RESEARCH REPORT

Substance over Form – Fraus Legis - Simulated Transactions
Is there a gap in South African tax law in circumstances where parties conceal or disguise a transaction but still give effect to the agreements in accordance with the tenor of their terms?

By Grant Anthony Hugo

(Student Number 9106268J)

A dissertation submitted in partial fulfilment of the requirements for the Degree of

M Com (Tax)

In the

School of Accounting

At the

University of the Witwatersrand

Supervised by

Professor AP de Koker

DECLARATION

I, **Grant Anthony Hugo**, hereby declare that this dissertation is my own, unaided work. The substance of it, or any part of it, has not been submitted in the past, nor is it to be submitted for a qualification at any other university. The information used in the dissertation was obtained by me while employed at Darryl Ackerman Attorneys.

Grant Anthony Hugo

30 June 2023

ACKNOWLEDGMENTS

To my wife, Mandy, thank you for your patience, sacrifice and support, without which I would not have been able to undertake this task.

Thank you to my children, James, Leo and Caitlyn. You are my inspiration.

Further thanks to Darryl Ackerman, Adam Markovitz and Leonette Malherbe, for your support and assistance, as well as to my supervisor, Professor AP de Koker, for your much appreciated advice and assistance.

Finally, with gratitude and thanks to God. I am ever grateful for the blessings you have bestowed upon me, which include the opportunity and ability to undertake my studies and this dissertation.

ABBREVIATIONS

The following abbreviations are used in this research:

Dadoo Ltd	Dadoo Ltd v Krugersdorp Municipal Council 1920 AD 530
Erf 3183 Ladysmith	Erf 3183/1 Ladysmith (Pty) Ltd and Another v CIR 1996 (3) SA 942 (SCA)
GAAR	The General Anti-Avoidance Rule as contained in Section 103 (repealed) and/or Sections 80A to 80L of the Income Tax Act
Income Tax Act	Income Tax Act 58 of 1962
NWK judgment	CSARS v NWK Ltd 2011 (2) SA 67 (SCA)
Randles Brothers	Commissioner of Customs and Excise v Randles Brothers & Hudson Ltd 1941 AD 369
SARS/the Commissioner	The South African Revenue Services
Sasol Oil	Sasol Oil v CSARS (923/2017) [2018] ZASCA 153 (9 November 2018) (Neutral Citation - Saflii)
the simulation inquiry	The classic statement postulated by Innes, CJ in Zandberg v Van Zyl, at page 309 of the judgment, as to the inquiry into simulated transactions
Zandberg v Van Zyl	Zandberg v Van Zyl 1910 AD 302

ABSTRACT

De Villiers J.A. in Dadoo Ltd v Krugersdorp Municipal Council 1920 AD 530 –

> 'The ordinary method of evading the law is by means of simulated agreements. Experience shows, human nature being what it is, that courts of law have constantly to be on their guard against evasions of the law of this kind.'

The above is equally applicable in the context of taxation. The purpose of this research has been to understand the juxtaposition between the intention of the contracting parties and their performance in the context of the tenor of the respective agreements. The adoption into South African law of the doctrine of substance over form and its relationship with the principles of *fraus legis* and simulated transactions was discussed through the development of cases dealing with transactions in *fraudem legis* and simulated transactions.

The research was undertaken in an endeavour to ascertain if there is a gap in South African tax law in circumstances where the parties disguise or conceal a transaction, but still give effect to the agreements in accordance with the tenor of their terms. In conclusion, there is no gap. More is required than that the parties give effect to their agreements in accordance with their tenor, the parties must in fact mean that the agreements shall have effect in accordance with their tenor. The concealment or disguise is sufficient in and of itself to infer simulation and giving effect to the agreements in accordance with their tenor will not deem the result to be tantamount to giving effect to the real agreement between the parties, or to shield the parties from the operation of the common law. Our courts will not be deceived by the form of a transaction, and in the event of a determination of simulation, they will strip off its ostensible form and give effect to what the transaction really is.

South African common law is adequately developed to deal with endeavours at tax evasion of this kind.

TABLE OF CONTENTS

Chapter 1 INTRODUCTION

Objective

1.1 The objective of this research is to identify the nature and extent of the principles relating to substance over form, *fraus legis* and simulated transactions in South African tax law in the context of assessing whether a gap exists in circumstances where parties conceal or disguise a transaction but still give effect to the agreements in accordance with the tenor of their terms.

1.2 Our courts have made inconsistent statements in this regard. On the one hand, our courts have stated that provided that the parties intend to take all the steps set out in their contracts or 'jump through the contractual hoops as a matter of form' the court cannot find that the transaction is simulated[1], while on the other hand it has been found[2] that where parties cast their agreements in an ostensibly acceptable form in order to remain outside of the charging provision and then performed in terms thereof in an endeavour to meet the limitation stated in the simulation inquiry, such performance did not '…in fact mean that a contract shall have effect in accordance with its tenor…' and the court rejected the form (tenor) of the agreements and gave effect to the real intention of the parties.

1.3 This dissertation is about common law substance over form and the resolution of the above-mentioned inconsistencies.

1.4 Tax evasion and tax avoidance are not the same. Tax avoidance is prima facie lawful, while tax evasion is inherently unlawful. The term 'impermissible avoidance arrangement', central to the new GAAR contained in Part IIA of the Income Tax Act, is intended to regulate arrangements that fall in the category between tax evasion and legitimate tax-avoidance.[3]

1.5 In considering tax avoidance, consideration should be given to the 'so-called

[1] Roschcon (Pty) Ltd v Anchor Auto Body Builders CC and Others [2014] 2 All SA 654 (SCA), page 666, paragraph 34
[2] Erf 3183 Ladysmith at page 952
[3] De Koker, AP and Williams, RC (2021) SILKE on South African Income Tax, LexisNexis Online Version Chapter 19, paragraph 19.1

principle of "fiscal nullity" articulated by Lord Wilberforce in W.T. Ramsay Ltd v IRC'[4]. De Koker quotes a portion of the speech by Lord Diplock in CIR v Burmah Oil Co Ltd 54 TC 200; [1982] STC 30 HL(Sc) as accurately summarising the Ramsay principle, as follows[5]:

> "First, there must be a pre-ordained series of transactions; or, if one likes, one single composite transaction. This composite transaction may or may not include the achievement of a legitimate commercial (i.e. business) end... Secondly, there must be steps inserted which have no commercial (business) purpose apart from the avoidance of a liability to tax – not "no business effect". If those two ingredients exist, the inserted steps are to be disregarded for fiscal purposes. The court must then look at the end result. Precisely how the end result will be taxed will depend on the terms of the taxing statute sought to be applied.' (Emphasis added.)"

1.6 The Ramsay decision was criticised by some commentators who expressed the concern that the judiciary was arrogating to itself the role of the legislature[6]. Over time the Ramsay decision has been reinterpreted, with the decision in Barclays Mercantile Business Finance Ltd v Mawson[7] currently regarded as the leading authority on the proper interpretation thereof. According to this interpretation, the Ramsay decision did not lay down a new principle of substantive law but rather one of statutory construction, involving a purposive approach. 'Lord Nicholls said in this regard that:

> "The essence of the new approach was to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered to the statutory description."[8]

1.7 It is important to bear in mind that the United Kingdom has no general anti-

[4] De Koker, A.P. and Williams, R.C. (2021) *SILKE on South AfricanIncome Tax, LexisNexis Online Version* Chapter 19 paragraph 19.2
[5] De Koker, A.P. and Williams, R.C. (2021) *SILKE on South AfricanIncome Tax, LexisNexis Online Version* Chapter 19, paragraph 19.2
[6] De Koker, A.P. and Williams, R.C. (2021) *SILKE on South AfricanIncome Tax, LexisNexis Online Version* Chapter 19, paragraph 19.2
[7] Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes) [2005] 1 AC 684 HL
[8] De Koker, A.P. and Williams, R.C. (2021) *SILKE on South African Income Tax, LexisNexis Online Version* Chapter 19, paragraph 19.2

avoidance provision in its income tax legislation. Consequently, any tax avoidance transaction that escapes the net of common law principles will succeed in its objective. As a result, the courts in the United Kingdom felt pressure to expand the reach of the common law to provide an effective counter to modern tax schemes and such pressure found expression in the judge-made ‘fiscal nullity’ doctrine[9].

1.8 South Africa has a general anti-avoidance provision in its Income Tax Act, and accordingly there isn’t the same pressure to develop the common law to deal with unacceptable tax schemes. The contribution of common law principles to the countering of unacceptable tax schemes can therefore be confined to the rule that the courts will not be deceived by a sham or disguised transaction and will give effect to the real transaction and that the courts will have regard to substance rather than form[10].

1.9 In South Africa, the statutory equivalent of the Ramsay Principle is housed in the GAAR in Section 80C, the relevant portion of which reads:

‘80C. LACK OF COMMERCIAL SUBSTANCE

1. For purposes of this part, an avoidance arrangement lacks commercial substance if it would result in a significant tax benefit for a party (but for the provisions of this Part) but does not have a significant effect upon either the business risks or net cash flows of that party apart from any effect attributable to the tax benefit that would be obtained but for the provisions of this Part.

2. For purposes of this Part, characteristics of an avoidance arrangement that are indicative of a lack of commercial substance include but are not limited to -

    2.1 the legal substance or effect of the avoidance arrangement as a whole is inconsistent with, or differs significantly from, the legal from of its individual steps; or

[9] De Koker, A.P. and Williams, R.C. (2021) *SILKE on South AfricanIncome Tax, LexisNexis Online Version* Chapter 19, paragraph 19.2

[10] De Koker, A.P. and Williams, R.C. (2021) *SILKE on South AfricanIncome Tax, LexisNexis Online Version* Chapter 19, paragraph 19.2

2.2 …'

1.10 The now-repealed Section 103(1) and the new GAAR provide that, where a transaction falls foul of its provisions, one of the resultant powers of the Commissioner is to treat the transaction as if it had not been entered into or carried out, in other words, as a fiscal nullity in the sense envisaged in the Ramsay decision.

1.11 Common law principles nullify some forms of tax evasion without the need to invoke statutory anti-avoidance provisions. The first inquiry where a suspicion arises that a tax scheme is improper is whether it falls foul of common law principles, that is, whether it involved a sham or disguised transaction. The strength of the common law is that it finds expression in terms of broad principles; by contrast, the reach of a statute is limited by the particular words in which it is couched[11].

1.12 Simulated transactions remain a regular method by which taxpayers seek to evade tax and:

1.12.1 the broad common law attack on such transactions, is the main focus of this dissertation

1.12.2 The consideration of substance over form in this dissertation is not limited to the concept of fiscal nullity (as contemplated by the Ramsay principle) or Section 80C of the GAAR

1.12.3 This dissertation approaches the issue of substance over form in the context of tax evasion as opposed to impermissible avoidance schemes contemplated in the GAAR and an in-depth consideration of the GAAR falls outside the ambit of this dissertation.

[11] De Koker, A.P. and Williams, R.C. (2021) *SILKE on South AfricanIncome Tax, LexisNexis Online Version* Chapter 19, paragraph 19.3

Methodology

1.13 This research has been undertaken by way of the adoption of legal-technical approach in conducting a qualitative analysis of the historical and contemporary approach of the South African courts to the doctrine of substance over form, with specific focus on taxation.

1.14 This research is intended to be comparative and analytical in scrutinising the following principles:

1.14.1 A taxpayer may arrange his affairs so as to minimise his tax liability

1.14.2 The doctrine of substance over form, particularly as it relates to simulated transactions, and

1.14.3 The possibility of a gap in the South African legal system in the context of the courts' apparent inconsistency in dealing with simulated transactions, with a focus on circumstances where the parties give effect to the tenor of the agreement, while still intending to disguise or conceal the true transaction.

1.15 In undertaking this research, answers to the following questions have been sought:

1.15.1 What is a simulated transaction?

1.15.2 Can performance in terms of the tenor of the agreements preclude a finding of simulation?

1.15.3 In what circumstances will the parties' performance in accordance with the tenor of the agreements not amount to simulation? Can such result obtain where the parties conceal or disguise a transaction?

General Overview

1.16 Taxes are imposed by statute. No taxes are imposed by common law. To the extent therefore, that a taxpayer's receipts (actual and deemed) do not fall within the ambit of the relevant legislative provisions, the taxpayer is not liable for tax and there is no basis for the South African Revenue Service or the courts to impose liability. [12]

1.17 In circumstances where a transaction or tax scheme is challenged, the point of departure is to consider whether it falls foul of the applicable common law. This often involves an assessment of its substance versus its form.

1.18 The doctrine of substance over form is the precept pursuant to which the court will, in circumstances where the parties to a transaction endeavour to avoid a peremptory law or statutory provision by concealing or disguising the real nature of the transaction, strip away the disguise of its given form, or given name, and have regard instead to the genuine substance thereof. [13]

1.19 The doctrine of *fraus legis* is a branch of the doctrine of substance over form[14], as is the principle *plus valet quod agitur quam quod simulate concipitur*[15] (meaning what is actually done is more important than that what seems to have been done).

1.20 In general, simulated transactions are invalid by reason of such transactions not constituting the actual agreement between the parties while transactions *in fraudem legis* are invalid as a result of the parties endeavouring to circumvent the law even though they genuinely intend to perform such agreements in accordance with their tenor.

1.21 All simulated transactions are in fraud of the law (in *fraudem legis*).[16] A transaction *in fraudem legis* is often referred to as a 'sham transaction'.[17]

[12] De Koker, A.P. and Williams, R.C. (2021) SILKE on South African Income Tax, LexisNexis Online Version Chapter 19, paragraph 19.1
[13] Hutchison, A. and Hutchison, D. 'Simulated Transactions and the Fraus Legis Doctrine' 131 South African Law Journal 69 (2014) at pg. 69
[14] Ibid at pg. 70
[15] Dadoo v Krugersdorp Municipal Council 1920 AD 530 at page 547
[16] Dadoo v Krugersdorp Municipal Council 1920 AD 530 at page 568
[17] De Koker, A.P. and Williams, R.C. (2021) *SILKE on South AfricanIncome Tax, LexisNexis Online Version* Chapter 19, paragraph 19.3

Chapter 2 TAXPAYER'S RIGHTS

2.1 Taxpayers frequently seek to arrange their affairs or transactions in such a manner as to minimise the tax that they will pay, or to delay the obligation for the payment of taxes. Lawful action taken in such endeavours will constitute tax avoidance, while unlawful methods of doing so will comprise tax evasion. Tax evasion takes many forms which may include, but are not limited to filing untruthful returns, and sham (simulated) transactions. 'Tax Evasion' and 'Tax Avoidance' are discrete terms and should not be conflated. [18]

2.2 It is generally accepted that taxpayers may, within lawful bounds, arrange their financial affairs in a tax efficient manner. An often quoted *obiter dictum* enshrining the principle that a person is entitled to structure his affairs so as to remain outside of the charging provisions of a statute and thereby avoid tax, comes from Lord Tomlin in the matter *IRC v Duke of Westminster* [1936] AC - 'Every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax.'[19] In circumstances therefore, where a taxpayer can achieve the same objective in different ways, he is entitled to choose the one most advantageous to him,[20] and

2.3 May be summarised as follows:

> 'No obligation rests upon a taxpayer to pay more than is legally due under the tax legislation and a taxpayer is not debarred from entering into a bona fide transaction which, when carried out, has the effect of avoiding or reducing liability to tax, provided that, in so doing, he does not fall foul of any of the common law principles … and that he does not infringe any statutory prohibition on the

[18] De Koker, A.P. and Williams, R.C. (2021) *SILKE on South AfricanIncome Tax, LexisNexis Online Version* Chapter 19, paragraph 19.1
[19] IRC v Duke of Westminster [1936] AC at page 19
[20] De Koker, A.P. and Williams, R.C. (2021) *SILKE on South AfricanIncome Tax, LexisNexis Online Version* Chapter 19, paragraph 19.1

avoidance, reduction or postponement of tax liability.[21]

2.4 This principle has been repeatedly endorsed by our courts. [22]

2.5 In *CIR v Conhage* (Pty) Ltd 1999 SA 1149 (Supreme Court of Appeal) a sale and lease-back of manufacturing plant and equipment was confirmed as legitimate. The court stated *obiter dictum* that:

> 'Within the bounds of any anti-avoidance provisions in the relevant legislation, a taxpayer may minimise his tax liability by arranging his affairs in a suitable manner. If, for example, the same commercial result can be achieved in different ways, he may enter into the type of transaction which does not attract tax or attracts less tax.'[23]

2.6 Based on the above *dictum*, the freedom to arrange one's affairs is clearly limited by the anti-avoidance provisions of the Income Tax Act.

2.7 The *dicta* of our courts indicate that in South Africa we have what is called a 'free floating' choice principle. That is, one not limited to options provided by statutory provisions, but unlimited other than as may fall foul of the anti-avoidance provisions or as may constitute a sham or disguised transaction in terms of the common law.[24]

2.8 Whether the choice under consideration has indeed been made available to the taxpayer under the Income Tax Act, is dependent upon whether a particular provision of the Income Tax Act clearly governs the situation and if the taxpayer can satisfy all of the requirements of such charging provision in the sense of showing that the choice of the taxpayer was one that was extended to him implicitly or explicitly, the Income Tax Act intends that the taxpayer is entitled to the tax benefit provided thereunder. [25]

2.9 In contrast to what is set out above in this chapter, SARS is required to collect

---

[21] De Koker, A.P. and Williams, R.C. (2021) *SILKE on South AfricanIncome Tax, LexisNexis Online Version* Chapter 19, paragraph 19.1

[22] Michau v Maize Board 2003 (6) SA 459 (SCA), 66 SATC 288 (SCA) paragraph [4]; Commissioner for the South African Revenue Service v NWK Ltd 2011 (2) SA 67 (6GA) at paragraph [42]; *CSARS v Bosch and Another* [2015] 1 ALL SA 1 (SCA), page 18, paragraph 40; Dadoo v Krugersdorp Municipal Council 1920 AD 530 at page 548

[23] At paragraph 1 of the judgment

[24] De Koker, A.P. and Williams, R.C. (2021) *SILKE on South AfricanIncome Tax, LexisNexis Online Version* Chapter 19, paragraph 19.3

[25] De Koker, A.P. and Williams, R.C. (2021) *SILKE on South AfricanIncome Tax, LexisNexis Online Version* Chapter 19, paragraph 19.3

(and seeks to maximise) taxes due to the fiscus. It is clear therefore that there is a strain, or conflict so to speak, between the application of the charging provisions of tax statutes and the taxpayer's rights to choose in respect of the transactions he concludes, or otherwise to reduce the amount of tax that he is required to pay. This research is aimed at ascertaining the limits of the taxpayer's right to choose and whether taxpayers may obtain an unfair advantage by performing in accordance with the tenor of their chosen agreements, while simultaneously concealing or disguising a transaction.

Chapter 3 INTRODUCTION OF SUBSTANCE OVER FORM INTO SOUTH AFRICAN LAW

General Introduction

3.1 In this Chapter 3, it is intended to undertake an analysis of the common law principles of substance over form established by the South African courts, with specific emphasis on simulated transactions. Our courts have, for many years, enforced the doctrine of substance over form under the so-called simulation principle, in terms of which the court will have regard only to the actual rights and obligations between the parties. The question is whether the parties intended the contract to have effect in accordance with its tenor, and if not, effect will be given to what the contract really is.[26]

3.2 As a result of the way in which *fraus legis* and simulated transactions have been conflated in their incorporation into South African law[27], the selected cases dealing with these principles are dealt with chronologically in this Chapter 3 as opposed to dealing with them as discrete topics or doctrines.

