IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO.: **A 410/2010**

In the matter between:

FAREED MOOLA **Appellant**

and

ABDULLAH SALIE **Respondent**

JUDGMENT GIVEN ON 12 AUGUST 2011

KIRK-COHEN, AJ

Respondent was the seller and appellant the purchaser of certain immovable property known 105 St Kilda Road, Crawford. Respondent, an attorney specialising mostly in conveyancing, wills and estates, had purchased the property intending initially to move in there himself. He set about renovating the property but then – through the intervention of Mr Shaheed Davids – came into contact with the appellant who wished to purchase the property. Agreements resulted, but the parties came to be in dispute about the efficacy and construction of these agreements. The resultant action was heard by the learned Magistrate Yake-Khaka, and judgment handed down by her in favour of Respondent. Appellant appeals against this judgment.

The factual matrix giving rise to the dispute is deceptively simple. The manner in which the parties chose to cast their transaction gives rise to complexities. The facts are these.

In or about July 2008 respondent met appellant. Oral agreement was reached that the purchase price for the respondent's property would be R1 950 000,00. The contract sum was to include certain building alterations which – at the time – were already at least partially (if not substantially) complete. The parties discussed, however, that appellant would only qualify for a bond of R1.2-million, and that it was necessary to structure a transaction taking this into account.

After execution of contract documentation (to which I revert below) and in conformity with the stated intentions, appellant applied for - but was declined - the envisaged bond of R1.2-million. Further negotiations between the parties ensued, and agreement was reached that the deal would be differently structured, with the overall contract to remain for the sum of R1 950 000,00.

It is in the structuring (and restructuring) of the above simple contractual intent that the problems arise. The original transaction (prior to appellant's failure to qualify for a bond) was structured on the basis of two separate documents both executed on 16 July 2008. The first document is styled: "*OFFER TO PURCHASE / MEMORANDUM OF AGREEMENT OF SALE*". The second document is styled: "*ACKNOWLEDGMENT OF DEBT*". There is one fundamental difference between the documents so executed: while the agreement of sale makes provision for (and

is signed by) both parties, the acknowledgment of debt is a unilateral document, and (as is customary) is signed by the debtor, appellant, only.

The agreement of sale is for a purchase price of R1.4-million. The purchase price is payable as to a deposit of R200 000,00 forthwith, and R1.2-million by means of mortgage finance. As regards this mortgage finance, clause 2 of the agreement is to the effect that, if the finance in the sum of R1.2-million is not obtained within 30 days of conclusion of the agreement, the agreement will automatically lapse and be of no further force or effect. The property is sold, in terms of clause 11 of the contract, "*voetstoets as it now stands*". A further term of the agreement (erroneously styled a condition but in truth a term) is that the seller (respondent) is obliged to complete the outstanding building works.

The acknowledgment of debt is in the sum of R550 000,00, and evidences an undertaking by the appellant to pay this amount within six months from the date of signature, subject to completion of the building works.

Assuming for the moment the legal validity of both of these documents, when it transpired that the mortgage finance was not available, the parties restructured the agreement. The restructuring took the form of a document, dated 1 November 2008, executed by both the appellant and Mr Shaheed Davids. It is styled an "ACKNOWLEDGMENT OF DEBT". The document contains an acknowledgement of joint and several liability of the signatories for the amount of R630 000,00, which amount was payable as to:

(1) An amount of "*R300 000,00 from the proceeds of Idas-Moola*". Authorisation was given in the acknowledgment for the firm of attorneys of which the respondent is a director to deduct this sum from the purchase price and pay to the respondent upon registration.

(2) The remainder of R330 000,00 "*will be paid by no than February 2009 in payments from sales of other properties*" (*sic*). It does not appear controversial that the word "*later*" requires insertion into this clause such that it reads "*by no later than February 2009*".

The restructuring did not expressly include the resuscitation of the lapsed deed of sale, although this appears to have been the intention.

