on individual aspects of the agreement and to read the entire agreement in a piecemeal fashion. The purpose of the impugned clauses requires a court to counterpoise the purpose of the agreement, on the one hand, on the other to ensure that the contextual approach to the proper interpretation of the exemption clause is not ignored.

It is apparent that the agreement requires a proper examination and understanding of the context within which clause 17 operates, giving effect to a sensible, business-like meaning . . .

In *Bothma-Batho Transport*, the Supreme Court of Appeal said that the interpretation of contractual terms does not stop at the literal meaning of words but considers them in light of all relevant and admissible context. Therefore, one cannot interpret the exemption clause by way of defining words alone. Interpretation is to be approached holistically: simultaneously considering the text, context and purpose.” Foot notes omitted.

[45] A **simulation** agreement has also been described as when a contract by mutual agreement, does not reflect the true intent of the parties involved. Evidently, it was the desire of the first respondent that this Court should have regarded the second agreement as null and void. According to the first respondent, the second Agreement was simulation intended to induce SARS to issue a transfer duty receipt. It is evident that the first respondent is challenging the integrity of the second Agreement.

[46] It is pertinent to note, as was stated in *Maize Board v Jackson* (396/2004) [2005] ZASCA 80; [2006] 3 All SA 511 (SCA); 2005 (6) SA 592 (SCA) (19 September

Commented [SA2]: See *Maize Board v Jackson* [2005] JOL 15614 (SCA) Also see *Roshcon (Pty) Ltd v Anchor Auto Body Builders CC and others* [2014] 2 All SA 654 (SCA)

2005) that the actual meaning of the contracting parties are primarily determined by resorting to the same aids and to invoke the same canons of interpretation. The Supreme Court of Appeal stated the following:

“A manifest intention to avoid the payment of levies would not, in the absence of anything else, be sufficient to justify the claim by the Maize Board that the agreements were simulated and that the true or real nature of the contractual relationship between Rainbow and the respondent was one of purchase and sale. The true enquiry in a matter such as this is to establish whether the real nature and the implementation of these contracts is consistent with their ostensible form. In pursuit of that enquiry one must strive to ascertain, from all of the relevant circumstances, the actual meaning of the contracting parties. It therefore becomes necessary to examine in greater detail the agreements in question and the manner in which they were implemented.”

Is the second Agreement an act of pretence?

[47] The pertinent question that emerges is whether the second Agreement is a simulated agreement, and whether the second Agreement was used to disguise its true circumstance. I am mindful of what was said in *Randles, Brothers and Hudson*, supra, when the Court stated the following:

“it is not enough for the parties to think that they have the intention, the intention must be proved as a fact apart from what they thought.”

[48] At this juncture, I regard it as essential to recite what was said in *Commissioner for South African Revenue Service v NWK Ltd* (27/10) [2010] ZASCA 168; 2011 (2) SA 67 (SCA); [2011] 2 All SA 347 (SCA); 73 SATC 55 (1 December 2010), when the following was stated:

“In my view the test to determine simulation cannot simply be whether there is an intention to give effect to a contract in accordance with its terms. Invariably where parties structure a transaction to achieve an objective other than the one ostensibly achieved they will intend to give effect to the transaction on the terms

agreed. The test should thus go further, and require an examination of the commercial sense of the transaction: of its real substance and purpose. If the purpose of the transaction is only to achieve an object that allows the evasion of tax, or of a peremptory law, then it will be regarded as simulated. And the mere fact that parties do perform in terms of the contract does not show that it is not simulated: the charade of performance is generally meant to give credence to their simulation.”

[49] I cannot accept that the first respondent has established any arguable point so far as the characterisation of the second Agreement as a sham. In light of the authorities as set out above, it is axiomatic that the guiding principles regarding the proper approach to adapt when the reality of a contract is assailed have been extensively discussed in authorities.

[50] The golden thread of these authorities, in my view, is to emphasise the point of importance that we should look at, examining the underlying reality rather than the focussing on the form or label. I pause only to note one further point, I wish to refer to another extract from the case of *Randles, Brothers and Hudson, Ltd* when Watermeyer JA, quoting *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530, stated the following:

“When a statute forbids or taxes a certain transaction, defined by name or description, and the question arises whether a particular transaction falls within or without the prohibition or tax, two problems of interpretation or construction arises. Firstly, the law has to be construed to ascertain what kind of transaction is forbidden or taxed. As to the interpretation of the law, the ordinary recognised principles of statutory interpretation are applied in order to determine what it is that is forbidden or taxed, and in this connection ‘the spirit of the law’ does not operate beyond the limits of its language.”

[51] It is inconsequential that the second Agreement assumed the form of a purchase agreement and that the purchase price did not reflect the market value. In addition, though I unhesitatingly accept that the form of an agreement is not itself determinative of the intention of the parties; it is, however, not permissible and

proper for a court to disregard an agreement's legal classification and rather focus on what is achieved from an economic interest.