3.3 Zandberg v Van Zyl is the *locus classicus* in respect of simulated transactions and has been quoted and applied in numerous cases dealing with simulated transactions for over a hundred years.

3.4 This case was an appeal to the Appellate Division from a judgment of Hopley J sitting as a court of appeal in the Cape Provincial Division. Hopley J sat in appeal of a magistrate's court decision in which the magistrate found that the real nature of the transaction under consideration was a pledge and not a sale. In the interpleader proceedings instituted by Mr. Paul Van Zyl, the Magistrate had ruled that a wagon was subject to valid judicial attachment. Hopley J disagreed and overturned the decision of the magistrate.

---

[26] Christie, RH. (2001) *The Law of Contract*. 4th Edition. LexisNexis Butterworths page 222;
[27] Hattingh, J. and Titus, A. 'Sasol Oil v CSARS: judicial reinterpretation of legal doctrine to address tax avoidance in South Africa' British Tax Review, Issue 2 (2020) at page 182 – obtained online https://ssrn.com/abstract=3650797

3.5 In the appeal to the Appellate Division, each of the three judges, Lord De Villiers C.J., Innes J. and Solomon J. found in favour of allowing the appeal, in separate judgments, striking down the transaction as being a pledge in the guise of a sale.

3.6 Innes J., on the basis of the maxim *plus valet quod agitur quam quod simulate concipitur* set out the nature of the simulation inquiry, as follows: [28]

> "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."

3.7 While the above quote of Innes J., is generally accepted as being the most succinct representation of the nature of the inquiry, Solomon J. shed further light on the inquiry by confirming that, in ascertaining the true nature of the transaction, the question depends more on facts than on the law and that once the facts have been determined, determination on the law can follow without difficulty.[18]

[17] Zandberg v Van Zyl 1910 AD 302 at page 309
[18] Zandberg v Van Zyl 1910 AD 302 at page 314

3.8 From the reasoning of both of the above judges it is clear that the inquiry is one of fact, to which the principles of the law are then to be applied.

3.9 The doctrine of *fraus legis* was defined in *Dadoo Ltd*.[29] In this case, it was held by the majority that the Roman Law texts D 1.3.29 and D 1.3.30 dealt with the principle that false appearances of facts should be ignored and that they did not permit the interpretation of statutes outside of their wording.[30]

3.10 The facts in *Dadoo Ltd* may be summarised as follows: -

3.10.1 In 1915 Dadoo Ltd was registered in the Transvaal with a share capital of 150 shares of which Mr Dadoo, being a British Indian and therefore an Asiatic held 149 shares and a Mr Jassup Ebrahim Gardee, also a British Indian and therefore an Asiatic held the other one share.

3.10.2 Thereafter the company purchased and received transfer of two stands situated within the area of jurisdiction of the Municipality of Krugersdorp.

3.10.3 In terms of the second section of Law 3 of 1885 as amended by a Volksraad *Besluit* of August 1886, Asiatics were prohibited from owning immovable property in the Transvaal and in terms of Section 130 of Act 35 of 1908, coloured persons were prohibited from acquiring or occupying ground held under the Gold Law.

3.10.4 In 1919 the Municipal Council of Krugersdorp obtained an order per Wessels J., in the Transvaal Provincial Division setting aside the transfers of the two stands to *Dadoo Ltd* pursuant to such transactions being *in fraudem legis* and contrary to law.

3.11 In the appeal from the Transvaal Provincial Division of the High Court to the Appellate Division, the decision was split 3 to 2. In providing the majority judgment in the Appellate Division, Innes C.J. reasoned as follows:

3.11.1 It was not considered or contended that Dadoo Ltd itself fell within the

[29] Christie, R.H. (2001) *The Law of Contract*. 4th edn. LexisNexis Butterworths at page 396
[30] Derksen, A.G. 'To what extent does the common law allow the avoidance of statutes?' A discussion in which specific reference is made to tax statutes' South African Law Journal 112 (1995) at page 96. It is noteworthy, but outside the ambit of this research that Derksen contends that the majority decision in this regard is 'without doubt incorrect';

ambit of the language of either prohibition in the sense that the company fell within the designation of an Asiatic or coloured person.

3.11.2 The Krugersdorp Municipality's argument was that the law had been wrongfully evaded by way of a violation of the spirit, as opposed to the letter, which view was upheld by the Trial Court. [31]

3.11.3 Wessels had found that the law impliedly prohibited Asiatics from forming themselves into a corporation in order to control fixed property in contravention of the settled policy of the Republic as laid down in the *Grondwet*. [32]

3.11.4 Every statute embodies a policy or is designed to carry out an object that the court has the authority to interpret.[33] The learned judge proceeded to consider what was meant by the authorities referring to a contravention of the spirit as opposed to the language of the law and whether such consideration may give rise to two equally operative enactments, one expressed and the other unexpressed. He considered in the alternative a narrower meaning in which transactions which in truth are within the provisions of a statute but are disguised in order to avoid them are invalid. In such circumstances interpretation of the transaction becomes more important than interpretation of the law. [34]

3.11.5 Pursuant to a consideration of the authorities including passages from the Corpus Juris, Innes C.J. came to the conclusion that the passages were not intended to lay down a doctrine so wide as to give authority to the unexpressed intention of the law giver[35] and that the examples of transactions in *fraudem legis* set out in the Digest clearly indicate the limits of the doctrine[36], leading the learned judge to the following conclusion:

> '… a transaction is in fraudem legis when it is designedly disguised so as to escape the provisions of the law, but falls in truth – within

[31] Dadoo v Krugersdorp Municipal Council 1920 AD 530 at page 542
[32] Dadoo v Krugersdorp Municipal Council 1920 AD 530 at page 542
[33] Dadoo v Krugersdorp Municipal Council 1920 AD 530 at page 543
[34] Dadoo v Krugersdorp Municipal Council 1920 AD 530 at page 544
[35] Dadoo v Krugersdorp Municipal Council 1920 AD 530 at pages 543 and 544
[36] Dadoo v Krugersdorp Municipal Council 1920 AD 530 at page 545

> these provisions. Thus stated, the rule is merely a branch of the fundamental doctrine that the law regards the substance rather than the form of things, --- a doctrine common, one would think, to every system of jurisprudence and conveniently expressed in the maxim plus valet quod agitur quam quod simulate concipitur.'[37]

3.11.6 Acts have to be construed by determining the intention, as expressed by the words used, and in respect of which it is important to ascertain the subject matter with respect to which the words are used in the context of the object of the Act.[38] Innes, C.J. thereafter quoted the rule that:

> 'To carry out effectively the object of a statute it must be so construed as to defeat all attempts to do or avoid in an indirect or circuitous manner that which it has prohibited or enjoined.'[39]

3.12 In clarification of the limits of the doctrine of *fraus legis*, Innes, C.J. stated[40] that -

> 'A Judge has authority to interpret, but not to legislate, and he cannot do violence to the language of the lawgiver by placing upon it a meaning of which it is not reasonably capable, in order to give effect to what he may think to be the policy or object of the particular measure… Then now, when the recognised canons of construction have been applied to a statute the concrete transaction with which the Court is concerned must fall either inside or outside its provisions, as so construed.'

3.13 In summary of the above analysis, Innes C.J., after having considered what is meant under the doctrine of *fraus legis*, by the idea that a statute may be transgressed not only by transgressing it directly, but by doing what it forbids by implication[41], considered whether this applied only to simulated transactions, or whether any act, or series of actions together, which contravenes the spirit of the law, can constitute *fraus legis*. Innes C.J. found

---

[37] Dadoo v Krugersdorp Municipal Council 1920 AD 530 at pages 546 and 547
[38] Dadoo v Krugersdorp Municipal Council 1920 AD 530 at page 547
[39] Dadoo v Krugersdorp Municipal Council 1920 AD 530 at pages 547 and 548
[40] Dadoo v Krugersdorp Municipal Council 1920 AD 530 at page 543
[41] Hutchison, A and Hutchison, D 'Simulated Transactions and the Fraus Legis Doctrine' 131 South African Law Journal 69 (2014) at page 71 – with footnote 12 – '… "A man who does what a statute forbids, transgresses the statute; a man who contravenes the intention of a statute, without disobeying the actual words, commits a fraud on it".

that the texts in the *Corpus Iuris* pointed only to simulated transactions being *in fraudem legis*.[42] The *fraus legis* rule was thereby consigned to being merely a special application of the rule *plus valet quod agitur quam quod simulate concipitur* and not an independent rule of law in South Africa.[43]

3.14 *Fraus legis* in South Africa is therefore a branch of the doctrine of substance over form, with substance over form in our law essentially being applied through the maxim *plus valet quod agitur quam quod simulate concipitur*, which was expressed in clear terms in the matter *Kilburn v Estate Kilburn* 1931 AD 501 507[44] as follows -

> 'It is a well known principle of our law that courts will not be deceived by the form of a transaction. They will rend aside the veil in which the transaction is wrapped and examine its true nature and substance. Plus valet quod agitur quam quod simulate concipitur.'

3.15 Zanderg v Van Zyl was applied in the case of Commissioner of Customs and Excise v Randles Brothers & Hudson Ltd 1941 AD 369. This case is one of the most crucial cases in the development of our law relating to substance over form, and specifically to simulated transactions.

3.16 The pertinent facts of this matter[45] were that, before 1936 and under the regulations of Act 36 of 1925, goods imported and provided to a manufacturer for manufacture into clothing (on the 'cut, make and trim' principle (CMT)), an importer could, notwithstanding that the importer remained the owner of the goods, apply for and receive a customs rebate. In 1936 however, the regulations were altered to the effect that the manufacturer to whom the importer delivered the goods for manufacture was required to declare that such manufacturer was the owner of the goods, for the importer to qualify for the customs rebate. The importer thereafter agreed to sell the goods to manufacturers who simultaneously agreed to execute the relevant ownership declaration (to permit the customs rebate) and to sell the manufactured goods back to the importer at the cost of

[42] Hutchison, A. and Hutchison, D. 'Simulated Transactions and the Fraus Legis Doctrine' 131 South African Law Journal 69 (2014) at pg. 72
[43] Joubert, NL 'Asset-based Financing, Contracts of Purchase and Sale, and Simulated Transactions' South African Law Journal 109 (1992) at page 711
[44] At page 507
[45] Commissioner of Customs and Excise v Randles Brothers & Hudson Ltd 1941 AD 369 at page 370

purchase thereof plus the CMT costs.

3.17 In arguing the matter, it was contended:

3.17.1 On behalf of the appellant[46], *inter alia* that (1) the court must enquire into the real nature of the transaction and give such real nature legal effect, and alternatively (2) that the transactions under consideration were *in fraudem legis*; and

3.17.2 On behalf of the respondent, *inter alia* that (1) in order to establish the passing of ownership it was necessary only to show delivery of the material together with a 'mutual intention in fact that ownership is to pass'[47], and (2) that there was a 'heavy onus' on the appellant to prove affirmatively that the transactions were not what they purported to be, the intention to pass ownership was simulated and that the real intention was for the respondent to retain ownership. The onus was heavy also because it involved an allegation that the respondent and five manufacturers conspired to commit fraud on the Customs. [48]

3.18 Both Watermeyer, J.A.[49] for the majority, and De Wet, C.J.[50] for the minority, quoted *Zandberg v Van Zyl* and applied the simulation inquiry laid down therein.

3.19 After having quoted the simulation inquiry postulated in Zandberg v Van Zyl, Watermeyer, J.A. explained further[51]

> 'I wish to draw particular attention to the words "a real intention, definitely ascertainable, which differs from the simulated intention", because they indicate clearly what the learned Judge meant by a "disguised" transaction. A transaction is not necessarily a disguised one because it is devised for the purpose of evading the prohibition in the Act or avoiding liability for the tax imposed by it. A transaction

[46] Commissioner of Customs and Excise v Randles Brothers & Hudson Ltd 1941 AD 369 at page 371
[47] Commissioner of Customs and Excise v Randles Brothers & Hudson Ltd 1941 AD 369 at page 372
[48] Commissioner of Customs and Excise v Randles Brothers & Hudson Ltd 1941 AD 369 at page 373
[49] Commissioner of *Customs and Excise v Randles Brothers & Hudson Ltd* 1941 AD 369 at pages 394 and 395
[50] Commissioner of *Customs and Excise v Randles Brothers & Hudson Ltd* 1941 AD 369 at pages 381 and 382
[51] Commissioner of *Customs and Excise v Randles Brothers & Hudson Ltd* 1941 AD 369 at pages 395 and 396

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 parties, 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. If this were not so, it could not find that the ostensible agreement is a pretence. The blurring of this distinction between an honest transaction devised to avoid the provisions of a statute and a transaction falling within the prohibitory or taxing provisions of a statute but disguised to make it appear as if it does not, gives rise to much of the confusion which sometimes appears to accompany attempts to apply the maxim quoted above.'[52]

3.20 Notwithstanding that the decision was spilt, and the judges came to different conclusions on the facts, all of the judges applied the simulation inquiry, to the effect that the intention of the parties needs to be established as a matter of fact[53], and thereafter the law is applied.

[52] The maxim referred to is *plus valet quod agitur quam quod simulate concipitur,* referred to at page 395 of the judgement

[53] Commissioner of Customs and Excise v Randles Brothers & Hudson Limited 1941 AD 369 at pages 383 (for minority), and 398 (for majority)

3.21 It is a necessary element of a simulated transaction that there is a deliberate element of disguise and thus, there are no honest simulations.[54] *Dolus* is required.

3.22 The fact that the decision was carried by a slim 3 to 2 majority highlights the difficulty that courts experience in coming to findings of fact on intention and dishonesty in these cases.

3.23 *Dadoo Ltd*, and specifically the line of reasoning adopted by the majority therein, was applied in *S v Pouroulis*[55], in which case the stages of inquiry were clearly set out by Stegman J[56].

3.24 The facts of *S v Pourolis*, briefly, were that 5 accused were charged with 59 counts of fraud (with 54 alternate charges) and 7 counts of theft relating to loans made in contravention of Section 226(4)(b) of the Companies Act 61 of 1973. The loans were made by a public company ('Lefco'), under a management agreement, to its holding company ('Salene'). The alleged holding company then lent the funds to various companies, some under the control of the same persons controlling Lefco (e.g. 'Golden Dumps') and some alleged to be under such control, but found by the court not to be (e.g. 'Cons Modder') [57]. It was alleged, *inter alia*, that this constituted the making of loans 'indirectly' as prohibited by said Section 226(4)(b) of the Companies Act 61 of 1973. [58]

3.25 The State relied upon an interpretation obtained from *Henochsberg on the Companies Act 4th ed vol 1 at 357*[59], where the learned authors suggest[60] that the use of the words 'directly or indirectly' in the statute extended the prohibition of loans made under Section 226 of the Companies Act 61 of 1971 (Now enshrined in Section 45 of the new Companies Act 71 of 2008) beyond the immediate parties to the loan[61] and to the use of conduits generally[62]. The

[54] Hutchison, A and Hutchison, D 'Simulated Transactions and the Fraus Legis Doctrine' 131 South African Law Journal 69 (2014) at page 71
[55] [1993] 3 ALL SA 39 (W)
[56] S v Pouroulis [1993] 3 ALL SA 39 (W) at Pgs. 58 and 59
[57] S v Pouroulis [1993] 3 ALL SA 39 (W) at Page 77
[58] S v Pouroulis [1993] 3 ALL SA 39 (W) at Pages 39 and 41
[59] S v Pouroulis [1993] 3 ALL SA 39 (W) at page 53
[60] S v Pouroulis [1993] 3 ALL SA 39 (W) at page 55
[61] S v Pouroulis [1993] 3 ALL SA 39 (W) at page 55
[62] S v Pouroulis [1993] 3 ALL SA 39 (W) at page 58

State's proposition included that the words 'or indirectly' were included to forestall simulated transactions. The court found this not to be the case[63], and that intentional acts in *fraudem legis* cannot, in any event, assist in evading the law. [64]

3.26 Stegman, J held that the common law concept of a loan already comprises loans made directly, where the lender advances the funds directly to the borrower, and loans made indirectly, where the lender advances the funds to a third party for the benefit of the borrower, thereby simultaneously making the loan indirectly. As the wording was clear and based on *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530, the court found that it could not 'stretch' the interpretation to justify a wider policy or object. [65]

3.27 The court specifically held that the prohibition in Section 226(1)(b) of the 1971 Companies Act did not extend to a transaction in which a company makes a loan to its holding company and such holding company then makes a loan to a company which would have fallen foul of the 226(1)(b) prohibition if made directly by the company first mentioned in this paragraph. [66]

Summary of Findings

3.28 On the one hand, the courts have been prepared to implement substance over form in circumstances including a *bona fide* belief on the part of the contracting parties. In the matter of *Goldinger's Trustee Appellant v Whitelaw & Son Respondents* 1917 AD 66 the court applied substance over form and implemented the real agreement.

3.29 On the other hand, and on the authority of *Randles Brothers* and many subsequent decisions that have followed it, dishonesty remains a *sine qua non* for substance over form and the implementation of the *plus valet quod agitur quam quod simulate concipitur* principle.

3.30 In circumstances where the substance differs from the form of a transaction, as a

[63] S v Pouroulis [1993] 3 ALL SA 39 (W) at page 54
[64] S v Pouroulis [1993] 3 ALL SA 39 (W) at page 59
[65] S v Pouroulis [1993] 3 ALL SA 39 (W) at page 66
[66] S v Pouroulis [1993] 3 ALL SA 39 (W) at page 66

result of the parties, acting in good faith and honestly, mislabelling their transaction, either accidently or as a result of a lack of knowledge, or acting on advice in a complex transaction, [67] the so-called 'label principle' is accordingly distinguishable from the simulation principle, falls outside the ambit of this research and is not dealt with herein.

3.31 Some writers have concluded that considering the erratic jurisprudential outcomes in South Africa, perhaps the time has come to see a separation of the doctrines of *Fraus Legis* and substance over form. Their view[68] in regard to the matter of *Sasol Oil* the reasoning by the court continues to show theoretical and systematic inconsistencies, caused at least in part by the conflation of sham and *fraus legis* doctrines, which 'is an old fault line present in the civil law origins of South African common law.'

3.32 In so far as the conflation of *fraus legis* and the simulation principle are concerned, further consideration thereof falls outside such conflation research, and it suffices to say that based on *stare decisis*[69] and the long line of authorities commencing with *Zandberg v Van Zyl*, through *Randles Brothers* all the way to *Sasol Oil* (dealt with later in this research), it is unlikely that such conflation of *fraus legis* and simulation can easily be unwound in our law.

3.33 In the final analysis, the doctrine of substance over form in South African law is encapsulated by the following quote from the simulation enquiry –

> '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.'*

[67] Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes) [2005] 1 AC 684 HL
[68] Hattingh, J and Titus, A 'Sasol Oil v CSARS: judicial reinterpretation of legal doctrine to address tax avoidance in South Africa' British Tax Review, Issue 2 (2020) at page 182 – obtained online https://ssrn.com/abstract=3650797
[69] *Barnard Labuschagne Incorporated v South African Revenue Service and Another* [2022] ZACC 8 at paragraph [30] 'Observance of the rules of precedent is not a display of politeness to courts of higher authority; it is a component of the rule of law, which is a founding value of the Constitution.'