The respondent, during his testimony at trial, gave evidence as to circumstances which cast some light upon the purpose and proper construction of this second acknowledgment of debt. He explained that appellant had qualified for a bond of R1.12-million only, and that there was thus a shortfall of R80 000,00 on the contemplated mortgage finance of R1.2-million payable upon transfer. In the circumstances, the further acknowledgment of debt was signed, increasing the amount acknowledged to be owing by the sum of R80 000,00, from R550 000,00 to R630 000,00. There was not, however, a simultaneous reduction of the purchase price payable in regard to the deed of sale.

There are several complexities which arise from all the aforegoing. In the first instance, how does one construe the two documents executed on 16 July

2008? In particular, does one construe them as evidencing one overall transaction of sale in regard to immovable property (in which case both documents must comply with section 2(1) of the Alienation of Land Act) or does one construe them separately as comprising a contract for the purchase and sale of immovable property (on the one hand) and an acknowledgment of debt in regard to building alterations (on the other hand). If the former is the correct construction, then the second agreement – forming part of a contract for the purchase and sale of immovable property – fails to comply with the Alienation of Land Act, in that it is not signed by the Respondent, with the result that the transaction fails.

The problems in construction – given the factual matrix deposed to by the respondent – are self-evident. In the first place, by the time of the execution of the acknowledgment of debt, the renovations had been largely effected, and - by a process of *accessio* – these renovations had acceded to and become part of the immovable property. The complexity deepens when one considers that the second acknowledgment of debt professes itself – in terms of clause 9 – to be "*...an additional agreement...*" and "*...not a novation of the existing debt or indebtedness*". This acknowledgment appears to fly in the face of the obvious construction that the second acknowledgment of debt was intended to replace the first. Moreover, the replacement of the first acknowledgment of debt by the second ought (if properly thought through) to have involved a reinstatement of the lapsed deed of sale, as also a consequent adjustment of the purchase price by a commensurate reduction of R80 000,00. A further difficulty is that the evidence establishes that the deed of sale lapsed for want of fulfilment of a

suspensive condition, and transfer was apparently effected on the strength of a deed of sale which had lapsed.. The complexities are worsened (and not ameliorated) by oral evidence at trial, in that these issues were scarcely dealt with.

The "real substance and purpose" of the agreements dated 16 July 2008.

In circumstances such as those sketched above, the possibility of a simulated transaction looms large. In **ZANDBERG V. VAN ZYL** 1910 AD 302, Innes JA said the following:

> '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.'

In the realms of simulated transactions, Hefer JA said the following in **ERF 3183/1 LADYSMITH (PTY) LTD AND ANOTHER v COMMISSIONER FOR INLAND REVENUE** 1996 (3) SA 942 (A):

> That the parties did indeed deliberately cast their arrangement in the form mentioned, must of course be accepted; that, after all, is what they had been advised to do. The real question is, however, whether they actually intended that each agreement would inter partes have effect according to its tenor. If not, effect must be given to what the transaction really is.

Divergent judgments have been given as to the ascertainment of a party's intention. This issue has been resolved by the decision in **COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE v. NWK LTD** 2011 (2) SA 67 (SCA) where – after a comprehensive review of the authorities – the Court held:

> 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.
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> (Emphasis is added)

This Court is enjoined, accordingly, to examine the commercial sense of the transaction; its real substance and purpose.

It seems indisputable that the commercial sense behind the structuring of the transaction was that the appellant was unable to afford the property if structured upon the normal basis, namely a deposit followed by payment in full upon registration of transfer. As reflected in the respondent's evidence: "*...we came to an agreement because at the time he told me that he could only qualify for a bond of R1.2 million*". The deal could, however, have been structured quite simply, taking into account appellant's inability to raise the full purchase price. This could have been achieved, for example, in a deed of sale with a deferral of the payment of a portion of the purchase price until after transfer. The deed could moreover have made provision for the registration of a second bond in favour of the seller to secure the outstanding balance of the purchase price.