[52] As I have already mentioned, the first respondent contends that the contemplated sale of the unregistered extended section of the sectional title to the applicant was not effected for bona fide business reasons. However, a fair assessment of the evidence in this matter suggest that the second Agreement was meant to give effect to the intention of the first respondent to sell the entire property to the applicant.

[53] It would, to my mind, be odd to deny that the second Agreement was a valid contract concluded between contracting parties. I am fortified in that conclusion by the consideration that the existence and the terms of the of the second Agreement are common cause between the parties.

[54] In this matter, it cannot be denied that there is, to say the least, evidence to support the applicant on this point. Other considerations that fortify this conclusion are that; it is common cause that the unregistered 374 square metres of the extended store also needed to be transferred to the applicant. It is also common cause, that from the onset, this was the intention of the parties involved.

[55] The applicant asserts that the second Agreement arises from the original Agreement. The evidence supports applicant's assertion that it was in that context that the second Agreement was concluded.

[56] Additionally, in my view considering the applicant's purported purpose of the second Agreement, the averment in the answering affidavit that the first respondent would have had no objection to the transfer sought by the applicant in this application going through if the applicant had kept its side of the bargain, is quite revealing.

[57] It is readily apparent that given the fact that the extension of Vredeloof Spar was not registered, it was not possible to transfer it to the applicant, in terms of the original Agreement.

[58] There is simply no adequate basis in this matter to demonstrate credence of simulation. Thus, I hold the view that the true intention behind the second Agreement in this matter, was solely to transfer the unregistered extended section of Vredeklouf Spar to the applicant.

[59] At the time when the original Agreement was concluded, the parties agreed to the price and that the first respondent was selling the entire extent of the property in question to the applicant. More significantly, in the context of this matter, it is critical to look at the substance of a transaction and not to its phraseology or to its characterisation. As far as this matter is concerned, I am satisfied that the real intention of the parties is easily ascertainable. There is no evidence of a tacit agreement or unexpressed agreement between the first respondent and the applicant.

[60] The pertinent facts are mainly to be discerned from the second Agreement and are, in most parts, uncontroversial. The tenor of the second Agreement does not suggest a simulated agreement. Additionally, the fact that the transfer of the unregistered extended section of Vredeklouf Spar might have been achieved through different means, does not impact the second Agreement.

[61] Equally, in respect of a simulated transaction, there is a lack of evidence of any intention to conclude a simulated agreement. Unlike in a simulated contract, the second Agreement has substance, it is not an act of mere pretence and devoid of any reality.

Tax implications

[62] The tax implications stemming from a business transactions are accurately ascertained by their substance and not by the form. Therefore, the substance of the transaction determines its character for purposes of taxation.

[63] In the present context, it was open for the applicant to transfer the extended section. At the cost of repetition, the record in this matter, provides ample evidence

that the parties agreed to enter into a deed of sale in respect of the entire property. Clearly, the purpose of the second Agreement was to ensure that the applicant bought the correct property, that reflects the unregistered boundaries and additions. Thus, it was entered into solely to facilitate the transfer of the unregistered portion to the applicant. Moreover, there is nothing in the record that indicates any contrary intention of the parties.

[64] It is critical that a clear distinction should be drawn between the purpose of the agreement and its effect. Occasionally, incidental effects in an agreement are inevitable. However, they should not be conflated with the object of an agreement.

[65] It would be a most unjust anomaly of the law if the substantive reality of a transaction does not determine its character and its tax implications. The evidence in this matter does not reveal that the main purpose of the parties was aimed specially at tax avoidance or mitigation [tax liability].

[66] The evidence in this matter reveals that the applicant purchased the property in good faith and for a fair value. The unregistered section of Vredeloof Spar rendered the original Agreement incomplete.

[67] As observed before, the substance of the second Agreement reveals that the ultimate result was intended from the outset when the first Agreement was concluded. It is well to bear in mind that from the outset the intended goal or end result was to sell the entire property to the applicant. From the word go, a purchase price was fixed for the entire purchased property, inclusive of the unregistered section of Vredeloof Spar. However, as pointed out before, that could not be achieved through the original Agreement due to the discrepancy between the original Agreement and the actual extent of the purchased property. Hence, the second Agreement.

[68] The question which then arises is whether the second Agreement should be considered as an entirely separate step, independent from the original Agreement, or if they should be viewed as interconnected phases within a unified transaction. In order to establish the integrity of an entire transaction [the two purchase

agreements], it is important that the separate steps that led to the conclusion of the two agreements must be viewed together [collectively] in order to ascertain tax implications.

[69] It is manifest from the pleadings that the two agreements are closely related. As such, the second Agreement was an integral component of the original Agreement. Therefore, it should be treated as a single contract for tax purposes.