Chapter 4 PRACTICAL APPLICATION OF THE SIMULATION INQUIRY

Tenor and Effect

4.1 The essence of this research comes down to an analysis of two specific phrases in the simulation inquiry. The phrase -

> 'The Court must be satisfied that there is a real intention, definitely ascertainable, which differs from the simulated intention'

must be analysed in context of its counter point-

> '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.'

4.2 The onus[70] is, in terms of Section 102 of the Tax Administration Act 28 of 2011, on the taxpayer and the taxpayer is required to prove its case (that is to disprove the assessment of the Commissioner) on a balance of probabilities[71] (in a non-criminal tax matter). While an evidentiary burden may shift (e.g. through the production of the cession agreement in the matter of *Hippo Quarries* (TVL) (Pty) Ltd v Eardley [1992] 1 All SA 398 (A) as referred to in paragraph 7.17), the onus

[70] Zeffert, D.T. and Paizes, A.P. (2017) *The South African Law of Evidence, 3rd. Ed. LexisNexis* Chapter 3, paragraph 3.1 – 'The burden or onus of proof in its ordinary sense is a metaphorical expression for the duty which one or the other of the parties has of finally satisfying the court that he or she is entitled to succeed on his or her claim or defence … In other words, the incidence of the onus tells us *who* must satisfy the court; but that is not all we need to know. We need to know too the degree or the standard of satisfaction – the quantum of proof – that the court requires the onus-bearing party to achieve before it may be so satisfied.'

[71] *Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (A) at 159B – D, per Holmes J.A. – 'As to the balancing of probabilities, I agree with the remarks of Selke J, in *Govan v Skidmore* 1952 (1) SA 732 (N) at 734, namely

> ". . . in finding facts or making inferences in a civil case, it seems to me that one may, as Wigmore conveys in his work on *Evidence* 3rd ed para 32, by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one".

I need hardly add that "plausible" is not here used in its bad sense of "specious", but in the connotation which is conveyed by words such as acceptable, credible, suitable (*Oxford Dictionary*, and *Webster's International Dictionary*)."

in any matter never shifts.[72]

4.3 The fact that there is no general rule that can be laid down to determine simulation, does not obviate the normal rules of evidence or the rules of interpretation of contracts in coming to the solution on the facts in each instance. Accordingly, in discharging the onus and meeting the evidentiary burden, the taxpayer will, of necessity, be required to present the tenor of the agreements as cast and the related facts to the court, showing that the parties in fact meant that such agreements would have effect in accordance with their tenor.

4.4 A useful metaphor for the process, was reaffirmed by Ponnan J.A.,[73] in the case of *Sasol Oil* Sasol Oil v CSARS (923/2017) [2018] ZASCA 153 (9 November 2018) (Neutral Citation - Saflii), as follows:

> ‘It goes without saying that the evidence must be looked at holistically. … As it was put in S v Hadebe and others 1998 (1) SACR 422 (Supreme Court of Appeal) at 426f-h (citing with approval from Moshephi and others v R (1980-984) LAC 57 at 59F-H):
>
> "The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees."’

[72] Zeffert, D.T. and Paizes, A.P. (2017) *The South African Law of Evidence, 3rd. Ed. LexisNexis* Chapter 3, paragraph 3.1

[73] Sasol Oil v CSARS (923/2017) [2018] ZASCA 153 (9 November 2018) (Neutral Citation - Saflii) paragraph 144

4.5 According to Nereus Joubert,[74] the following factors have been taken into consideration by the courts in ascertaining simulation:

4.5.1 The form of the agreement, that is, its tenor

4.5.2 The object of the agreement (Joubert indicates that this factor has become more or less disregarded in recent decisions)

4.5.3 Surrounding circumstances – the factual occurrences before, during and after the conclusion of the agreement

4.5.4 Unusual or atypical terms in the agreement.

4.6 In that it is established that there is no hard and fast rule to determine simulation and the simulation enquiry is undertaken in each instance based on the facts of the particular matter, it is submitted that the above four categories are by no means discrete elements or even a closed set.

The Form of the Agreement (Tenor)

4.7 The following constitutes a summary of some of the more regularly utilised principles of contractual interpretation set out in LAWSA. [75]

4.7.1 The fundamental object when interpreting contracts is to ascertain and give effect to the common intention of the parties, which intention is to be gathered from the language which they used rather than from what either of them may have had in mind.

4.7.2 In accordance with the decision in *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (Supreme Court of Appeal) (which case is considered in more detail hereunder), to ascertain the ordinary grammatical meaning of the words used by the parties, the contract is interpreted as a whole. The court must consider the interrelation between the provision in issue and the rest of the document and have regard to the apparent purpose and scope of the

[74] Joubert, N.L. 'Asset-based Financing, Contracts of Purchase and Sale, and Simulated Transactions' South African Law Journal 109 (1992) at pages 712 to 715
[75] Van Rensburg, A.D.J., (2022) The Law of South Africa, Contracts (Volume 9 – Third Edition) Interpretation – 351 Principles of Interpretation, LexisNexis online

provision, the nature and purpose of the contract, and relevant circumstances attendant upon conclusion of the contract.

4.7.3 It has been decided by the Supreme Court of Appeal[76] that, irrespective of whether or not the language is vague or ambiguous, regard may be had to evidence of surrounding circumstances to understand the wider context, and the distinction historically drawn between background circumstances and surrounding circumstances has been done away with.[77] This includes evidence of what passed between the parties on the subject of the contract (their prior negotiations and correspondence), as well as evidence of the sense in which they understood and acted on the document, but not direct evidence of their own intentions before or at the time of formation of the contract.

4.8 Insofar as its effect on contemporary judicial consideration is extensive, the matter of *Natal Joint Municipal Pension Fund v Endumeni Municipality,*[78] warrants additional consideration, moreover as it impacts directly upon the proper interpretation of statutes and contracts in South Africa.

4.9 The facts of the case are not relevant to this research. The portions of the case that are pertinent are those relating to interpretation of statutes and contracts, which the court pronounced are of general application and should be followed.[79]

4.10 Wallis J.A., in a unanimous decision, warns against endeavouring to ascertain the true intention of the legislature (or the contracting parties, as the case may be) through the ordinary meaning of the words used[80] and imposes a unitary approach to interpretation going forward. In terms of paragraph [22] of the judgment, the broad purpose of the relevant legislation is relevant to the process of

[76] KPMG Chartered Accountants (SA) v Securefin Limited and Another (644 of 2007) [2009] ZASCA 7 (13 March 2009)
[77] Footnote 23 in LAWSA - In *KPMG Chartered Accountants v Securefin Ltd* supra, Harms D.P. said (par 39): "The time has arrived for us to accept that there is no merit in trying to distinguish between 'background circumstances' and 'surrounding circumstances'. The distinction is artificial and, in addition, both terms are vague and confusing. Consequently, everything tends to be admitted. The terms 'context' or 'factual matrix' ought to suffice."
[78] [2012] 2 All SA 262 (SCA)
[79] Page 273, paragraph [19]
[80] Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] 2 All SA 262 (SCA) page 276 paragraph 17

interpretation, as is the mischief at which the legislation is aimed. Courts set out to give legislative purpose and effect within the constraints imposed by the language adopted by the Legislature. Wallis J.A. stated that construing "the intention of the legislature" merely as an expression used to encompass these matters as a form of convenient shorthand would have been better than departing from the premise of a primary or golden rule of statutory interpretation to ascertain the intention of the legislature.

4.11 Paragraph [25] of the judgment is quoted below:

> 'Which of the interpretational factors I have mentioned will predominate in any given situation varies. Sometimes the language of the provision, when read in its particular context, seems clear and admits of little if any ambiguity. Courts say in such cases that they adhere to the ordinary grammatical meaning of the words used. However, that too is a misnomer. It is a product of a time when language was viewed differently and regarded as likely to have a fixed and definite meaning, a view that the experience of lawyers down the years, as well as the study of linguistics, has shown to be mistaken. Most words can bear several different meanings or shades of meaning and to try to ascertain their meaning in the abstract, divorced from the broad context of their use, is an unhelpful exercise. The expression can mean no more than that, when the provision is read in context, that is the appropriate meaning to give to the language used. At the other extreme, where the context makes it plain that adhering to the meaning suggested by apparently plain language would lead to glaring absurdity, the court will ascribe a meaning to the language that avoids the absurdity.'[81]

4.12 Paragraph [26] of the judgment is quoted below:

> 'In between these two extremes, in most cases the court is faced with two or more possible meanings that are to a greater or lesser degree available on the language used. Here, it is usually said that the language is ambiguous although the only ambiguity lies in selecting the proper meaning (on which views may legitimately

[81] Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] 2 All SA 262 (SCA) page 278 paragraph [25]

differ). In resolving the problem, the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation. An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration.'[82]

4.13 In this matter, the Supreme Court of Appeal rejected the historical so-called objective approach in its reference to the 'ordinary meaning' of the words and the 'intention of the parties' and encapsulated the new approach in paragraph 18 of the judgment to the effect that 'from the outset one considers the context and the language together, with neither predominating over the other.'[83]

4.14 The object of the agreement should be considered in the interpretation of contracts in a manner corresponding to the consideration given to the 'mischief at which the legislation is aimed'[84] in the interpretation of legislation. To do otherwise would be to create an artificial lacuna and an unjustifiable deviation between the two.

The Substance of the Agreement

4.15 This heading deals with the phrase 'The Court must be satisfied that there is a real intention, definitely ascertainable, which differs from the simulated intention'.

4.16 The difficulty that the courts have in ascertaining the real intention of the parties is evident from the following statements:

4.16.1 From *Randles Brothers*, per Watermeyer J.A., 'Whenever an act is voluntarily done with the expectation that a consequence will follow, that consequence is intended … So, when a person makes an agreement thinking that he is buying, he intends to buy, and it is difficult to see how he can think that he has the intention to buy without having it'[85];

[82] Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] 2 All SA 262 (SCA) page 278 paragraph [26]
[83] Donelly, D. 'A new approach to the interpretation of contracts and the management of strategic corporate relationships' Journal of Contemporary Management 11 (2014) at page 24, paragraph 4.2
[84] Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] 2 All SA 262 (SCA) page 278 paragraph [22]
[85] At page 399

4.16.2 From *CIR v Saner,*[86] per Tindal J., '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'[87].

4.17 The matter of *Michau v Maize Board* 2003 (6) SA 459 SCA provides a good example of the courts consideration of the actual intention of the parties through the evaluation of both objective factors (including the conduct of the parties and the result of the transaction) and subjective factors (including the evidence of Michau, the appellant as to his actual intentions in concluding the agreements).

4.18 In circumstances involving a finding of simulation, the court's assessment of the evidence, while undertaken as a single exercise, will have to ascertain two types of intention on the part of the contracting parties, being:

4.18.1 (1) the simulated intention of the parties in respect of the expressed agreements. In this sense, the term 'intention of the parties' constitutes the 'form of convenient shorthand'[88] referred to by Wallis J.A. in the case of *Natal Joint Municipal Pension Fund* v Endumeni Municipality[89] and comprises a 'misnomer' in so far as it may be understood to convey that this interpretation involves an enquiry into the actual mindset of the contracting parties. The reason for this, according to Wallis J.A., 'is that the enquiry is restricted to ascertaining the meaning of the language of the provision itself', that is, the tenor of the terms of the agreement/s. The 'intention of the parties' in this sense is obtained from the facts presented by the parties and found relevant by the court, undertaken in terms of the relevant principles of the law of the interpretation of contracts, which principles are summarised in paragraphs 4.8 and 4.14; and

4.18.2 (2) the real intention of the parties, to the transaction/s to be obtained from the facts presented by the parties and found to be relevant by the court.[90] This is what is referred to in the simulation inquiry as "… a real

[86] 1927 TPD 162 at Pg 172
[87] At page 172– This from the judgment in McAdams v Fiander's Trustee & Bell N.O. 1919 AD 207 dealt with in more detail in chapter 7
[88] At page 276 paragraph [22]
[89] [2012] 2 All SA 262 (SCA)
[90] *Michau v Maize Board* 2003 (6) SA 59(SCA) paragraph [4] – 'Each case will depend on its own facts. A court will seek to ascertain the true intention of the parties from all the relevant circumstances, including the manner in which the contract is implemented.'

intention, definitely ascertainable, which differs from the simulated intention". This inquiry, while obviously taking the structure and content of the expressed agreements, into account, is not restricted by, or conducted through the medium of the rules of contractual interpretation. It is not restricted to ascertaining the meaning of the language of the provision itself but looks to the factual meeting of the minds, that is, the true intention of the parties.

Summary of Findings

4.19 The inquiry revolves around the real intention of the contracting parties as a matter of fact. The court in *S v Pouroulis* found that there was no intention by the parties to make unlawful loans by Lefco to the other companies and not in fact to Salene[91], the holding company. While the following remark was made obiter, it is telling, and material, that the court in *S v Pouroulis* followed its specific finding (referred to in paragraph 3.27) with the following statement –

> 'This finding relates, of course, to substance and not mere form. If the substance of the transaction (to be found in the true intention of the parties) results in a contract of loan by a lender company to a disqualified borrower, then it will not avail the parties to simulate the form of a transaction outlined above. A transaction in that form only remains outside the prohibition … if its form represents its authentic substance, and not if the authentic substance is a prohibited loan to a disqualified borrower.'

4.20 The effect of the above is that even where a transaction appears lawful and permissible, if the parties enter into same with a different true intention, simulation will be found.

4.21 This equates to the statement of Hefer J.A. in the matter of *Erf 3183 Ladysmith*, to the effect that the real intention of the parties as a matter of fact is paramount. [92]

[91] S v Pouroulis at page 77
[92] At page 952

Chapter 5 PERFORMANCE AND SIMULATION

5.1 In *Erf 3183/1 Ladysmith (Pty) Ltd and Another v CIR* 1996 (3) SA 942 (Supreme Court of Appeal), the court concluded that the contracts bore the 'stamp of simulation'[93] and that the purpose could have been to conceal the real or complete terms of what the parties truly intended but chose not to express. In this matter:

5.1.1 Two subsidiary companies, which owned immovable properties (vacant stands), let the properties to a pension fund in terms of leases pursuant to which the fund was entitled (but not obliged) to construct buildings thereon.

5.1.2 As the holding company of the two property-owning subsidiary companies required the use of such buildings, the holding company ('Pioneer'), concluded sublease agreements with the fund pursuant to which the fund was obliged to procure the construction of the buildings on the properties.

5.1.3 Concluded simultaneously with the leases and the subleases, were a construction contract between the fund and the contractor and variation agreements amending the period of each of the leases to align same with the completion of the buildings in terms of the construction contract.

5.2 Pioneer claimed that the purpose of the scheme was to obtain a benefit in terms of Section 11(f) of the Income Tax Act, pursuant to which a deduction from income is allowed in respect of any consideration in the nature of a premium is paid for the right of use or occupation of land or buildings used or occupied for the production of income or from which income is derived. Pioneer relied on the principle enunciated by Lord Tomlin in *Duke of*

[93] Erf 3183/1 Ladysmith (Pty) Ltd and Another v Commissioner for Inland Revenue 1996 (3) SA 942 (A) at page 956

Westminster[94] and argued that effect must be given to the agreements according to their tenor, despite their underlying purpose. It was argued by the taxpayers that whatever the purpose of the agreements, a right in terms of subsection (h) of the definition of gross income in Section 1 of the Income Tax Act did not accrue to them as there was no obligation on the fund, in terms of its agreement with the taxpayers to construct the buildings on the stands. The parties had crafted the agreements so that such obligation rested on the fund in terms of the subleases concluded with the taxpayers' holding company (Pioneer).

5.3 By contrast thereto, the Commissioner relied[95] upon the principle that courts will not be deceived by the form that the parties give their transaction and will 'rend aside the veil in which the transaction is wrapped and examine its true nature and substance'[96]

5.4 The court referred to previous judgments referring to the mutual exclusivity of the applicability of these two principles and concluded that, provided each of the aforementioned principles is confined within their recognised bounds, there is no reason why they cannot co-exist. The learned judge proceeded to confirm that the court will only consider substance over form when it must decide whether the taxpayer has succeeded in avoiding the application of a statute through the arrangement of his affairs. [97]

5.5 It was acknowledged by the court,[98] that Subsection (h) applies when a party accrues a right to have improvements effected and not when the actual benefit of such improvements may accrue.

5.6 In considering the effect of the parties performing in terms of their agreements, Hefer J. reasoned[99] as follows:

---

[94] Erf 3183/1 Ladysmith (Pty) Ltd and Another v Commissioner for Inland Revenue 1996 (3) SA 942 (A) at page 949
[95] Erf 3183/1 Ladysmith (Pty) Ltd and Another v Commissioner for Inland Revenue 1996 (3) SA 942 (A) at page 951
[96] *Kilburn v Estate Kilburn* 1931 AD 501 at page 507
[97] Erf 3183/1 Ladysmith (Pty) Ltd and Another v Commissioner for Inland Revenue 1996 (3) SA 942 (A) at page 952
[98] Erf 3183/1 Ladysmith (Pty) Ltd and Another v Commissioner for Inland Revenue 1996 (3) SA 942 (A) at page 950
[99] Erf 3183/1 Ladysmith (Pty) Ltd and Another v Commissioner for Inland Revenue 1996 (3) SA 942 (A) at page 950

'As a matter of pure logic and law the argument is undoubtedly sound if the enquiries are confined to the four corners of the written agreements. However, the Commissioner's case is that the documents do not reflect the real intention of the contracting parties; because the entire purpose of the transaction was to evade tax, the agreements were concluded in a form which conceals the fact that the appellants did acquire the right to have the buildings erected'.

5.7 Hefer J. found that it was not correct that merely because the parties intended to structure their arrangement in the form that they did, that effect needs to be given to each agreement in accordance with its tenor. He found that while the parties may, and in this case did, indeed formulate their transaction in the above manner, the 'real question' is whether they intended that each agreement would *inter partes*, have effect in accordance with its tenor and if not, substance must be given to the real transaction.[100]

5.8 Having regard to the fact that all the agreements (including the leases and the separate variations thereto) were signed simultaneously, together with other anomalies in the transaction, the court concluded that the agreements were simulated and that the value of the improvements had accrued to the taxpayers in accordance with Subsection (h).

5.9 That is, the court found that there was a tacit or unexpressed agreement between Pioneer and the subsidiary companies that the subsidiary companies would indeed be entitled to enforce compliance against Pioneer, or against Pioneer and the Fund jointly, and that a right in terms of Section (h) of the Income Tax Act had indeed accrued to the subsidiary companies as contemplated in the definition of gross income.[101]

5.10 In coming to the decision in this matter, the court did not apply the 'fiscal nullity' principle as contemplated in the *Ramsay* and *Furniss* cases (discussed in Chapter 8, but relied rather on the principles established in the cases of *Zandberg v Van Zyl* and *Randles Brothers*, including quoting the extracts from

[100] Erf 3183/1 Ladysmith (Pty) Ltd and Another v Commissioner for Inland Revenue 1996 (3) SA 942 (A) at page 953
[101] De Koker, A.P. and Williams, R.C. (2021) *SILKE on South AfricanIncome Tax, LexisNexis Online Version* Chapter 19, paragraph 19.22

Randles Brothers set out in paragraph 3.19.[102]

5.11 As can be seen from the decision in *Erf 3183 Ladysmith*, the parties cast their agreements in an ostensibly acceptable form to remain outside of the charging provision and then performed in terms thereof in an endeavour to meet the limitation stated in the simulation inquiry. As such performance did not '…*in fact mean that a contract shall have effect in accordance with its tenor…'.* [103] The court rejected the form (tenor) of the agreements and gave effect to the real intention of the parties.