The respondent was adamant in his evidence that there were two separate contracts, not one. When it was put to him in evidence that the appellant – as part of the sale – had bought all fixtures and fittings on the property, he answered: "I'm telling you again that that is we have two separate agreements and the agreement that we had was that I was going to sell him the property for R1.4m ... and that is why we concluded the separate agreement for R550 (thousand)".

In the light of respondent's own evidence that the renovations to the property had been substantially complete by date of contracting, the stance that there are two separate contracts is problematic. Respondent is a conveyancer, and can be no stranger to the notion that structures acceed to (and become part of) the immoveable property. It is even more problematic when one realises that transfer duty is calculated on value, and that the effect (if not the intent) of the structuring of the contract in two separate agreements may be to decrease the amount of transfer duty payable by the appellant. Such a reduction would ease the passage of the transaction to the benefit of both parties (and to the detriment of the fiscus) by increasing the amount available to the appellant to fund the transaction.

Was the avoidance of transfer duty the "real substance and purpose" of the choice of structure? The difficulty in this regard is that this issue was not raised at all in the evidence, perhaps deliberately so.

One must be mindful that parties are entitled to organise their affairs and contractual relationships in such a way as to pay the least tax legally permissible. One must also be mindful that the test is not whether there were alternative (and better) ways in which the parties could have structured their affairs, although the availability of alternative means might in some instances be insightful as to intent. The test is to determine the real substance and purpose of the transaction, and gauge its commercial rationale.

The stated commercial rationale in structuring the transaction in this fashion was to apportion the overall sum payable as between the immoveable property (in the form of the deed of sale) and the cost of renovations (in the form of the acknowledgment of debt), without which the transaction was beyond the appellant's immediate means. The chosen structure is certainly problematic, given that the renovations were relatively advanced at the time of contracting. The evidence about precisely when accession took place, however, is diffuse. It was put to the respondent that building work to the value of some R400 000,00 (out of an approximate total of R496 000,00) had been "completed" by the time the initial agreements were executed in July 2008. His response was a qualified denial; he stated that expenditure of this magnitude had been incurred, including expenditure on materials which had not yet been utilised. The extent to which *accessio* had taken place by 16 July 2008 is accordingly not clear on the evidence.

In these circumstances, the evidence supports the respondent's contention that the predominant purpose of the agreements of 16 July 2008 was to facilitate the transaction by structuring the agreed overall sum of R1.95 million as to a purchase price for immovable property for in the amount of R1.4 million, and an acknowledgement of debt for R550 000,00 to cover the cost of renovations. It was, moreover, a composite transaction, and the two agreements were not severable one from the other. I am not prepared – on the available evidence – to find as a fact that the transaction was a simulated one designed "only to achieve an object that allows the evasion of tax" as per the test set forth in CSARS v. NWK, supra.

In the circumstances, the "real substance and purpose" of the transaction by apportioning the overall contract sum in the two separate contracts is - on balance - a legitimate one. The deed of sale was signed by both parties and was otherwise valid on signature. The acknowledgment of debt of this date is not a deed of alienation of immovable property, and need not comply with the Alienation of Land Act. Its signature by the appellant only suffices.

That this chosen structure had the potential of reducing the transfer duty which was paid upon transfer is potentially problematic. I revert to this issue below.

Subsequent to 16 July 2008, however, two events of note took place. On a date which is not established in the evidence, the appellant ascertained that he was unable to get mortgage finance for R1.2 million as contemplated in clause 2 of the deed of sale, but only for R1.12 million. The consequence of this, in the absence of any amendment to the deed of sale, or any waiver (none was pleaded or dealt with in the evidence) was that it lapsed. The second event of significance (related to the first) is that the parties executed the second acknowledgment of debt, purporting to increase the amount owing in terms of he acknowledgment by R80 000,00, the extent of the shortfall in the mortgage facility offered to the appellant. The oral consensus between the parties – express or implied – which emerges on a totality of the evidence is that the transfer of the property would go ahead, utilising the mortgage facility of R1.12 million and the deposit already paid, with only R1.32 million changing hands on transfer. The R80 000,00 which was owing as and for a portion of the purchase price would be payable by the appellant after transfer.