[70] It was therefore particularly important that the conclusion of the second Agreement was not a pretence but was intended to pass title of the remaining portion of the property. Hence, an insignificant consideration was to be paid.

[71] In my mind, these factors evinces that there was a binding commitment for the parties to take the further step [the second Agreement] in order to facilitate passing of title of the remaining section to the name of the applicant. For all these reasons, I conclude that it makes sense then that the two agreements are best interpreted as two interdependent agreements.

[72] In circumstances, I even venture to say that the transaction contemplated by the second Agreement could have been done even with a much less value.

Sufficiency of the consideration

[73] Inasmuch as it is obvious that the real value of the unregistered extended section Vredeloof Spar was worth more than R1000,00. As such, the R1000, 00 consideration depicted in the second Agreement may perhaps appear to be inadequate. However, the sufficiency of the consideration is not in all circumstances a determinative factor to the question whether a contract is simulated. The Payment of a consideration, although inadequate, is sufficient enough to facilitate and justify a bona fide transfer of property. Thus, the applicant and the first respondent, by concluding the second Agreement, created genuine rights and obligations between themselves.

[74] I recognise that this is not a new problem. In a reported case of *Bosch and Another v Commissioner, South African Revenue Services* 2013 (5) SA 130 at para 78 and 85 (WCC); (20 November 2012), the following was stated:

“In my view, in *NWK* the Court was confronted with a starkly clear set of simulated transactions. The facts of the case illustrated, without doubt, that the parties had not created genuine rights and obligations but had constructed a loan for R 95 m as opposed to R 50, million purely to enable the taxpayer to obtain a greater tax benefit.

[85] It appears that the intention of this paragraph is to point in the direction which the mandated enquiry must take in such cases namely to examine the real commercial sense of the transaction. If there is no commercial rational, in circumstances where the form of the agreement seeks to present a commercial rational, then the avoidance of tax as the sole purpose of the transaction, would represent a powerful justification for approaching the set of transactions in the manner undertaken by the Court in *NWK*.”

[75] Albeit inadequate, the price stipulated in the second Agreement also evinces that the [second Agreement] is not simulated. The second agreement reveals that the purchaser intended to give something to the seller of the property, in the form of a consideration. Surely, in the circumstances of this matter, it is unreasonable to expect the applicant to pay twice for the same property. That would not make good business sense. It thus, makes good commercial sense that an insignificant amount was fixed as a purchase price.

[76] The second Agreement was supported by a consideration mentioned in the original Agreement.

[77] What is more, the mere fact that the applicant seeks specific performance under the second Agreement clearly demonstrates that it is a contract with binding effect. In the circumstances of this case, the second Agreement could be a sham only if the intention of the first respondent and the applicant was that the ownership of the unregistered extended section of Vredeklouf Spar should remain with the first respondent.

[78] For that matter, the first respondent did not allege that the R1000, 00 consideration was not paid. It can also not be said that the applicant did not make any cash payment at all for the transfer of the extended unregistered section of Vredeklouf Spar. It might appear that the second Agreement may be questionable as to its value and it might be so that [the second Agreement] appears advantageous to the applicant; I do not, however, believe this renders the second Agreement a sham.

[79] The R6 000 000,00 held in the trust account also attests to the fact that there is a consideration to be paid after the transfer of the unregistered extended property to the applicant.

[80] In this matter, the allegation that the parties entered into the second Agreement to induce SARS to issue a transfer duty receipt sounds hollow. The first respondent's point in this regard seems to be rather an obstacle put up as an afterthought, than a real concern.

[81] Surely, allegations of fraud should not be assumed, but should be proven. The first respondent did not adduce evidence of defrauding SARS or suspicious circumstances. The only thing the first respondent provided was a mere say so that the second Agreement is a sham.

The R6 000,000,00 held in the trust account

[82] Turning to the second issue and the question of the R6000 000,000. Regarding whether the first respondent is entitled to claim interests to the retained R6 000 000,00, that is not an issue before this Court. Perhaps it remains an issue for future determination, in another forum.

[83] Finally, the aspect pertaining to the duty of loyalty of the second respondent does not affect the legitimacy of the second contract, this much was also not asserted by the first respondent. For purposes of this application, the first respondent had not put forward evidence that suggests that the second respondent

had engaged in a conspiracy with the applicant to the disadvantage of the first respondent.

Conclusion

[84] There were several reasons why the first respondent's position was untenable. All the above considerations reinforce my conclusion that I have reached that the second Agreement is not a sham. For the reasons set out above, I granted the applicant's motion.

CN NZIWENI
JUDGE OF THE HIGH COURT

PARTIES

For the Applicant	:	Adv Mary-Anne McChesney
Briefed by	:	Gerrit Moller Attorneys
For the First Respondent		Micheal Wagener Attorneys