5.12 In a similar matter, *Relier (Pty) Limited v Commissioner for Inland Revenue* [1998] 1 All SA 183 (A), Relier (Pty) Ltd ("Relier") concluded a series of transactions with various parties, including a provident fund, which owned Relier. The parties included the provident fund because it was exempt from income tax in terms of s10(1)(d). The provident fund then subleased the properties to a company that intended to erect a building thereon. The terms of the sublease included that the sublessee company was obliged to construct the building which would become the property of Relier at the end of the sublease. Again, it was contended that there was no right, as contemplated in Subsection (h) of the definition of 'gross income' as defined in Section 1 of the Income Tax Act, accruing to Relier to have improvements effected to its property in terms of a contract pursuant to which it allowed the use or occupation of such land. The court stated[104] that if the contracts were taken at face value, the appellant, Relier, should succeed, however, there were 'unusual' and 'unreal' aspects to the interposition of the fund in the transaction and it was questionable whether the fund intended to lease and sublet the property. The court found that the interposition of the fund was a simulation[105] in that such interposition was not truly intended by the parties. In this matter, Harms J.A., with reference to the decision in Erf 3183/1 Ladysmith, and commentary thereon by Professor Williams, stated that parties could not cast their agreements to remain outside of the charging provisions of a statute through the use of simulated transactions,[106] as follows:

---

[102] De Koker, A.P. and Williams, R.C. (2021) *SILKE on South African Income Tax, LexisNexis Online Version* Chapter 19, paragraph 19.22
[103] Erf 3183 Ladysmith at page 952
[104] Relier (Pty) Limited v Commissioner for Inland Revenue [1998] 1 All SA 183 (A) at page 187
[105] Relier (Pty) Limited v Commissioner for Inland Revenue [1998] 1 All SA 183 (A) at page 188
[106] Relier (Pty) Limited v Commissioner for Inland Revenue [1998] 1 All SA 183 (A) at page 187

> 'One commentator hailed the decision in Ladysmith as a welcome reminder that many tax-avoidance schemes can be nullified by the application of common-law principles (R.C. Williams "Income Tax: Disguised Transaction: Unexpressed Agreement or Tacit Understanding"114 (1997) SALJ 458 at 460. In the main this Court concluded that although the law permits people to arrange their affairs so as to remain outside the provisions of a particular statute (at page 951A-B), including a taxing provision, the question in the end remains whether the arrangement was one of substance and not one of form (at page 952B). More to the point, it was held that parties cannot arrange their affairs through or with the aid of simulated transactions (at page 951C-D) and effect will be given to unexpressed agreements and tacit understandings (at page 954 I-J).'

5.13 Notwithstanding other issues it may have, the NWK judgment remains important and as authority for the proposition that where parties perform, or allege to have performed, their contracts in accordance with the tenor of their terms, such performance is insufficient to prove that such transactions are not simulated. In response to the contention that provided the parties perform in terms of their agreements there can be no simulation, the NWK judgment confirmed, with reference[107] to the judgments in *Erf 3183/1 Ladysmith*[108] and *Relier*[109], that not only does the production of agreements not prove that the parties have a genuine intention for such agreements to have their ostensible effect, but that such production does not even shift the onus in terms of Section 82 of the Income Tax Act that the taxpayer has to prove such genuine intention. As aforesaid, Section 82 of the Income Tax Act has since been replaced by Section 102 of the Tax Administration Act 28 of 2011, which has the same effect for the purposes of this research.

[107] *CSARS v NWK Ltd* 2011(2) SA 67 (SCA), paragraphs [40] and [41]
[108] Erf 3183/1 Ladysmith (Pty) Ltd and Another v CIR 1996 (3) SA 942 (SCA
[109] Relier (Pty) Ltd v CIR 1997 (SCA)

Summary of Findings

5.14 It is clear that performance in accordance with the tenor of the agreements does not preclude a finding of simulation. More is required than that the parties give effect to their agreements in accordance with their tenor, the parties must '<u>in fact mean that the agreements shall have effect in accordance with their tenor</u>.' That is, the parties cannot harbour any 'real intention, definitely ascertainable, which differs' from the tenor of their agreements.

5.15 It has already been established that there is no standard test to determine simulation, the next two chapters (6 – Economic Substance and Simulation, and 7 – a Discernible Separate Intention) deal with how the court approaches the simulation inquiry in order to come to a determination.

Chapter 6 ECONOMIC SUBSTANCE AND SIMULATION

The NWK Decision

6.1 With the handing down of the *NWK* judgment, the topic of substance over form, and specifically simulated transactions, became a hotbed of debate with opinions being divided. In this Chapter 6 it is proposed to undertake further analysis of judgments and legal writings on simulated transactions focusing on the relationship between commercial substance and the common law requirements for simulated transactions.

6.2 In this matter, NWK Limited ("NWK"), a maize co-operative, claimed Section 11(a) interest deductions in respect of a loan in an alleged amount of over R 96 415 776 it had obtained from Slab Trading Company (Pty) Ltd ("Slab"), a subsidiary of First National Bank ("FNB"). In respect of its assessments from 1999 to 2003 NWK claimed deductions which were granted. After having first allowed the deductions, the Commissioner issued new assessments disallowing same and imposing additional tax and interest, in an aggregate amount of R 47 360 583. The Commissioner claimed that the contract was not genuine, but a series of transactions designed to disguise. The Commissioner's stance was that the loan had to be considered together with several other agreements between FNB and NWK, and when this was done, it became evident that the loan was for only R 50 million. [110]

6.3 The facts relating to the transactions were found unanimously, and it is submitted correctly, to indicate simulation. Subsequent courts have endorsed the finding in NWK (on the issue of the facts indicating simulation), with the court in Bosch and Another V Commissioner for the South African Revenue Service [2013] 2 All SA 41(WCC)[99] referring to the court in this matter being presented with a 'starkly clear set of simulated transactions'.

6.4 The Commissioner claimed that the loan transaction was simulated and that, in

[110] *CSARS v NWK Ltd* 2011(2) SA 67 (SCA), paragraphs [1], [2] and [3]

the alternative, it fell foul of the GAAR which at the time was Section 103(1). [111]

6.5 The Supreme Court of Appeal summarised the contentions of NWK as follows:[112] –

> 'NWK alleged in its grounds of appeal that the contracts concluded between Slab, NWK and FNB were performed in accordance with their terms: NWK received the amount of R 96 415 776 in terms of the loan agreement and delivered the promissory notes to Slab. NWK paid the price of the maize – R46 415 776 – to First Derivatives in terms of the forward sale agreement. NWK was not party to the agreements between Slab and FNB. The terms of the loan reflected the intention of NWK and were implemented and performed in accordance with their tenor. And there was no tacit understanding or unexpressed agreement on the part of NWK that was not recorded in the contracts to which it was party.'

6.6 The Supreme Court of Appeal acknowledged that NWK outwardly performed in terms of the various contracts. [113]

6.7 The Commissioner contended[114], and the Supreme Court of Appeal found for the Commissioner, that:

6.7.1 None of NWK, FNB or Slab actually intended to trade maize and that the entire scheme, other than the loan for R 50 million was a 'paper exercise' as the maize agreements were 'illusory' and there was 'never any intention to deliver maize in the future. [115] According to Lewis J.A., 'At the outset, there was, as the Commissioner has contended, no intention to effect delivery at all.'[116]

6.7.2 To find 'the true intention of NWK one had to ignore entirely all the rights and obligations in respect of the maize.' [117]

6.7.3 The value of the maize purportedly being traded was calculated with

---

[111] *CSARS v NWK Ltd* 2011(2) SA 67 (SCA), Page 349, paragraph [4]
[99] At page 59 paragraph [72]
[112] *CSARS v NWK Ltd* 2011(2) SA 67 (SCA), Page 355, paragraph [35]
[113] *CSARS v NWK Ltd* 2011(2) SA 67 (SCA), Page 365, paragraph [80]
[114] *CSARS v NWK Ltd* 2011(2) SA 67 (SCA), paragraphs [26] to [34]
[115] *CSARS v NWK Ltd* 2011(2) SA 67 (SCA), paragraph [89]
[116] *CSARS v NWK Ltd* 2011(2) SA 67 (SCA), paragraph [76]
[117] *CSARS v NWK Ltd* 2011(2) SA 67 (SCA), paragraph [85]

reference to the loan, interest and fees agreed in the scheme and not related to the actual price of maize, either at the time of the transaction, or with reference to the value of the maize on the purported date of delivery and no security was provided; [118]

6.7.4 The risks usually considered in maize transactions scheduled for delivery in the future such as security, storage, transport and volatility were wholly absent from the transactions; [119]

6.7.5 Even though some R45 million worth of maize was sold (twice), the transactions did not result in maize changing hands and the only explanation for this by NWK was that the maize trade was a hedge. This argument was found to be self-defeating as the purported hedge could never have been required without the maize trade in the first place. In other words, the court summarised NWK's explanation of the maize trade portion of the transactions, in effect, as a hedge against itself. [120]

6.7.6 The transactions were dishonest and a simulation –

> 'The FNB proposal itself, the transactions concluded between NWK and Slab, and Slab and FNB, with their peculiar features, and Barnard's inability to give any credible explanation of aspects of the transactions show, I consider, that NWK could not have believed, and did not in fact believe, that the loan was for the sum of R 96 415 776. The contract was dressed up in order to create an obligation to pay interest, and consequently a right to claim a tax deduction, to which NWK was not entitled. NWK deliberately disguised the true nature of the loan for this purpose. It did not intend, genuinely, to borrow a sum approximating the one it purported to borrow.'[121]

6.7.7 The above fits squarely within the four corners of the simulation inquiry from Zandberg v Van Zyl and comprises the *ratio decedendi* of the judgment.[109] However, this was unfortunately not the end of the matter. The court went further and, in its deliberations, made *inter alia*, the

[118] *CSARS v NWK Ltd* 2011(2) SA 67 (SCA), paragraphs [73] and [74]
[119] *CSARS v NWK Ltd* 2011(2) SA 67 (SCA), Page 366, paragraph [82]
[120] *CSARS v NWK Ltd* 2011(2) SA 67 (SCA), paragraph [86]
[121] *CSARS v NWK Ltd* 2011(2) SA 67 (SCA), paragraph [87]

following comments:

6.7.11 'Does it have any commercial substance …?'[122]

6.7.1.2 '… as I have said, there must be some substance – commercial reason – in the arrangement, not just an intention to achieve a tax benefit or to avoid the application of a law.'[123]

6.7.8 While the above considerations can probably still be reconciled with the assessment of commercial substance, or lack thereof, as an indicator of a simulated transaction, the court went so far as to state that the actual test for simulation should go further than the inquiry set out in Zandberg v Van Zyl. The court stated[124] that:

> '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.'

6.7.9 The above caused upheaval in the legal community, particularly with those involved in the tax environment as it implied that dishonesty was no longer a requirement for simulation, in other words it attempted to objectivise fraud out of the principles developed to determine simulation[125] and that in elevating the role of commercial substance as a consideration in the common law it encroached on the domain of the

[122] *CSARS v NWK Ltd* 2011(2) SA 67 (SCA), paragraph [57]
[123] *CSARS v NWK Ltd* 2011(2) SA 67 (SCA), paragraph [80]
[112] *'the test to determine simulation'*
[124] *CSARS v NWK Ltd* 2011(2) SA 67 (SCA), paragraph [55]
[125] Hutchison, A. and Hutchison, D. 'Simulated Transactions and the Fraus Legis Doctrine' 131 South African Law Journal 69 (2014) at page 86

legislature and invalidly stretched the common law.[126]

6.7.10 One of the main difficulties with the NWK judgment is that it was capable of being interpreted as establishing lack of commercial substance as a self-standing requirement for a simulated transaction. [127]

6.7.11 Based on the above approach, SARS could, and indeed endeavoured[128] to, assess transactions that lacked commercial substance, but which did not involve dishonesty on the part of the contracting parties (in other words, honest transactions, which did not involve a real intention, definitely ascertainable, which differs from the simulated intention), as simulated transactions.

6.7.12 It is important to note that, notwithstanding the emphasis placed on the lack of commercial substance by the court in this case, the court did not suggest that the transactions were, on that basis, a fiscal nullity as envisaged by the Ramsay principle. [129]

6.7.13 The only way that this decision can be reconciled with the long-standing common-law principles is if lack of commercial substance is to be regarded as not, in and of itself, having legal consequences, but being viewed as 'symptomatic' of a sham or simulated transaction, concealing the actual and different underlying transaction.[130]

6.7.14 With respect, the court in NWK erred in conflating the basis of the inquiry as set out in Zandberg v Van Zyl with a general test for simulation, in contradiction of the express statement in Zandberg v Van Zyl that no general test can be laid out, and that each matter needs to be assessed according to its own merits.

---

[126] De Koker, A.P. and Williams, R.C. (2021) *SILKE on South AfricanIncome Tax, LexisNexis Online Version* Chapter 19, paragraph 19.2

[127] Humphries, C. and Mahon, D. (2017) *Simulated Agreements: Dressing up transactions. De Rebus*

[128] Bosch and Another v Commissioner for the South African Revenue Services [2013] 2 ALL SA 41 (WCC)

[129] De Koker, A.P. and Williams, R.C. (2021) *SILKE on South AfricanIncome Tax, LexisNexis Online Version* Chapter 19, paragraph 19.2

[130] De Koker, A.P. and Williams, R.C. (2021) *SILKE on South AfricanIncome Tax, LexisNexis Online Version* Chapter 19, paragraph 19.3

Judicial Repairs

6.8 What has followed the NWK judgement can only be described as a decade of judicial consideration and repairs.

6.9 One of the first cases to consider the NWK judgment was Bosch and Another v Commissioner for the South African Revenue Services [2013] 2 ALL SA 41 (WCC).

6.10 This case deals with the taxation, in terms of Section 8A(1)(a) of the Income Tax Act, of shares procured by employees through an employee share incentive scheme commonly referred to as a deferred delivery scheme[131] ("DDS Scheme"). The appellants were two of 117 Foschini employees who were participants in the DDS Scheme. In 2008 the Commissioner reviewed the DDS Scheme and issued additional assessments in respect of all 117 employees. The Appellants were selected as test cases in respect of the issues under consideration.

6.11 The basic principles of the DDS Scheme[132] were that the Foschini Group granted options to its employees which had to be exercised within 21 days of the offer. Thereafter, the option shares would be delivered in three equal tranches on each of the second, fourth and sixth anniversaries of the option notice date. Delivery of the shares was effected against payment of the portion of the consideration attributable to the relevant tranche. On the respective anniversary dates, employees who had exercised their options could elect to sell the shares to Foschini as opposed to taking delivery. Between the date of exercise of the option and the respective delivery date, the employee was not entitled, in respect of shares not yet delivered, to alienate or encumber the shares in any way. No risk or benefit transferred to the employee, who did not receive dividends, and such employee was not entitled to vote on the share unless and until such employee paid the purchase price and accepted delivery. Both appellants accepted the offer within the 21-day period.

6.12 The Commissioner objected when the value of the shares at delivery substantially

[131] Bosch and Another v Commissioner for the South African Revenue Services [2013] 2 All SA 41 (WCC), Page 45 paragraph [9]
[132] Bosch and Another v Commissioner for the South African Revenue Services [2013] 2 All SA 41 (WCC), Page 45 paragraphs [12] and [13]

exceeded the value thereof at the date of exercise of the options.

6.13 The Commissioner's additional assessments were premised on three grounds, [133] including reliance upon the NWK judgment. In respect of the first two grounds, the Western Cape High Court found for the appellants on grounds not relevant to this research. In respect of the third issue, while the court found again for the appellants, the learned judges were divided in their opinions as to how to deal with the decision in the NWK judgment.

6.14 For the purposes of this research, there are two noteworthy issues to the approach by Davis J.

6.15 Firstly, the learned judge refers to the court's acknowledgement that taxpayers can arrange their affairs to remain outside the provisions of the Income Tax Act, while holding that a court will not be deceived by the form of an agreement but will examine its true nature and substance. From this Davis J. states that 'accordingly, the onus which rests on a taxpayer in terms of Section 82(a) of the Act is not discharged simply by a party showing that effect was given to the contract in accordance with its terms.'[134]

6.16 Secondly, Davis J essentially bypassed the portions of the NWK decision that he construed as being incongruous with long standing precedent.[135]

6.17 In paragraphs [79] to [83] Davis J then reaffirmed the century of precedent in the cases *Zandberg v Van Zyl*, *Randles Brothers* and *Erf 3183/1*. The learned judge concluded that the NWK decision should be read within the above 'body of precedent' and should not be construed as 'an unexplained rupture from more than a century of jurisprudence'[136] and that paragraph 55 of the NWK judgment merely points to the direction that the enquiry must take, being that lack of commercial rationale is a strong indicator of simulation.[137]

[133] Bosch and Another v Commissioner for the South African Revenue Services [2013] 2 All SA 41 (WCC), page 59 paragraph [71]
[134] Bosch and Another v Commissioner for the South African Revenue Services [2013] 2 All SA 41 (WCC), page 59 paragraph [72]
[135] Bosch and Another v Commissioner for the South African Revenue Services [2013] 2 All SA 41 (WCC), Page 59 paragraph [72]
[136] Bosch and Another v Commissioner for the South African Revenue Services [2013] 2 All SA 41 (WCC), Page 59 paragraph [84]
[137] Bosch and Another v Commissioner for the South African Revenue Services [2013] 2 All SA 41 (WCC), Page 59 paragraph [84]

6.18 Davis J. concluded that the situation in this matter (Bosch) is more akin to that in *CIR v Conhage (Pty) Ltd* 1999 (4) SA 1149 (Supreme Court of Appeal) than to the facts in the NWK decision and decided the matter on all issues against the Commissioner.[138] Baartman J. concurred with Davis J.

6.19 Waglay J., by contrast, viewed the NWK judgment differently. After quoting from paragraphs [78] and [85] of Davis J.'s judgment, he referred to Davis J.'s need to restate the century of precedent in paragraphs [79] to [83] of the judgment and calls the interpretation of Davis J., 'somewhat strained'.[139]

6.20 Waglay J. went on to confirm that the scheme implemented by the Foschini Group under consideration in this matter was a scheme devised at tax avoidance and not tax evasion and on the face of it would, in terms of the NWK judgment amount to a simulated transaction.[140] Waglay J., however, then proceeded to dismiss the NWK Judgment as 'precedent binding on the lower courts' as it is not clear and unequivocal, it did not plainly and clearly reject the long standing binding precedents and its apparent indiscrete consideration of the terms tax evasion and tax avoidance culminates in untenable interpretation results with regard to simulated transactions.[141]

6.21 The NWK judgment was considered again in the matter of *Roshcon (Pty) Ltd v Anchor Auto Body Builders CC and others* [2014] 2 ALL SA 654 (Supreme Court of Appeal).