This oral consensus was not reduced to writing and signed. In the first place, had the issues been properly dealt with, the deed of sale ought to have been reinstated (it had lapsed) and the purchase price reduced. It was not. Secondly, and in a clumsy endeavour to regularise the contractual arrangements, a new acknowledgment of debt was executed. Nonsensically, it states itself to be an additional agreement, and not a novation of the existing debt or indebtedness. This clause is inconsistent with the oral agreement between the parties. It is executed both by the appellant and Mr Shaheed Davids as debtors, the reason for the latter's preparedness to sign as a debtor not emerging fully in the evidence. The document is not executed by the respondent. Examining the "...commercial sense of the transaction: of its real substance and purpose", one is driven to conclude that the agreement as a whole constitutes a variation of the purchase price payable in respect of immovable property, and the timing of that payment. With this as its real purpose and substance, the document styled "Acknowledgment of Debt" executed on 1 November 2008 is invalid for want of compliance with section 2(1) of the Alienation of Land Act. It is accordingly invalid, and of no force or effect.

Notwithstanding all the above (and, especially, notwithstanding that the deed of sale had lapsed) transfer took place. On the principle of *omnia rite acta esse*, I must accept that all steps necessary to procure transfer were taken, including declarations by both buyer and seller to the Commissioner for the South African Revenue Service in terms of the Transfer Duty Act 40 of 1949.

What is the situation when transfer of immoveable property takes place in terms of an agreement which has lapsed, and which is the subject matter of an oral (or possibly tacit) revival? The answer is to be found in section 28(2) of the Act, which reads as follows:

> "Any alienation which does not comply with the provisions of section 2 (1) shall in all respects be valid *ab initio* if the alienee had performed in full in terms of the deed of alienation or contract and the land in question has been transferred to the alienee".

The effect of this section – after transfer – is to regularise agreements which are otherwise non-compliant with section 2(1). In the instant case, its effect is to regularise the oral (or tacit) agreement to re-instate the deed of sale.

To sum up thus far: The contractual relationship between the parties is governed by two contracts, a deed of sale and an acknowledgement of debt, both executed on 16 July 2008. The respondent's entitlement was to receive R1.4 million rand in regard to the former, and R550 000,00 in regard to the latter. The document styled "ACKNOWLEDGMENT OF DEBT" and dated 1 November 2008 is nul and void ab initio.

Plaintiff's claim is for R310 000,00. It is common cause that Plaintiff has received amounts totalling R1 640 000,00. These amounts are:

- The deposit of R200 000,00;
- An amount of R1 120 000,00 upon transfer;
- A sum of R300 000,00 in January 2009;

- A further sum of R20 000,00 in June 2009.

The calculation of the sum of R310 000,00 is correct, with two qualifications. In the first place, the receipt of R300 000,00 in January 2009 appears to have been made from funds due emanating from Mr Shaheed Davids (second defendant in the court a quo) and not from appellant. It is beyond the ambit of the issues in this litigation to deal with the status of this payment and the position of Mr Davids, other than to observe that the respondent has apportioned this against his entitlements under the contractual relationship. In the second place, respondent alleges in his claim that this entitlement is under the second acknowledgement of debt, an agreement which I have found to be invalid.