6.22 In this case, Roshcon (Pty) Ltd ("Roshcon") contended that a vehicle floor plan was in effect a loan secured by the vehicles without the bank having to be in possession of the vehicles. Roshcon claimed that this resulted in an advantage not permissible in law and that the floor plan agreement and the supplier agreement were simulated. The bank claimed that Roshcon had not discharged its onus to prove that the transactions were simulated and that there were sound

[138] Bosch and Another v Commissioner for the South African Revenue Services [2013] 2 All SA 41 (WCC), Page 59 paragraphs [91] and [96]
[139] Bosch and Another v Commissioner for the South African Revenue Services [2013] 2 All SA 41 (WCC), Page 67 paragraph [4]
[140] *Bosch and Another v Commissioner for the South African Revenue Services* [2013] 2 All SA 41 (WCC), Page 59 - Waglay J., page 68, paragraph [5]
[141] *Bosch and Another v Commissioner for the South African Revenue Services* [2013] 2 All SA 41 (WCC), Page 59 - Waglay J., page 86, paragraphs [7] and [8]

commercial reasons underpinning the transactions.[142]

6.23 The court *a quo* had found that the agreements were commercially sound and that the parties had valid reasons for contracting in the manner that they did, that within the framework of the business they permitted the dealers to be in possession of the vehicles to offer them for sale, while the bank retained ownership and could vindicate the vehicles if it was not paid.

6.24 Importantly, again, both the appellant and the respondent referred to the simulation inquiry from *Zandberg v Van Zyl* and the fact that each matter must be decided on its own facts.[143]

6.25 Shongwe J.A. determined that the issue was whether the agreements were intended by the parties to have effect in accordance with their terms and found that there was no tacit or disguised understanding between them. He found that Roshcon had not proven any secret understanding.[144]

6.26 He accordingly found that Roshcon had failed to discharge its onus.[145]

6.27 Wallis J.A., concurred in the judgment of Shongwe J.A., but provided an additional note in relation to how the courts should deal with the NWK Judgment. He stated that his explanation was necessitated by an apparent misconception regarding simulated transactions that became apparent by the submissions made in the matter to the effect that the NWK Judgment had altered the law relating to simulated transactions and this case had taken 'our law in that regard in a new direction'.[146]

6.28 Wallis J.A. then confirmed the simulation enquiry stated by Innes J. in *Zandberg v Van Zyl* as the foundation of our law regarding simulated transactions and proceeded to summarise the established common law principles in paragraphs

[142] Roschcon (Pty) Ltd v Anchor Auto Body Builders CC and Others [2014 2 All SA 654 (SCA), page 658, paragraph 7
[143] Roschcon (Pty) Ltd v Anchor Auto Body Builders CC and Others [2014] 2 All SA 654 (SCA), page 659, paragraph 10
[144] Roschcon (Pty) Ltd v Anchor Auto Body Builders CC and Others [2014] 2 All SA 654 (SCA), page 661, paragraph 15
[145] Roschcon (Pty) Ltd v Anchor Auto Body Builders CC and Others [2014] 2 All SA 654 (SCA), page 661, paragraph 16
[146] Roschcon (Pty) Ltd v Anchor Auto Body Builders CC and Others [2014] 2 All SA 654 (SCA), page 662, paragraph 22

[24] to [31] of his judgment.[147]

6.29 In these paragraphs, Wallis J.A. provides a particularly lucid explanation of the differences between the majority judgment and the minority view in *Randles Brothers*, and the fact that the difference was one of the genuineness of the transactions. He noted that matter had come to the Supreme Court of Appeal after a long trial in which the taxpayer was found by a majority to have honestly arranged the transactions within the enabling provisions of the relevant statute. The majority found that the taxpayer had been advised that only a genuine transaction involving an actual transfer of ownership would suffice and accordingly there was no incentive for them to simulate the transaction.[148]

6.30 According to Wallis J.A. 'It is against that background that the well-known passages in the judgment of Watermeyer J.A. must be read. Having cited both *Zandberg v Van Zyl* and *Dadoo*, Watermeyer J.A. said:

> "…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."[149]'

6.31 In referring to the minority judgment of De Wet C.J. in *Randles Brothers*, Wallis J.A. confirmed that such judgment does not alter the established principles. Wallis J.A. summarised the unusual features of the transactions as set out by De Wet C.J. and pointed out that De Wet C.J. accordingly concluded that there had been no genuine intention, particularly on the part of the manufacturers, to purchase the cloth and become owners thereof, but that they simply complied with the taxpayers new formalities in order to obtain the CMT work. Accordingly, the differences between the majority and minority judgments, again, were based on the respective findings of fact as to the intention of the parties.[150]

6.32 Wallis J. concluded that the principles, as established in *Dadoo Ltd*, *Zandberg v Van Zyl* and *Randles Brothers* had not been altered but that in income tax cases,

---

147 Roschcon (Pty) Ltd v Anchor Auto Body Builders CC and Others [2014] 2 All SA 654 (SCA), page 662, paragraph 23

148 Roschcon (Pty) Ltd v Anchor Auto Body Builders CC and Others [2014] 2 All SA 654 (SCA), page 664, paragraph 28

149 Roschcon (Pty) Ltd v Anchor Auto Body Builders CC and Others [2014] 2 All SA 654 (SCA), page 665, paragraph 30

150 Roschcon (Pty) Ltd v Anchor Auto Body Builders CC and Others [2014] 2 All SA 654 (SCA), page 665, paragraph 31

these principles are considered and applied in a different context. He then drew a distinction between the three last mentioned cases, and income tax cases, wherein the courts must deal with the situation where the parties add complex additional elements, which often cancel each other out and add nothing to the transaction but are designed exclusively to obtain tax advantages. After referring to the "air of unreality" in *Erf 1383/1* and "unusual and unreal aspects" in *Relier*, Wallis J.A. summarised the analysis of Lewis J.A. in the NWK Judgment as follows –

> 'The analysis by Lewis J.A. of the transactions in NWK clearly demonstrated that a range of unrealistic and self-cancelling features had been added to a straightforward loan. They served no commercial purpose, were based on no realistic valuation of the different elements of the transaction and were included solely to disguise the nature of the loan and inflate the deductions that NWK could make against its taxable income. In those circumstances, the courts stripped away the unrealistic elements in order to disclose the true underlying transaction'[151]

6.33 Wallis J.A. summarised the difficulty that the court in *NWK* faced in the circumstances where the parties actually performed in terms of their unrealistic and self-cancelling obligations and the parties contended therefore that the transactions were not simulated, that is, provided that the parties intend to take all the steps set out in their contracts or, in Wallis J.A.'s words 'jump through the contractual hoops as a matter of form' the court cannot find that the transaction is simulated. This premise lead to Lewis J.A.'s statement in paragraph 55 of her Judgment.[152]

6.34 Wallis J.A. supported Shongwe J.A. in his determination that each case needs to be dealt with on its own merits and facts[153], and endorsed the judgement in this matter to the effect that, while our law requires a pledgee to be and remain in possession of the movables in order for the pledge to be valid, transactions in terms of which finance houses secure their interests by taking ownership of the movables that are subject to a financing arrangement are legitimate commercially

[151] Roschcon (Pty) Ltd v Anchor Auto Body Builders CC and Others [2014] 2 All SA 654 (SCA), page 666, paragraphs 32 and 33
[152] Roschcon (Pty) Ltd v Anchor Auto Body Builders CC and Others [2014] 2 All SA 654 (SCA), page 666, paragraph 34
[153]

and in law. Wallis J.A. pointed to Lewis J.A.'s reference in the *NWK* judgment to *Conhage* as confirmation of this.[154]

6.35 Wallis J.A. accordingly concluded that, for the above reasons –

> '… the notion that NWK 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 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 a transaction is simulated.'[155]

6.36 After *Roshcon*, the *Bosch* case was heard by the Supreme Court of Appeal. The judgment, in respect of a unanimous decision of such court, was written by Wallis J.A.[156]

6.37 Wallis, J.A. confirmed that the issue to be determined was whether, in terms of Section 8A(1)(a) of the Income Tax Act, the taxpayers obtained rights to acquire shares in terms of the employee share scheme when they exercised their options, or when payment and delivery occurred. Wallis J.A. stated that such determination commences with the consideration of the words considering their context, and the apparent purpose of the provision and any relevant background material. The learned judge then summarised some of the principles laid out in *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (Supreme Court of Appeal) para [18] and quoted Schreiner J.A. in *Jaga v Dönges NO and another; Bhana v Dönges NO and another* [1950] 4 All SA 414 (A). The learned judge said that:

> 'the determination of the provision's proper meaning will depend as much on context, purpose and background as on dictionary definitions or what Schreiner J.A. referred to as "excessive peering

[154] Roschcon (Pty) Ltd v Anchor Auto Body Builders CC and Others [2014] 2 All SA 654 (SCA), page 667, paragraph 36
[155] Roschcon (Pty) Ltd v Anchor Auto Body Builders CC and Others [2014] 2 All SA 654 (SCA), page 668, paragraph 37
[156] *CSARS v Bosch and Another* [2015] 1 All SA 1 (SCA), page 4, paragraph 1

at the language to be interpreted without sufficient attention to the historical contextual scene."[157]

6.38 To the extent that the Commissioner relied upon substance over form in this matter, the argument rested on paragraph [55] of the NWK judgment. The Commissioner argued that the employee benefit scheme had been designed to enable the employees to avoid liability for tax and that in terms of the fore mentioned paragraph of the NWK Judgment, simulation did not require a finding of dishonesty. The Commissioner therefore argued that the scheme should be treated as a conditional entitlement to shares, providing for application of Section 8A(1)(a) of the Income Tax Act as at the date of delivery and payment, and not at the exercise of the option.[158]

6.39 Wallis J.A. explained that the argument utilised by the Commissioner was based upon a misunderstanding of the NWK judgment, and referred to his judgment in Roshcon, wherein the legal position, as it had stood for many years, was reiterated. This explanation bears quoting -

> ' … as was pointed out in Roshcon. There I stressed that simulation is a question of the genuineness of the transaction under consideration. If it is genuine then it is not simulated, and if it is simulated then it is a dishonest transaction, whatever the motives of those who concluded the transaction. The true position is 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 a transaction is simulated." Among those features will be the income tax consequences of the transaction. Tax evasion is of course impermissible and therefore, if a transaction is simulated, it may amount to tax evasion. But there is nothing impermissible about arranging one's affairs so as to minimise one's tax liability, in other words, in tax avoidance. If the revenue authorities regard any particular form of tax avoidance as undesirable, they are free to amend the Act, as occurs annually, to close anything they regard as

[157] *CSARS v Bosch and Another* [2015] 1 All SA 1 (SCA), page 6, paragraph 9
[158] *CSARS v Bosch and Another* [2015] 1 All SA 1 (SCA), page 17, paragraph 38

> a loophole. That is what occurred when section 8C was introduced.'[159]

6.40 Wallis J.A. found that the employees had no intention to purchase shares on terms other than those set out in the employee benefit scheme and accordingly the argument based on simulation failed.[160]

6.41 In the Sasol Oil matter, the issue of the NWK judgment was again raised. The court aligned itself with the comments made by Wallis J.A. in *Roschcon (Pty) Ltd v Anchor Auto Body Builders CC and Others* [2014] 2 ALL SA 654 (Supreme Court of Appeal)[161] and *CSARS v Bosch and Another* [2015] 1 ALL SA 1 (Supreme Court of Appeal)[162] to the effect that the NWK judgement had not changed the law regarding simulated transactions. While some have indicated that the nature of the pronouncements actually made in the NWK judgment do not permit of such interpretation (e.g. Waglay J., in the *Bosch* matter dealt with above), such contentions may have some theoretical merit, but to the extent that it existed, there is no practical value left in the judgement in so far as commercial substance being anything more than a symptom of simulation is concerned.

6.42 The focus on the concept of commercial substance, or the lack thereof, in the NWK judgment and its importance in matters dealing with simulated transactions appears therefore not to have been necessary in any event. The court found that (while the parties performed in terms of their expressed agreements) the parties did not intend to perform in terms of their (real) agreements, that is, in point of fact, they did not intend to create loans in the amount of R 96 milliion and never harboured such an intention – De Koker quoting the *ratio decedendi* of the case – "In view of the conclusion that I have reached that the loan for R 96 415 776 was a transaction designed to disguise the real agreement between the parties … a loan for R 50 million … the Commissioners assessments were correct …"[163]. There was thus a real intention, definitely ascertainable and which differed from the intention *ex*

[159] *CSARS v Bosch and Another* [2015] 1 All SA 1 (SCA), page 18, paragraph 40
[160] *CSARS v Bosch and Another* [2015] 1 All SA 1 (SCA), page 18, paragraph 41
[161] Sasol Oil Proprietary Limited v Commissioner for the South African Revenue Services [2019] 1 All SA 106 (SCA), page 121 paragraph 60
[162] Sasol Oil Proprietary Limited v Commissioner for the South African Revenue Services [2019] 1 All SA 106 (SCA), page 121 paragraph 61
[163] De Koker, A.P. and Williams, R.C. (2021) *SILKE on South African Income Tax, LexisNexis Online Version* Chapter 19, paragraph 19.3

facie the agreements.

6.43 Other than as an indicator of sham or disguised transactions, the common law is not at all concerned with the 'commercial substance' of a transaction, or lack thereof.[164]

Summary of Findings

6.44 Lack of economic substance is a major indicator of simulation. It is not a self-standing requirement and the court is still required to find a real intention, definitely ascertainable, that differs from the simulated intention, in order to determine that there has been simulation.

6.45 With respect, Wallis' statement in paragraph [34] that provided that the parties intend to take all the steps set out in their contracts or, in Wallis J.A.'s words 'jump through the contractual hoops as a matter of form' the court cannot find that the transaction is simulated is what, led to Lewis J.A.'s statement in paragraph 55 of her Judgment, is not correct. As has been shown in the last chapter, performance does not avail the parties where they harbour a separate dishonest intention.

6.46 It is submitted, with respect, that where the court in NWK erred, is in its over-simplistic statement of *'the test to determine simulation'.* [112] In the first instance, due to complexities of the issues, in each such matter and the ever-developing ingenuity of those who may wish to evade being taxed, it was correctly postulated in the simulation inquiry that there is no general test and that in following the simulation inquiry, the facts of each matter are required to be assessed. Second, the benchmark stated in the simulation inquiry that, in order for there to be simulation, there needs to be a real discernible intention of the parties, separate from the simulated intention is wider than, as postulated in the NWK judgment, that the test is simply '…whether there is an intention to give effect to a contract in accordance with its terms.'

6.47 This issue of the parties not only performing but having an intention to give effect to a contract in accordance with its terms and still concealing or disguising a

[164] De Koker, A.P. and Williams, R.C. (2021) *SILKE on South African Income Tax, LexisNexis Online Version* Chapter 19, paragraph 19.2

transaction is considered further in the following chapter.

Chapter 7 A REAL INTENTION, DEFINITELY ASCERTAINABLE, WHICH DIFFERS

A Different Intention

7.1 It has been established that in order to determine the existence of simulation, the court must make a finding of a real intention, definitely ascertainable which differs (referred to in this chapter as a different intention) from the simulated intention, simulated intention in this context being synonymous with the tenor of the agreements, it must be asked, how the courts have historically established such separate intentions.

7.2 In the case of *Skjelbreds Rederi A/S and others v Hartless* (Pty) Ltd [1982] 1 All SA 15 (A), a peregrinus company, Freedom Tramping Enterprises Inc ("Freedom Tramping"), ceded its claim under a shipping agreement to a local company, Hartless (Pty) Ltd ("Hartless"), in order to affect an attachment of the of the property in South Africa of a company named Skjelbreds Rederi A/S ("Skjelbreds"), to found jurisdiction in a South African court. The cession was challenged on the basis that it was a simulated transaction and that Hartless was merely the agent or nominee of Freedom Tramping.

7.3 The court took cognisance of the manner in which the cession was concluded[165], in that Freedom Tramping, a *peregrinus*, could not enforce its claim against Skjelbreds, also a *peregrinus,* in a South African court, and that Freedom Tramping could not apply for an attachment order to found jurisdiction. Hartless admitted that it was to overcome this jurisdictional difficulty that Freedom Tramping ceded its claim to it. The court also considered that the fact that the cession was entered into for this purpose would not, by itself, showed that Freedom Tramping could not genuinely have intended to make a cession of its claim in the terms contained in the written agreement, but it

[165] *Skjelbreds Rederi A/S and others v Hartless* (Pty) Ltd [1982] 1 All SA 15 (A) page 25

was nevertheless significant that the cession was entered into in order to enable Hartless to do something which Freedom Tramping could not do, and which would be for the benefit of Freedom Tramping and not Hartless.

7.4 The fact that Hartless was obliged to account to Freedom Tramping was not decisive of the dispute.[166] However, the fact that Hartless would, in terms of the provisions of the cession itself be entitled to enforce the claim for its own benefit, was not congruous with its obligation in reality to account to Freedom Tramping for the proceeds of the claim, and was, in effect, a negation of the cession as formulated in the written agreement.

7.5 The court found that the truth of the matter was that Hartless would not be entitled to retain the proceeds of the claim that was purportedly ceded to it out-and- out, and that the claim was therefore, as far as Hartless was concerned, an empty shell, having no economic content.[167]

7.6 In the final analysis,[168] the court found that the written cession was not a true reflection of the real agreement between the parties thereto and the parties harboured a separate intention to that of entering into a cession agreement.

Discerning Intention

7.7 In the matter of *Hippo Quarries (TVL) (Pty) Ltd v Eardley* [1992] 1 All SA 398 (A), the court was required to determine whether a cession of a trading debt between two associated companies was a sham.[169]

7.8 The facts of the matter were that Hippo Quarries (Pty) Ltd ("Hippo Q") and Hippo Quarries (Transvaal) (Pty) Ltd (“Hippo T”), the appellant in this matter, were both subsidiaries of the same holding company.[170] During the relevant period, Hippo T was a dormant company but Hippo Q, had been actively trading in the manufacture and supply of aggregates to the construction and other civil

[166] *Skjelbreds Rederi A/S and others v Hartless* (Pty) Ltd [1982] 1 All SA 15 (A) page 25
[167] *Skjelbreds Rederi A/S and others v Hartless* (Pty) Ltd [1982] 1 All SA 15 (A) page 26
[168] *Skjelbreds Rederi A/S and others v Hartless* (Pty) Ltd [1982] 1 All SA 15 (A) page 28
[169] Hippo Quarries (TVL) (Pty) Ltd v Eardley [1992] 1 All SA 398 (A) page 398
[170] Hippo Quarries (TVL) (Pty) Ltd v Eardley [1992] 1 All SA 398 (A) page 398

industries.[171]

7.9 Keith Eardley ("Eardley") was a director of Rietfontein Sand and Stone (Pty) Ltd ("Rietfontein"), a customer of Hippo Q. Eardley bound himself as surety for the obligations of Rietfontein to Hippo T, and not Hippo Q, on 7 May 1984.[172]

7.10 On 24 September 1986 Eardley completed and executed an application for credit on behalf of Rietfontein for trading credit with Hippo Q, which application included a clause (20.10) to the effect that Eardley bound himself with Rietfonten as surety and co-principal debtor for payment of all monies which may now or in the future be due and owing by Rietfontein to Hippo Q.[173]

7.11 Accordingly, by 1987 Hippo Q and Hippo T each held a deed of suretyship by which Eardley bound himself for the liabilities of Rietfontein.

7.12 On 27 May 1987 Hippo Q instituted action against Rietfontein, and Eardley as surety, for payment. The action against Eardley was based on the suretyship Eardley signed on 7 May 1984 in favour of Hippo T. Upon it becoming apparent that the suretyship relied upon was not in favour of Hippo Q, but in favour of Hippo T, Hippo Q withdrew its action. On reconsideration, it was decided that Hippo T, rather than Hippo Q, would act as plaintiff to recover the debt. In order to enable that, Hippo Q would cede its claim against Rietfontein to Hippo T.[174]

7.13 On 14 October 1987 Hippo Q ceded its claims to Hippo T.[175]

7.14 The same Hippo representative, one Mr. Jones, executed the cession document for both Hippo Q and Hippo T. Rietfontein and Eardley were notified of the cession.

7.15 Hippo T then instituted action in the matter under consideration against Eardley. It relied on two causes of action, being (1) based on the suretyship which Eardley completed in favour of Hippo T and which it was alleged, was activated by the cession of the claim, and (2) alternatively, on clause 20.10 of the document Eardley completed in Hippo Q's favour and the benefit of which, it was alleged,

---

[171] Hippo Quarries (TVL) (Pty) Ltd v Eardley [1992] 1 All SA 398 (A) page 398
[172] Hippo Quarries (TVL) (Pty) Ltd v Eardley [1992] 1 All SA 398 (A) page 398
[173] Hippo Quarries (TVL) (Pty) Ltd v Eardley [1992] 1 All SA 398 (A) page 398
[174] Hippo Quarries (TVL) (Pty) Ltd v Eardley [1992] 1 All SA 398 (A) page 399
[175] Hippo Quarries (TVL) (Pty) Ltd v Eardley [1992] 1 All SA 398 (A) page 399

passed to Hippo T conjointly with the cession of the claim.

7.16 The aforementioned Mr. Jones, testified for the Hippos to the effect that on success, the money would go to Hippo Q. Hippo T was a conduit for Hippo Q and that the cession was merely for the purposes of enabling Hippo T to collect the debt owing to Hippo Q.[176]

7.17 Hippo T accordingly had to prove the cession as an essential link in its case against Eardley to succeed, which it did by producing the duly executed written cession. The evidentiary burden consequently shifted to Eardley to show that the document was not what it purported to be. It is important to note, in this regard, that this was not a tax matter and the application of Section 82 of the Income Tax Act (subsequently replaced by Section 102 of the Tax Administration Act, 28 of 2011) was not applicable in respect of onus.

7.18 In the Supreme Court of Appeal, Nienaber, J.A. pointed out that:

7.18.1 a right is transferred in terms of a cession through the concurrence between-

> 'the cedent's *animus transferendi* of the right and the cessionary's corresponding *animus acquirendi*.'[177] and it will only constitute an out-and-out cession if a complete surrender is intended, irrespective of the form of the agreement; and

7.18.2 The aim is an inquiry into such true intention, which like any enquiry into intention, is a purely factual one[178]. If such intention is found to be feigned, the effect of the simulation will be disregarded.

7.19 It was argued for Eardley that the cumulative effect of the following factors showed that the intention was feigned and that the cession was a mere cloak under which Hippo T would institute action against him:

7.19.1 Hippo T was not a trading company - it would not therefore in the normal course of events have taken cession of the claim;

7.19.2 Hippo T and Hippo Q were sister companies represented by Jones;

[176] Hippo Quarries (TVL) (Pty) Ltd v Eardley [1992] 1 All SA 398 (A) page 399
[177] Hippo Quarries (TVL) (Pty) Ltd v Eardley [1992] 1 All SA 398 (A) page 400
[178] Hippo Quarries (TVL) (Pty) Ltd v Eardley [1992] 1 All SA 398 (A) page 400

7.19.3 the debt itself was worthless and there was no prospect or intention of recovering anything from Rietfontein;

7.19.4 Hippo T gave no consideration for the cession;

7.19.5 Hippo Q was responsible for financing the litigation; and

7.19.6 Hippo T obtained no beneficial interest in the outcome of the litigation.

7.20 Eardley therefore contended that 'the written cession, though not a deliberate fabrication, was accordingly not a true reflection of the parties' real intention and should not be treated as if it were.'[179] It was not contended on behalf of Eardley that there was any subterfuge or dishonesty in the cession between Hippo Q and Hippo T.

7.21 Nienaber J.A. commented that they were sister companies one of whom held a claim and the other a right against a surety. In the circumstances the express purpose of tying the two together through the 'knot' of the cession was legitimate.

> 'He (Jones) made that concession because the whole idea was to employ the plaintiff's suretyship for Hippo's benefit. Hippo could have proceeded against the defendant in terms of clause 20.10 of the 1986 application for credit, but that would have meant discarding the 1984 suretyship. The only way in which the latter suretyship could have been utilised was if Hippo Q ceded its debt against Rietfontein to Hippo T. In that manner both suretyships could be harnessed against the defendant.'[180]

7.22 The court held that there was nothing intrinsically wrong with ceding the claim because Hippo T, for whatever legitimate reason, was better poised to collect it than Hippo Q. 'Motive and purpose differ from intention.'[181] Nienaber J.A. confirmed the position that, as a principle of law, if the purpose of the parties is unlawful, immoral or against public policy the transaction will be ineffectual even if the intention to cede is genuine. Conversely, if the intention to cede is not genuine because the real purpose of the parties is something other than cession, their ostensible transaction will likewise be ineffectual, as the law disregards

---

[179] Hippo Quarries (TVL) (Pty) Ltd v Eardley [1992] 1 All SA 398 (A) page 400
[180] Hippo Quarries (TVL) (Pty) Ltd v Eardley [1992] 1 All SA 398 (A) page 404
[181] Hippo Quarries (TVL) (Pty) Ltd v Eardley [1992] 1 All SA 398 (A) page 405

simulation. The court allowed the implementation of the cession on the basis that the purpose was legitimate, and the intention was genuine. In this matter, the court found no different intention and allowed the cession.

7.23 The object or purpose behind the transaction is completely irrelevant to the enquiry whether the simulation principle is applicable.

> 'a transaction is not necessarily a disguised one because it is devised for the purpose of evading the prohibition in the Act or avoiding liability for the tax imposed by it. 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…' [34]

7.24 In the matter of *CIR v Conhage* the court was confronted with the contention that two sale and lease-back agreements were simulated and were in fact loans. In terms of the agreements Conhage (formerly "Tycon") sold some of its manufacturing plant and equipment to Firstcorp Merchant Bank Ltd ("FirstCorp") and leased same back for a fixed period, with options to renew.

7.25 The Commissioner disputed Tycon's right to deduct the rentals paid in terms of the leasebacks as expenditure in the production of income under Section 11(a) of the Income Tax Act.[182]

7.26 The Commissioner contended that, despite the form of the agreements, Tycon did not sell its equipment and lease same back, but in reality borrowed the purchase price from Firstcorp. It was not contended by the Commissioner that the parties acted *in fraudem legis* by deliberately disguising their transactions. The Commissioner argued[183] that the agreements should not be applied according to their tenor as:

> '… although Tycon and Firstcorp might honestly have believed that it would be sufficient to go through the formality of concluding that kind of agreement in order to procure tax benefits for themselves, they had no real intention to enter into agreements of sale and leaseback.'

---

[182] Commissioner for Inland Revenue v Conhage (Pty) Ltd (formerly Tycon (Pty) Ltd) (606/97) [1999] ZASCA 64 (17 September 1999) paragraph 2

[183] Commissioner for Inland Revenue v Conhage (Pty) Ltd (formerly Tycon (Pty) Ltd) (606/97) [1999] ZASCA 64 (17 September 1999) paragraph 3

7.27 The honourable judge reasoned that the Commissioner's contention that an honest belief that performance in terms of the agreements would suffice in law, while harbouring a factual intention that the agreements were in reality something else, was tantamount to an allegation of dishonest intention, that is a different intention as defined above and contemplated in the simulation inquiry. The court referred, *inter alia* to the matter of *McAdams v Fiander's Trustee & Bell NO* 1919 AD 207, as support the proposition that 'the true nature of a transaction will prevail where the parties enter into an agreement in the honest belief that they will achieve a particular purpose by doing so, but do not actually intend it to have effect according to its tenor'.[184] In circumstances where the parties understood the tax benefits of sale and leasebacks and Firstcorp was prepared to provide the funds that Tycon needed for expansion, the parties decision to go that route would necessarily have amounted to simulation if they had not held the intention that ownership would pass in accordance with the agreements. The court reasoned that in such circumstances the only inference would be that of *fraus legis*.

7.28 The argument of the Commissioner turned on the effect of the agreements and not the intention of the parties.[185]

7.29 The special court accepted the evidence of the Tycon and Firstcorp witnesses and found accordingly that Tycon had discharged its onus in terms of Section 82 of the Income Tax Act.[186]

7.30 The court in the Supreme Court of Appeal construed the Commissioner's biggest problem to be his contention that the parties never had any intention to enter into sale and leaseback agreements, while, at the same time, discarding the possibility that the agreements were deliberately disguised.[187]

7.31 The Supreme Court of Appeal considered the Commissioner's contention, being that the parties might have believed that the formal agreements would provide the desired tax advantages. However, the court found that this contention found no

[184] Commissioner for Inland Revenue v Conhage (Pty) Ltd (formerly Tycon (Pty) Ltd) (606/97) [1999] ZASCA 64 (17 September 1999) paragraph 4
[185] Commissioner for Inland Revenue v Conhage (Pty) Ltd (formerly Tycon (Pty) Ltd) (606/97) [1999] ZASCA 64 (17 September 1999) paragraph 5
[186] Commissioner for Inland Revenue v Conhage (Pty) Ltd (formerly Tycon (Pty) Ltd) (606/97) [1999] ZASCA 64 (17 September 1999) paragraph 7
[187] Commissioner for Inland Revenue v Conhage (Pty) Ltd (formerly Tycon (Pty) Ltd) (606/97) [1999] ZASCA 64 (17 September 1999) paragraph 8

support in the evidence and was against the probabilities[188], moreover in that (1) the consideration that the parties representatives gave to the pros and cons of sale and leaseback agreements, and (2) the disadvantages of no longer being owner of the equipment was expressly mentioned and considered by Tycon, and (3) Tycon considered sale and leasebacks from other banks during the process, and (4) Tycon and Firstcorp negotiated with each other extensively and at arm's length, and lastly (5), the expertise of the representatives involved in the negotiation and execution of the agreements was taken into consideration.

7.32 The court held that as a matter of fact the parties intended to enter into sale and leaseback agreements and to put such agreements into effect, and the special court accordingly had no option but to decide in Tycon's favour.[189]

7.33 It was accordingly found by the Supreme Court of Appeal that Tycon had discharged its evidentiary burden to establish that the transactions were genuine, and such finding rested on the subjective intention of Tycon, inferred objectively through the evidence presented,[190] amounting to the fact that the parties harboured no different intention to the tenor of their agreements. They in fact meant such agreements to have effect in accordance with their tenor.

7.34 The view that a bona fide intention to cast and perform will avail the taxpayer was not accepted in Saner. It will therefore not avail the parties even if they harbour an honest belief that giving effect to the tenor of the expressed agreements will pass muster in circumstances where the parties harbour a real, separate intention.

7.35 To return to the colourful metaphor(s) stated by Ponnan J.A. (paragraph 4.4) it must be accepted that each judge does not assess each mosaic tile/piece of evidence in the same way, give it the same weight or relevance, and accordingly, to continue the metaphor, to put it in the same place in the overall picture. That is why different judges, all hearing the same evidence, might step back as it were, and not all see exactly the same picture. For this reason, there have been so many split benches, even in some of the cases that are construed as *locus*

[188] Commissioner for Inland Revenue v Conhage (Pty) Ltd (formerly Tycon (Pty) Ltd) (606/97) [1999] ZASCA 64 (17 September 1999) paragraph 8
[189] Commissioner for Inland Revenue v Conhage (Pty) Ltd (formerly Tycon (Pty) Ltd) (606/97) [1999] ZASCA 64 (17 September 1999) paragraphs 9 and 10
[190] Hutchison, A. and Hutchison, D. 'Simulated Transactions and the Fraus Legis Doctrine' 131 South African Law Journal 69 (2014) at page 82

classicus, including *Zandberg v Van Zyl* and *Randles Brothers*. Discerning dishonesty has always been difficult.

Summary of Findings

7.36 To return to the colourful metaphor(s) stated by Ponnan J.A. (paragraph 4.4) it must be accepted that each judge does not assess each mosaic tile/piece of evidence in the same way, give it the same weight or relevance, and accordingly, to continue the metaphor, to put it in the same place in the overall picture. That is why different judges, all hearing the same evidence, might step back as it were, and not all see the same picture. For this reason there have been so many split benches, even in some of the cases that are construed as *loci classici*, including *Zandberg v Van Zyl* and *Randles Brothers*. Discerning a dishonest intention has always been difficult for the courts.

Chapter 8 SIMULATION IN TAXATION

Complex structures

8.1 Taxpayers seeking to pay less tax usually to avail themselves of the benefits of a particular section or sections of the Income Tax Act sometimes endeavour to do so with the use of complicated structures or transactions. Whether a series of transactions comprises tax avoidance or tax evasion can be a matter of substantial complexity and uncertainty.

8.2 When it comes to dealing with complex structures and the topic of tax evasion, the courts in England have developed the common law through a principle of fiscal nullity.

8.3 The principle of fiscal nullity was stated by Lord Wilberforce in the matter of *WT Ramsay Ltd v IRC* [1981] 1 All ER 865 (HL)[191]. It subsequently become known as the 'Ramsay principle'.

8.3.1 In *CIR v Burmah Oil Co Ltd 54 TC 200*, Lord Diplock summarised the 'Ramsay principle', as follows:

> 'First, there must be a pre-ordained series of transactions; or, if one likes, one single composite transaction. This composite transaction may or may not include the achievement of a legitimate commercial (business) end … Secondly, there must be steps inserted which have no commercial (business) purpose apart from the avoidance of a liability to tax – not "no business effect". If those two ingredients exist, the inserted steps are to be disregarded for fiscal purposes. The court must look at the end result. Precisely how the end result will be taxed will depend on the terms of the taxing statute sought to be applied.'

[191] De Koker, A.P. and Williams, R.C. (2021) *SILKE on South African Income Tax, LexisNexis Online Version* Chapter 19, paragraph 19.2

8.3.2 The above interpretation of the Ramsay principle was subjected to some criticism. [192] The leading authority on the proper interpretation of the Ramsay principle is now considered to be *Barclays Mercantile Business Finance Ltd v Mawson* [2005] STC 1 pursuant to which it is accepted that the Ramsay matter did not lay down a new principle of substantive law, but rather a principle involving a purposive approach to statutory interpretation. [193]

8.4 De Koker quotes the explanation from *Astall and another v Revenue and Customs Commissioners* [2010] STC 137, setting out the two steps inherent in applying a purposive approach as follows:

> 'In my judgment, applying a purposive interpretation involves two distinct steps: first, identifying the purpose of the relevant provision. In doing this, the court should assume that the provision had some purpose and Parliament did not legislate without a purpose. But the purpose must be discernible from the statute: the court must not infer one without a proper foundation for doing so. The second stage is to consider whether the transaction against the actual facts which occurred fulfils the statutory conditions.'

8.5 The *Ramsay*, *Burmah*, *Barclays* and *Astall* matters were all the subject of consideration of courts in the United Kingdom which has no legislated general anti-avoidance provision and relies on its common law to distinguish between tax avoidance and impermissible tax avoidance[194]. In a South African context, and in the view of the writer, the UK courts' interpretation of a' purposive basis' is, in light of what is set out in paragraph 4.6 and the *Natal Joint Municipal Pension Fund v Endumeni Municipality* case more important than its identification of, and dealing with, elements of fiscal nullity. According to De Koker, whereas 'the Ramsay principle, as now interpreted, takes a purposive approach to the interpretation of fiscal legislation, decisions of the South African courts such as Randles Brothers & Hudson focus on analysing and giving effect to the true intention of the parties to the arrangement,

[192] De Koker, A.P. and Williams, R.C. (2021) *SILKE on South African Income Tax, LexisNexis Online Version* Chapter 19, paragraph 19.2
[193] De Koker, A.P. and Williams, R.C. (2021) *SILKE on South African Income Tax, LexisNexis Online Version* Chapter 19, paragraph 19.2
[194] De Koker, A.P. and Williams, R.C. (2021) *SILKE on South African Income Tax, LexisNexis Online Version* Chapter 19, paragraph 19.2

shorn of any disguise'.[195]

8.6 The concept of purposive interpretation is expanded upon in Chapter 9.

8.7 There is no gap in South African common law in so far as the courts' jurisdiction to deal with simulation in composite transactions is concerned. *Erf 3183/1 Ladysmith*, the *NWK* judgment and *Sasol Oil Proprietary Limited v Commissioner for the South African Revenue Services* [2019] 1 All SA 106 (Supreme Court of Appeal) are instances in which the courts accepted that they had jurisdiction to deal with alleged simulation in composite transactions.[196]

8.8 As will be seen in the section dealing with the GAAR, in terms of Part IIA of the Income Tax Act, a lack of commercial substance has become an important consideration in making the distinction between tax avoidance and impermissible tax avoidance.

8.9 Both the repealed section 103(1) and the new GAAR set out in Part IIA of the Income Tax Act provide that, where a transaction falls foul of its provisions, one of the resultant powers of the Commissioner is to treat the transaction as if it had not been entered into or carried out, that is as a fiscal nullity.

8.10 The above therefore leads to a brief consideration of the GAAR insofar as same relates to the parties concealing or disguising transactions.

THE GAAR

8.11 The relationship between the common law and the GAAR is summarised by De Koker in Chapter 19.3.[197] Where a court finds a sham or disguised transaction, it will give effect to the agreements in accordance with the actual intention of the parties, together with the tax consequences that attach thereto. By contrast, where a statutory anti-avoidance provision applies, the court imposes consequences different to those intended by the parties. The anti-avoidance

[195] De Koker, A.P. and Williams, R.C. (2021) *SILKE on South African Income Tax, LexisNexis Online Version* Chapter 19, paragraph 19.3
[196] De Koker, A.P. and Williams, R.C. (2021) *SILKE on South African Income Tax, LexisNexis Online Version* Chapter 19, paragraph 19.2
[197] De Koker, A.P. and Williams, R.C. (2021) *SILKE on South African Income Tax, LexisNexis Online Version* Chapter 19, paragraph 19.3

provisions may be applied to the real agreement found between the parties even after the sham or disguise has been stripped away. [198]

8.12 For purposes of the common law, whenever it is required to be determined whether a statute, including a charging provision in a tax statute, is applicable, it is irrelevant that someone intended to avoid it.[199] Under common law, the motives of the parties remain irrelevant, however the GAAR is different.