The appellant submitted in argument that the respondent should not be entitled to make out a cause of action on appeal other than the one pleaded. There is some merit in this argument but – on balance – it lacks traction. The appellant did not testify, and advanced contentions which were simply unsustainable (and indeed bordered upon the vexatious) on appeal. Most notable among these was the submission that the true consensus between the parties was that the sum of R1.4 million was the total sum payable by appellant for the property and the renovations. This submission was not only unsustainable but flatly in conflict with his own affidavit opposing summary judgment. He did not testify at trial. Given his stance, it seems highly unlikely that he would have testified, or conducted the matter any differently, had the pleadings been formulated upon the basis that the respondent claimed the sum under the agreements of 16 June 2008, rather than under the agreement of 1 November

2008. The issues surrounding the earlier contracts were canvassed by the respondent in his evidence, and appellant chose not to give evidence. Moreover, the oft-quoted dictum of Innes CJ in **ROBINSON V. RANDFONTEIN ESTATES GM CO LTD** 1925 AD 173 is apposite: "For pleadings are made for the Court, not the Court for the pleadings". I am satisfied that the appellant owes the sum of R310 000,00 to the respondent, and that the conduct of his case would have been no different had the pleadings been differently cast.

The learned Magistrate granted costs on an attorney and client scale. The reason for costs being awarded on this scale does not emerge with clarity. There is, it is true, potential justification for such an order in examining the conduct of the appellant, which I have held bordered upon the vexatious. However, there is much which can be said about the conduct of the respondent as well. As an attorney and conveyancer, he was responsible for the parlous state of the contract documentation between the parties. He has formulated his pleadings upon an invalid document. He was not only a contracting party, but the conveyancer to the transaction as well, and as much (or indeed, more) to blame as the appellant for the simulated transaction signed by the appellant on 1 November 2008. I see no reason – as between these two litigants – to afford one a punitive costs order at the expense of the other.

In the circumstances, the appeal must fail, save that the scale of costs ordered by the learned Magistrate is set aside, and substituted with an order of party and party costs only.

It remains to deal with the issue of the payment of transfer duty which arises from the structuring of the agreement. In terms of Section 2 of the Transfer Duty Act 40 of 1949 ["the Act"] transfer duty is payable on the value of immovable property. In terms of section 5(1)(a), this value is *prima facie* to be found in the consideration payable for the property.

In terms of section 6(1)(c), moreover, duty is also payable on:

> "...any consideration which the person who has acquired the property has paid or agreed to pay to any person whatsoever in respect of or in connection with the acquisition of the property, over and above the consideration payable to the person from whom the property was acquired..."

Both buyer and seller are obliged to make declarations to the Commissioner as to the consideration payable for the property. If the Commissioner is of the opinion that the consideration declared is less than the fair value of the property, he is empowered – under section 5(6) – to determine the fair value, and thereupon to determine the correct duty payable based upon fair value. He is entitled and obliged to recover the differential, so empowered by section 13 of the Act.

Given that the renovations to the property were substantially advanced at the time of contracting, and that – to a large extent – accessio had taken place, there is a prospect that the value of the house was in excess of the contract sum of R1.4 million. Moreover, given that the parties deliberately structured the contractual relationship in two separate contracts, and that the respondent insisted in his evidence that there were two separate contracts, there is the

real prospect that the transfer of the property was done with reference to the deed of sale only, and not with reference to the acknowledgement of debt, which agreement evidences payment of a "*... consideration ... in connection with the acquisition of the property...*" as contemplated by section 6(1)(c). Transfer duty ought, accordingly, to have been paid on the full sum of R1.95 million.

There is a prospect, accordingly, that the effect of the transaction was to deprive the fiscus of its entitlements to transfer duty under the Act.

In the circumstances, I propose an order in the following terms:

1. The judgment of the learned Magistrate Yake-Khaka is amended by substituting an order of costs on the scale as between party and party, in place of the order of attorney and client costs.

2. Save as above, the appeal is dismissed with costs,

3. This judgment shall be referred to the Commissioner for the South African Revenue Service for his consideration as to whether:

    a. There has been proper compliance with the provisions of the Transfer Duty Act 40 of 1949 in regard to the transfer from the respondent to the appellant of the property situate at Erf 58817, Cape Town, more commonly known as 150 St Kilda Road, Crawford;

b. Any offences have been committed under section 17 of the said Act.

KIRK-COHEN, AJ

I agree, and it is so ordered.

ZONDI, J