8.13 In circumstances where a structure or series of transactions is challenged, the point of departure is to consider whether it falls foul of the applicable common law. This involves ascertaining whether it is a sham or disguised transaction. Thereafter, the GAAR is considered. The consideration under the GAAR is narrower as the 'reach' of the statute will necessarily be 'limited' by the specific nomenclature utilised.[200]

8.14 Our law is currently concerned with two GAARs - Section 103(1) (the 'old GAAR') in respect of transactions or schemes concluded before 2 November 2006 and the new GAAR in respect of transactions or schemes entered into on or after 2 November 2006 (the 'new GAAR').

8.15 The old GAAR accordingly rests on the following two criteria, which both must co-exist:

8.15.1 Subjectively, the main or sole purpose of the transaction must have been the reduction or avoidance of tax; and

8.15.2 The objective abnormality of any of the means or manner in which the transaction was entered into, or in which it was carried out, or of the rights and obligations created thereby.

8.16 SARS was dissatisfied with the old GAAR because abnormal transactions fell outside the ambit of the old GAAR, provided that the subjective main or sole purpose of the taxpayer was not the avoidance of tax, as did objectively normal transactions notwithstanding that the main or sole purpose of the taxpayer was

[198] De Koker, A.P. and Williams, R.C. (2021) *SILKE on South African Income Tax, LexisNexis Online Version* Chapter 19, paragraph 19.3
[199] Derksen, A.G. 'To what extent does the common law allow the avoidance of statutes?' A discussion in which specific reference is made to tax statutes' South African Law Journal 112 (1995) at page 101
[200] De Koker, A.P. and Williams, R.C. (2021) *SILKE on South African Income Tax, LexisNexis Online Version* Chapter 19, paragraph 19.3

the avoidance of tax.[201]

8.17 In terms of Section 103(4) though, any transaction, operation or scheme resulting in the postponement or avoidance of tax was rebuttably presumed to have been entered into for the subjective main or sole purpose of delaying or reducing tax and the onus to prove otherwise rested on the taxpayer.

8.18 In 2006, South Africa received a world-class new GAAR, in the form of Sections 80A to 80L of the Income Tax Act.[202]

8.19 Based though, on the presumption that the GAAR serves the purpose of protecting the general provisions of the Income Tax Act, a critical principle, as yet undetermined by our courts, is whether it follows that if such general provisions (explicitly or implicitly) provide the taxpayer with a choice as to the ways in which to structure his affairs, then the GAAR cannot be interpreted as to deny the taxpayer such choice, even where the tax benefit of that choice constitutes the sole or main motivation of the taxpayer.[203] Unlike in Australia, our courts have never limited the ambit of the taxpayer's choices to alternatives offered by tax legislation.[204]

8.20 Our courts have not, yet been required to consider or pronounce upon the relationship between the GAAR and the choice principle (either under Section 103(1) or under the new GAAR). De Koker proceeds further to propose that the only satisfactory method to determine in any set of circumstances whether the choice principle prevails against the GAAR is to ascertain whether the choice exercised by the taxpayer was one implicitly or expressly provided to him under the Income Tax Act. If so, the choice principle should trump the GAAR.[205]

8.21 Our courts dealt with the choice principle in relation to a GAAR (Section 90, being the GAAR applicable at the time) in the matter of *CIR v King* 1947 (2) SA 196 (A),

---

[201] De Koker, A.P. and Williams, R.C. (2021) *SILKE on South African Income Tax, LexisNexis Online Version* Chapter 19, paragraph 19.4
[202] Kruger, D., Stein, M., Dachs, P. and Davey, T. (2012) *Broomberg on Tax Strategy*, Fifth Edition, Lexis Nexis, at page 257
[203] De Koker, A.P. and Williams, R.C. (2021) *SILKE on South AfricanIncome Tax, LexisNexis Online Version* Chapter 19, paragraph 19.3
[204] De Koker, A.P. and Williams, R.C. (2021) *SILKE on South AfricanIncome Tax, LexisNexis Online Version* Chapter 19, paragraph 19.3
[205] De Koker, A.P. and Williams, R.C. (2021) *SILKE on South AfricanIncome Tax, LexisNexis Online Version* Chapter 19, paragraph 19.3

14 SATC 184[206] wherein Watermeyer C.J. stated that :

> '… there are many other ordinary and legitimate transactions and operations which, if a taxpayer carries them out, would have the effect of reducing the amount of his income to something less than it was in the past, or of freeing himself from taxation on some part of his future income … He can carry out such operations for the avowed purpose of reducing the amount of tax he has to pay, yet it cannot be imagined that Parliament intended by the provisions of s90 to do such an absurd thing as to levy a tax upon persons who carry out such operations as if they had not carried them out.'

8.22 The provisions of Sections 80A to 80L are extensive in the breadth of their scope.[207] Where an 'impermissible tax avoidance arrangement' as defined has been entered into, the Commissioner may determine (Section 80B (1) of the Act) the consequences of such arrangement for any party by –

8.22.1 disregarding, combining, or re-characterising any steps in or parts of the impermissible avoidance arrangement

8.22.2 disregarding any 'accommodating or tax-indifferent party' as defined (see further below) or treating any such entity and any other party as one and the same person

8.22.3 deeming persons who are connected persons in relation to one another to be one and the same person

8.22.4 reallocating any gross income, receipt or accrual of a capital nature, expenditure or rebate amongst the parties

8.22.5 re-characterising any gross income, receipt or accrual of a capital nature or expenditure

8.22.6 treating the impermissible tax avoidance arrangement as if it had not been entered into or carried out, or in such other manner as in the circumstances of the case the Commissioner deems appropriate for the prevention of diminution of the relevant 'tax benefit' (another definition

[206] At pages 191 and 192
[207] Kruger, D., Stein, M., Dachs, P. and Davey, T. (2012*) Broomberg on Tax Strategy*, Fifth Edition, Lexis Nexis, at pages 261 and 262

crucial to the application of the GAAR).

8.23 The first consideration is whether the relevant transaction/step falls within the ambit of the definition of 'avoidance arrangement" (Section 80L of the Act).[208] The net is widely cast and includes any 'arrangement' which results in a 'tax benefit'. 'Arrangement' is defined (Section 80L of the Act) as 'any transaction, operation, scheme, agreement or understanding (whether enforceable or not), including all steps therein or parts thereof, and includes any of the foregoing involving the alienation of property'.

8.24 The second consideration is whether or not the avoidance arrangement has been entered into or carried out 'solely or mainly for the purpose of obtaining a 'tax benefit'" (Section 80A of the Act).[209]

8.25 In terms of Section 80G of the Act, an avoidance arrangement is deemed to have been entered into or carried out solely or mainly for the purpose of obtaining a tax benefit unless, and until, the taxpayer proves that, 'reasonably considered in light of the relevant facts and circumstances[210]', obtaining a tax benefit was not the sole or main purpose of the avoidance arrangement.[211] Section 80G, the enquiry into purpose has now become objective with the distinction between purpose and effect thereby falling away[212] i.e the taxpayer now bears the burden of proving that looking at the transaction or scheme objectively (and irrespective of the actual intention of the taxpayer) that tax reduction or delay is not the main or sole purpose of such transaction/scheme. This constitutes one of the major changes between the old GAAR and the new GAAR.

8.26 Typically, there may be an innocent business purpose for a scheme viewed as a whole, but one of the components of that scheme, or a transaction entered in the course of carrying out that scheme, is tainted with a tax avoidance purpose: *CIR v Ocean Manufacturing Ltd* 1990 (3) SA 610 (A), 52 SATC 15 and *CIR v Conhage*

[208] Kruger, D., Stein, M., Dachs, P. and Davey, T. (2012) *Broomberg on Tax Strategy*, Fifth Edition, LexisNexis, at page 262
[209] Kruger, D., Stein, M., Dachs, P. and Davey, T. (2012) *Broomberg on Tax Strategy*, Fifth Edition, LexisNexis, at page 262
[210] Ibid
[211] Kruger, D., Stein, M., Dachs, P. and Davey, T. (2012) *Broomberg on Tax Strategy*, Fifth Edition, LexisNexis, at page 263
[212] De Koker, A.P. and Williams, R.C. (2021) *SILKE on South African Income Tax, LexisNexis Online Version* Chapter 19, paragraph 19.4

(Pty) Ltd 61 SATC 391. The fact that a taxpayer may have a dual purpose (business and tax avoidance) in entering the specific transaction is more often the norm rather than the exception. It is for this reason that the Supreme Court of Appeal's judgment in the *Conhage* case is so important. Hefer J.A. in delivering the judgment of the court held that the agreements of sale and leaseback served the dual purpose of providing (Conhage) with capital and to take advantage of the tax benefits to be derived from that type of transaction.

8.27 Should the taxpayer be unable to demonstrate that the sole or main purpose of the transaction 'reasonably considered considering the relevant facts and circumstances' was not to derive a tax benefit, then the taxpayer will need to demonstrate that no tainted elements are present in the transaction[213], that is: –

8.27.1 in a business context, (a) the avoidance arrangement was entered into in a manner not normally used for *bona fide* business purposes, or (b) it lacks 'commercial substance' (as defined in Section 80C of the Act); or

8.27.2 other than a business context, the avoidance arrangement was entered into in a manner which would not normally be employed for *bona fide* purposes, other than obtaining a tax benefit; or

8.27.3 in any context, the avoidance arrangement (a) has created rights or obligations that would not normally be created between parties dealing at arm's length, or (b) would result in any provision of the Act (including the new Sections 80A to 80L) being misused or abused.

8.28 In her article on the rigours of the new GAAR, Dr, Pidduck summarises the purposive approach to the interpretation of the GAAR[214] as follows:

8.28.1 'This approach interprets the legislation by taking cognisance of the intention of the legislature by promoting the general underlying purpose of the statutory provision… The steps taken for interpretation may be described as follows:

8.28.1.1 Firstly, this is done by having regard to the words used and given to them, unless specifically defined, their ordinary grammatical meaning in conjunction with the purpose of the

[213] Kruger, D., Stein, M., Dachs, P. and Davey, T. (2012) *Broomberg on Tax Strategy*, Fifth Edition, LexisNexis, at page 264
[214] Pidduck, T.M. 'The Sasol Oil case – would the present South African GAAR stand up to the rigours of the court?', paragraph 2.1 - obtained online at – https://ssm.com/abstract=3553155

legislation, thereby attempting to determine what the courts would find in applying this word, sentence or piece of legislation...

8.28.1.2 Secondly, if giving the words such a meaning would lead to absurdities or abnormalities that could not have been contemplated by the legislature, the legislature's intention must be considered of paramount importance in order to remain within the bounds of the Constitution...

8.28.1.3 Thirdly, where a word, sentence or piece of legislation has already come before the courts (in a similar context and with a similar intention), the interpretation used by the courts is used...

8.28.1.4 Lastly, the interpretation of anti-avoidance legislation adds an additional consideration in that it must be interpreted widely to "supress the mischief" and advance the remedy of the revenue authority but must also not stretch the meaning beyond what the language permits...'

8.28.2 In this interpretational context, the facts of Sasol Oil and the interpretation and application of the components of the current GAAR are discussed in paragraph 8.59 below.

8.29 It is evident from the judgments of the court, including the Supreme Court of Appeal in the judgments in Roshcon, Bosch and Sasol that heavy reliance is still placed on the simulation inquiry.

Roshcon v Anchor Auto Body

8.30 In the matter of Roschcon (Pty) Ltd v Anchor Auto Body Builders CC and others [2014] 2 All SA 654 (SCA), Wallis J.J.A. dealt specifically with how the courts deal with simulation in the context of taxation.[215] When it comes to matters of income tax, parties sometimes endeavour to take advantage of complex legislation, including by inserting complex features or steps that have no commercial purpose, do not add anything to the transaction and often are self-cancelling.

[215] At paragraphs [32] and [33]

Sasol Oil

8.31 The *Sasol Oil* case is an apposite example of the consideration by the courts of the context in which simulation is considered in income tax matters, as alluded to by Wallis J.J.A. in *Roshcon* above.

8.32 This matter was not unanimously decided. It was decided on a narrow three to two split. For convenience, in this analysis, the judges' finding for the majority, Lewis J.A. (Ponnan and Cachalia J.J.A. concurring) are referred to as "the majority" and the judges' finding in the minority Mothle A.J.A. (with Makgoke J.A.) are referred to as "the minority".

8.33 In analysing this case it is important to bear in mind the portion of the simulation inquiry quoted and referred to in Chapter 3 as the encapsulation of our doctrine of substance over form in South African law, including -

> '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 concpitur*.'

8.34 It has been shown in this research that our courts will not apply the above doctrine in the absence of consideration of its limits, also set out in Chapter 3, being -

> 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.

8.35 It is not clear from the judgment in *Sasol Oil* whether the Commissioner set out a clear allegation of a real intention, definitely ascertainable, which differed from the agreements, but it can be gleaned from the minority judgment[216] that the position of the Commissioner in this regard can be summarised as follows:

> 'The role of SISL as stated in the supply agreements was a simulation. The continued reference to SISL, well beyond the adoption of the supply agreements, as a company with shipping functions and providing a service

[216] *Sasol Oil* at paragraph [137]

instead of trade functions, exposes its real role in the supply chain. No explanation could be provided to the Tax Court by Sasol Oil as to why it now had to take two companies to conduct a trade that was initially handled by one company'.

8.36 The facts of the case are set out below.

8.37 The pertinent entities in the Sasol Group are the ultimate holding company in South Africa, Sasol Limited, two South African resident subsidiaries of Sasol Limited, being Sasol Oil (Pty) Ltd ("Sasol Oil" - the taxpayer under consideration) and Sasol International Holdings (Pty) Ltd ("SIH") and two subsidiaries of SIH, being Sasol International Services UK ("SISL" – a UK resident company) and Sasol Trading International ("STI" – a company registered in the Isle of Man).

8.38 In 2004, STI was replaced in the structure by another Isle of Man company, Sasol Oil International ("SOIL"), a subsidiary of Sasol Oil.

8.39 During or about 2000 and 2001, Sasol Group embarked on a restructure. Whether this was based on tax advice or rationalisation, or both, was contested.

8.40 Before the restructure STI used to procure crude oil on term contracts from Middle East suppliers and sell same directly to Sasol Oil in South Africa.

8.41 After the restructure STI purchased the crude oil, sold same to SISL who, in turn on sold it to Sasol Oil.

8.42 In 2004, Sasol Group replaced STI with SOIL. SOIL continued the trend of selling the crude oil to SISL, however, since SOIL was not selling to a South African resident company who was also a connected person, the controlled foreign company rules ("CFC Rules") did not apply to these transactions.

8.43 The Commissioner claimed that the interposition of SISL was a simulation and that it could tax Sasol Oil as if the transactions were directly between SOIL and Sasol Oil, alternatively that the transactions were subject to the then GAAR, Section 103(1).

8.44 The structure has been represented diagrammatically[217] (Diagram 1 and Diagram 2) which diagrams are reproduced below for convenience.

[217] Hattingh, J. and Titus, A. 'Sasol Oil v CSARS: judicial reinterpretation of legal doctrine to address tax avoidance in South Africa' British Tax Review, Issue 2 (2020) at page 177 – obtained online https://ssrn.com/abstract=3650797

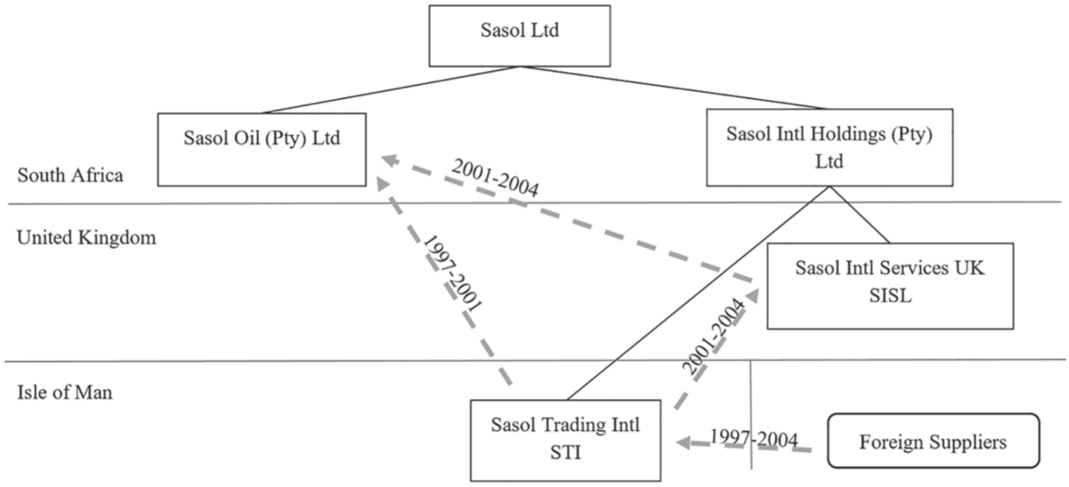

Diagram 1: corporate structure and oil procurement transactions 1997–2004

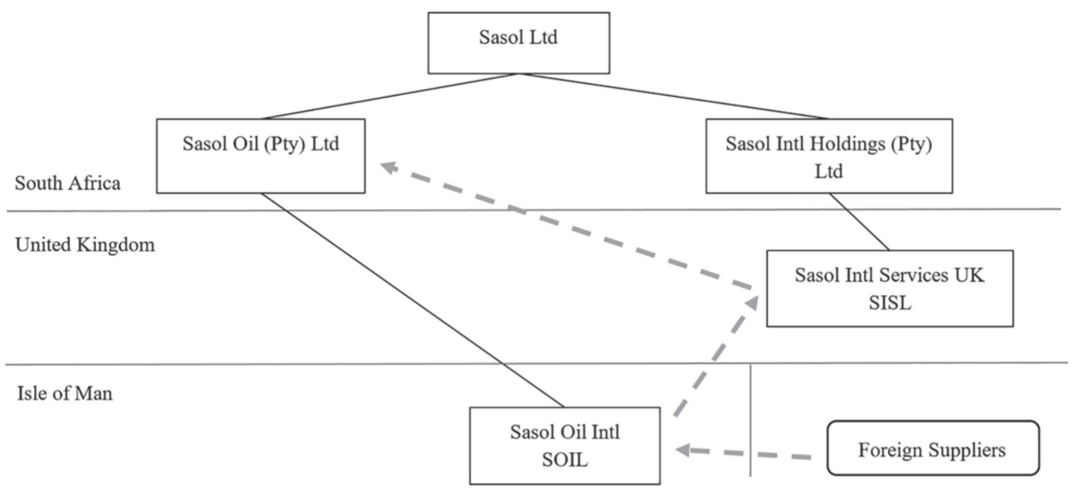

Diagram 2: corporate structure and oil procurement transactions 2004–2007

8.45 A major part of the case involved the investigation into the commercial substance (referred to in the judgment alternatively as '*commercial reason*' or '*commercial justification*') of the interposition of SISL in the structure.

8.46 As has been established in Chapter 6, lack of commercial substance is a major indicator, but not determinative, of simulation.

8.47 The majority rely on the existence of commercial substance and refer to same thirteen times in their judgment. It is, however, only in two paragraphs that they find what that commercial substance really is, and it seems to be limited to:

8.47.1 Rationalisation of expenses[218] which ultimately were not saved as the rationalisation plan was, for the most part, abandoned.[219] The understanding from paragraph [74] is that the majority accepted the contention that such savings were replaced by

> 'the profits that Sasol Oil would make and the fees that SISL would earn in terms of the supply agreements'

It is submitted that, not only is that justification nebulous, but the witness' understanding that SISL was earning '*fees'* militates in favour of the minority. In addition, they refer to such rationalisation of expenses as being '*lost*; and

8.47.2 The assumption by SISL of risk[220] – which was understood by the UK revenue authorities to be (proportionately) minimal and for the most part insured against[221]. This notwithstanding, the majority found that there was a risk that might be considerable.

8.48 The balance of the references in the majority judgment to commercial substance are divided between reference to the advice received by Sasol Group as to the importance of commercial justification[222] and bald statements[223] that there was commercial reason for the interposition of SISL in the transaction.

8.49 The Commissioners' contention[224] was that 'several features of the supply agreements between STI, SISL and Sasol Oil have an aura of artificiality, and that there was no commercial justification for them. He argues that the interposition of SISL in the supply chain served no commercial purpose.'

8.50 The minority finding in respect of commercial justification, which it is submitted finds an amount of traction in the facts that is not immaterial, was that despite the advice from PWC, there was no explanation as to commercial justification for the

[218] *Sasol Oil,* at paragraph [19]
[219] *Sasol Oil,* at paragraph [74]
[220] *Sasol Oil,* at paragraph [45]
[221] *Sasol Oil,* at paragraph [75]
[222] *Sasol Oil,* at paragraphs [25] and [52]
[223] *Sasol Oil,* at paragraph [70], [74] and [79]
[224] *Sasol Oil,* at paragraph [77]

interposition of SISL in the supply chain.[225]

8.51 The majority finding of '*good commercial reason*'[226] apparently based on the fact that SISL had been envisaged as the oil trader and shipper since 2001, therefore appears a little optimistic and somewhat thin. There was, ultimately, not an abundance of commercial justification in the sense of real risks and functions as indicated by PWC.

8.52 In addition to an alleged lack of commercial substance, the Commissioner raised the following in respect of the transactions:

8.52.1 Artificial features - of the transactions[227] including that the effective date of the agreements was agreed to be 1 July 2001 (which coincided with the introduction of residence-based tax) rather than when the agreements were signed, later in that year[228] In respect of which, it appears that there may be some merit. This issue is not addressed in any detail by the majority.

8.52.2 Complexity - The complexity of the structures proposed by PWC.[229] It is submitted that, when properly analysed, the advised structure is indeed not complicated. In its implemented form it essentially entails only two changes to the original simple transaction structure, being (1) interposition of SISL as a trading company between STI and Sasol Oil, and some four years later, (2) the substitution of STI, a subsidiary of SIH, with SOIL, a subsidiary of Sasol Oil. It is submitted that, so laid out, the structure is not complicated.

8.52.3 Delivery - Lack of clarity as to the method of delivery to SISL.[230]

8.52.4 Inconsistency - with other documents. [231]

8.52.5 Ownership - The fact that the sales to SISL of the crude oil never resulted in ownership thereof actually transferring to SISL.[232]

---

[225] *Sasol Oil,* at paragraph [118]
[226] *Sasol Oil,* at paragraph [74] and [80]
[227] Sasol Oil at paragraph [77]
[228] Sasol Oil at paragraph [77]
[229] Sasol Oil at paragraph [73]
[230] Sasol Oil at paragraph [71]
[231] Sasol Oil at paragraph [75]
[232] Sasol Oil at paragraph [67]

8.52.6 Purpose - That the purpose of the transactions was in pursuance of the advice of PWC in an endeavour by Sasol Group to achieve tax efficiency in terms of the 'ultimate modus operandi'.[233] In respect of purpose, the majority found that there is nothing sinister in Sasol Group following the PWC advice[234], while it was found by the minority that the entire restructure was premised on the proposal by PWC and that it had as its main object the reduction of tax[235].

8.53 Notwithstanding the above, it is important to note the CFC rules only came into operation in this case because of the substitution of STI with SOIL. By that time, the interposition of SISL had been in place for approximately 4 years. That is, the modus operandi of using SISL as a trading company had been in place for some four years before the potential for tax liability in terms of the CFC Rules became applicable, and the majority relied heavily on that fact in respect of intention –

> 'It must be recalled, however, that when the back-to-back supply agreements were first concluded, in 2001, neither STI nor SISL were subsidiaries (foreign controlled companies) of Sasol Oil: Sasol Oil would not have been liable, at that stage, and until 2004, for residence-based tax on STI's income. The transactions thus did not have the effect of avoiding liability for tax.' Thus, at the time of the interposition of SISL, the intention was not the avoidance of tax through the CFC Rules. It was the substitution of STI with SOIL and not the interposition of SISL that ultimately gave rise to potential liability in terms of the CFC Rules.

8.54 The majority finding in respect of the above[236] was that ultimately, on an assessment of the whole of the evidence and insofar as it relates to the allegation of simulation, it comes down to a determination of the relevant intention.

8.55 In the final analysis of this case, it appears that while there was not an abundance of commercial substance in the transactions and the transactions certainly suffered from some other indicators of simulation, Sasol Oil succeeded in discharging its onus and establishing that the Sasol Group in fact meant that the

---

[233] Sasol Oil at paragraph [62]
[234] *Sasol Oil,* at paragraph [62]
[235] *Sasol Oil,* at paragraph [105]
[236] Sasol Oil at paragraph [78]

agreements would have effect in accordance with their tenor.

8.56 The above is encapsulated by Ponan J.A. in paragraph [145] of the judgement wherein he states -

> 'There is accordingly no basis for finding that the ostensible agreements were a pretense or that there was any secret or unexpressed agreement, at odds with the apparent agreements.'

8.57 It is submitted with respect that, in their judgment, the minority placed determinative emphasis on the issue of commercial substance and insufficient weight on the overall analysis of the evidence into the real intention of the parties.

8.58 In conclusion, it is apparent that the Sasol Group in fact meant that its agreements would have effect in accordance with their tenor and that the established facts of the matter do not support a finding of a real, definitely ascertainable and different intention to the tenor of their agreements.

8.59 Regarding the allegation of simulation it is submitted that the facts of the matter are sufficiently similar that Randles Brothers is on point and applies. There has been no simulation. In such circumstances the issue is required to be put to the GAAR (which in this case was the erstwhile Section 103(1)). The majority indeed did so and found that the section was not applicable. That analysis is outside the scope of this research. Such in depth analysis falls outside of the ambit of this research. A noteworthy question though, is what the effect of the current GAAR would have been in the circumstances of Sasol Oil. In her article '*The Sasol Oil case – would the present South African GAAR stand up to the rigours of the court?*', Dr Pidduck compared the facts in Sasol Oil to the new GAAR[237] and came to the following conclusions:

8.59.1 The transactions under consideration by the court constituted an arrangement.

8.59.2 Transaction/operation/scheme resulted in a tax benefit.

8.59.3 It was not the sole or main purpose to obtain such a tax benefit.

8.59.4 The transaction/s contained tainted elements as follows:

[237] Pidduck, T.M. 'The Sasol Oil case – would the present South African GAAR stand up to the rigours of the court?', paragraph 3.6 – Table 1 - obtained online at – https://ssm.com/abstract=3553155

8.59.4.1 Regarding business transactions:

8.59.4.1.1 the transaction was not entered into a manner not normal for bona fide business purposes; and

8.59.4.1.2 the transaction lacked commercial substance.

8.59.4.2 With regard to transactions in any context:

8.59.4.2.1 the arrangement created rights and obligations that are not at arm's length;

8.59.4.2.2 there was no misuse or abuse of provisions of the Act.

8.60 Dr Pidduck considered the difference between the application of substance over form in terms of the common law and the application therein within the new GAAR[238] and submitted:

8.60.1 'that the substance over form test is a highly subjective one. It is therefore likely that there would be similar controversy in applying the test for the purposes of the current GAAR, based on the facts of the case'; and

8.60.2 'that a judgement in terms of the common law principles may complicate the application of the substance over form indicator if it is later applied in the alternative for the purpose of the current GAAR. This is a factor to be considered by the Commissioner before it comes before the courts. In such a case the Commissioner may choose the application of GAAR in isolation and not in the alternative, as this indicator is one of many to be considered for the purposes of the tainted elements and commercial substance provisions. Therefore, the Commissioner may have greater success in applying the GAAR as opposed to an attack in terms of the common law.'

8.61 The writer is not in full agreement with the above and submits that each of the common law simulation inquiry and the application of the GAAR have their place, moreover as:

8.61.1 the application of substance over form in terms of the common law is

[238]Pidduck, T.M. 'The Sasol Oil case – would the present South African GAAR stand up to the rigours of the court?' Page 23 - obtained online at – https://ssm.com/abstract=3553155

far broader than the assessment of substance over form in terms of Section 80C(2)(a) which essentially assesses complex transactions in a Ramsay Principle-like manner;

8.61.2 In terms of the common law, lack of economic substance is an indicator for a substance over form finding. In terms of the application of the new GAAR, a difference between substance and form in terms of Section 80C(2)(a) is an indicator of a lack of commercial substance in determining whether there are any tainted elements; and

8.61.3 In the application of the GAAR, a test in terms of the formulation of the section is applied, while the simulation enquiry has no set test.

Chapter 9 PURPOSIVE INTERPRETATION

9.1 In terms of *Natal Joint Municipal Pension Fund v Endumeni Municipality*[239], a unitary approach to interpretation, which does not rely on the outdated rules of interpretation is set out.[240] The approach is iterative in that it requires language and context to be considered together from the outset, as a unitary process. A summary[241] of the process is:

9.1.1 It is still not permissible to consider what either of the contracting parties actually thought the words in the contract meant at the time of conclusion of the agreement. The process of interpretation therefore remains objective and not subjective.

9.1.2 The agreement should be given a sensible, business-like meaning that upholds rather than undermines its apparent purpose.

9.1.3 The language remains the point of departure. However, there is no seeking the ordinary meaning thereof or resorting to the subjective meanings in the minds of either party.

9.1.4 The meaning of the language used is to be obtained through the ordinary rules of grammar and syntax read in context of the purpose of the provision and the background relating to the preparation and production of the document.

9.2 Allowing the courts greater latitude in terms of the purposive approach, in moving beyond the actual words used, may lead to greater uncertainty for the parties as to how their contract will be interpreted.[242] This will also impact third parties, particularly those in the position of SARS whose rights flow from such contracts.

---

[239] [2012] 2 All SA 262 (SCA)

[240] While this shift in interpretation has faced some push back including in cases (e.g. *Tswane City v Blair Atholl Homeowners Association* 2019 (3) SA 398 (SCA)) seeking to serve the interests of preserving the place of the parol evidence rule, it has received support from the Constitutional Court in the matter *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC)

[241] Donelly, D 'A new approach to the interpretation of contracts and the management of strategic corporate relationships' Journal of Contemporary Management 11 (2014) at page 24, paragraph 4.3

[242] Donelly, D. 'A new approach to the interpretation of contracts and the management of strategic corporate relationships' Journal of Contemporary Management 11 (2014) at page 26, paragraph 6.1

9.3 It is important though, not to conflate the elements of the simulation inquiry – purposive interpretation of the legislative provision in order to broaden the ambit of its application or, in other words, to ‘stretch’ the meaning of the words does not in and of itself have any effect on a separate discernible intention of the parties in terms of their agreement, or the honesty or dishonesty of such parties – such intention and dishonesty will have to be determined in terms of the establishment of simulation.

9.4 The so-called stretching of the meaning of the statutory provision is limited to the extent that it must still find support in the actual words used in the statute, which inquiry may itself involve a purposive examination of the relevant legislative provision.

9.5 It is proposed by Hutchison and Hutchison[243] that despite the possibility of a move away from the subjective intention of the parties to a more objective interpretation of contracts, the test for simulation should continue to rest on the intention of the parties. They state that ‘While it is perfectly acceptable to infer subjective intention from objective factors, it seems paradoxical to argue that a transaction may be simulated without the parties to it having a dishonest intention’. It is submitted, with respect, that Hutchisons’ fear in this regard may be unfounded. Whether purposive or not, the interpretation of the agreement goes to the finding of the tenor of the agreement not the real intention. The inquiry into the underlying real intention is not restricted by a purposive construction of the contract and will not be fettered by any move to a purposive interpretation. According to Innes C.J., it is a factual inquiry, there is no test and no limit imposed by a purposive (or other) approach.

9.6 The real intention is ascertained independently of and does not affect the scope of the legislation to which it is applied. In other words, the courts will apply a purposive interpretation to the agreements as expressed, there is no such thing as applying a purposive interpretation to the real intention of the parties in the sense of bringing same in alignment with the agreements as expressed. To do so would be tantamount to the arguments that have already been rejected in the matters of *Erf 3183 Ladysmith* and *CIR v Saner*. Doing so would also conflict with

[243] Hutchison, A. and Hutchison, D. ‘Simulated Transactions and the Fraus Legis Doctrine’ 131 South African Law Journal 69 (2014) at page 85

the simulation inquiry, pursuant to which there is no set test.

9.7 The shift from an objective / golden rule / plain meaning approach to a purposive or unitary approach of interpretation of statutes will not have any effect *per se* on whether the parties to the transaction harbour a separate real intention, or on their honesty or dishonesty. It may merely create a bigger target, in the sense that more transactions may be caught in the ambit of the legislation using the purposive or unitary approach.

9.8 The same shift in the interpretation of the provisions of the agreement will also not realise any such gap, it merely brings the process of ascertainment of the tenor of the expressed agreements in line with current jurisprudence. The inquiry still proceeds to ascertain the real intention of the parties.

Chapter 10 CONCLUSION

‘There is no art to find the mind’s construction in the face’[244]

10.1 A real, ascertainable and different intention (a dishonest intention) is required to sustain a finding of simulation. Our courts have had immense difficulty in consistently ascertaining a dishonest intention on the part of the contracting parties. This difficulty is a recurring theme in our courts, more specifically as taxpayers are, in the circumstances under consideration, actively seeking to conceal or disguise such intention.

10.2 In undertaking this research, the questions posed in Chapter 1 have been answered as follows:

10.2.1 A simulated transaction is one in which the parties harbour a real, ascertainable and different intention to their expressed agreement in the sense that they do not in fact mean such agreement to have effect in accordance with its tenor.

10.2.2 Performance in terms of the tenor of the agreements will not preclude a finding of simulation. The benchmark is not based on performance, it is based on a factual finding as to the real intention of the parties.

10.2.3 The parties’ performance in accordance with the tenor of the agreements will not amount to simulation if they in fact mean (intend) for such agreement to have effect in accordance with the tenor thereof. There is a world of difference between:

10.2.3.1 the parties *giving effect* to their agreements in accordance with their tenor (i.e. mere performance in terms of the agreement); as opposed to

10.2.3.2 the parties in fact meaning (intending) that their agreement will

[244] William Shakespeare: Macbeth, Act 1 scene 4 – King Duncan:

have effect in accordance with its tenor, being the legal benchmark (i.e that performance of the tenor of the agreement is intended achieve the real object of the parties).

10.3 There is no circumstance in which the parties can disguise or conceal a transaction and still *mean* that their expressed agreement will have effect in accordance with the tenor of its terms. There is accordingly no common law gap in this regard in South African tax law.

BIBLIOGRAPHY

Books:

Christie, R.H. (2001) *The Law of Contract. 4th Edition. LexisNexis Butterworths;*

De Koker, A.P. and Williams, R.C. (2021) *SILKE on South African Income Tax, Lexis Nexis Online Version*

Humphries, C. and Mahon, D. (2017) *Simulated Agreements: Dressing up transactions. De Rebus*

Kruger, D., Stein, M., Dachs, P. and Davey, T. (2012) *Broomberg on Tax Strategy*, *Fifth Edition, Lexis Nexis,*

Van Rensburg, A.D.J., (2022) *The Law of South Africa, Contracts (Volume 9 – Third Edition) Interpretation – 351 Principles of Interpretation, LexisNexis online*

Zeffert, D.T. and Paizes, A.P. (2017) *The South African Law of Evidence, 3rd. Ed. Lexis Nexis;*

Articles:

Derksen, A.G. *'To what extent does the common law allow the avoidance of statutes?' A discussion in which specific reference is made to tax statutes' South African Law Journal 112 (1995)*

Donelly, D. *'A new approach to the interpretation of contracts and the management of strategic corporate relationships' Journal of Contemporary Management 11 (2014)*

Hattingh, J. and Titus, A. *'Sasol Oil v CSARS: judicial reinterpretation of legal doctrine to address tax avoidance in South Africa' British Tax Review, Issue 2 (2020) obtained online https://ssrn.com/abstract=3650797*

Hutchison, A. and Hutchison, D. '*Simulated Transactions and the Fraus Legis Doctrine' 131 South African Law Journal 69 (2014)*

Joubert, N.L. '*Asset-based Financing, Contracts of Purchase and Sale, and Simulated Transactions' South African Law Journal 109 (1992)*

Pidduck, T.M. '*The Sasol Oil case- would the present South African GAAR stand up to the rigours of the court?*' obtained online at – https://ssm.com/abstract=3553155

Cases:

Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes) [2005] 1 AC 684 HL

Barnard Labuschagne Incorporated v South African Revenue Service and Another [2022] ZACC

Bosch and Another v Commissioner for the South African Revenue Services [2013] 2 ALL SA 41

Commissioner for Inland Revenue v Conhage (Pty) Ltd (formerly Tycon (Pty) Ltd) (606/97) [1999]

Commissioner for the South African Revenue Service v NWK Ltd [2011] (2) SA 67 (6GA) (WCC)

Commissioner of Customs and Excise v Randles Brothers & Hudson Ltd [1941] AD 369

CSARS v Bosch and Another [2015] 1 ALL SA 1 (Supreme Court of Appeal),

CSARS v NWK Ltd [2011] (2) SA 67 (Supreme Court of Appeal)

Dadoo v Krugersdorp Municipal Council [1920] AD 530

Erf 3183/1 Ladysmith (Pty) Ltd and Another v Commissioner for Inland Revenue [1996] (3) SA 942 (A)

Hippo Quarries (TVL) (Pty) Ltd v Eardley [1992] 1 All SA 398 (A)

IRC v Duke of Westminster [1936] AC

Kilburn v Estate Kilburn [1931] AD 501

KPMG Chartered Accountants (SA) v Securefin Limited and Another (644 of 2007) [2009] ZASCA 7 (13 March 2009)

Michau v Maize Board [2003] (6) SA 459 (Supreme Court of Appeal), 66 SATC 288 (Supreme Court of Appeal)

Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] 2 All SA 262 (Supreme Court of Appeal)

Ocean Accident and Guarantee Corporation Ltd v Koch [1963] (4) SA 147 (A)

Relier (Pty) Limited v Commissioner for Inland Revenue [1998] 1 All SA 183 (A)

Roschcon (Pty) Ltd v Anchor Auto Body Builders CC and Others [2014] 2 All SA 654 (Supreme Court of Appeal),

Sasol Oil Proprietary Limited v Commissioner for the South African Revenue Services [2019] 1 All SA 106 (Supreme Court of Appeal), *Skjelbreds Rederi A/S and others v Hartless (Pty) Ltd* [1982] 1 All SA 15 (A)

S v Pouroulis [1993] 3 ALL SA 39 (W)

The Constitutional Court in the matter University of Johannesburg v Auckland Park Theological Seminary and Another [2021] (6) SA 1 (CC)

ZASCA 64 (17 September 1999)