THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 49/13

In the matter between:

ROSHCON (PTY) LIMITED **Appellant**

and

ANCHOR AUTO BODY BUILDERS CC **First Respondent**

FIRSTRAND BANK LIMITED **Second Respondent**

THEODOR WILHELM VAN DEN HEEVER NO **Third Respondent**

MPOYANA LAZARUS LEDWABA **Fourth Respondent**

NISSAN DIESEL (SOUTH AFRICA) (PROPRIETARY) LIMITED **Fifth Respondent**

CMH COMMERCIAL WESTMEAD **Sixth Respondent**

UNITRANS SUPPLY CHAIN SOLUTIONS (PROPRIETARY) LIMITED T/A

UNITRANS SUGAR AND AGRICULTURE **Seventh Respondent**

Neutral citation: *Roshcon (Pty) Ltd v Anchor Auto Body Builders CC* (49/13) [2014] ZASCA 40 (31 March 2014)

Coram: Maya, Shongwe, Wallis, Petse, Saldulker JJA

Heard: **12 March 2014**

Delivered: **31 March 2014**

Summary: Ownership – movable property – supplier and floor plan agreements reserving ownership to finance house as security over the trucks before they were fully paid for by purchaser – whether a simulated or disguised transaction – test to be applied – each case to be decided on its own merits.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Louw J sitting as court of first instance):

The appeal is dismissed with costs including costs of two counsel.

JUDGMENT

Shongwe JA (Maya, Wallis, Petse and Saldulker JJA concurring)

[1] This appeal in a nutshell revolves around the question who is the lawful and true owner of five Nissan trucks (the trucks). These were three 9 ton trucks and two 14 ton trucks. The appellant, Roshcon (Pty) Ltd (Roshcon) claimed to be the true owner of all the trucks. It was in possession of two of the 9 ton trucks when litigation started and the second respondent, Firstrand Bank Limited (trading as Wesbank), was in possession of the third. When the application for a declaration of rights commenced in the North Gauteng High Court, there were seven respondents. But the *lis* was eventually limited to Roshcon, Wesbank and Unitrans. Wesbank filed a counter-application for an order directing Roshcon to deliver to it the two trucks in its possession. The application was dismissed with costs and the counter-application was granted with costs. This appeal is with leave of the court a quo.

[2] It is instructive to mention, without elaborating, the parties involved in this matter – the appellant, Roshcon is in the business of infrastructure

development, civil and electrical infrastructure, and waste beneficiation throughout Sub-Saharan Africa. The first respondent, Anchor Auto Body Builders CC (Anchor), is in the business of repair and construction of truck sub-frames and load bodies. The second respondent is Firstrand Bank, trading as Wesbank (Wesbank). The third and fourth respondents are cited in their official capacities as the provisional liquidators of Toit's Commercial (Pty) Limited (in liquidation) (Toit's). The fifth respondent, Nissan Diesel (SA) (Pty) Limited (Nissan Diesel) is a supplier of motor vehicles and in particular supplied the five trucks which form the subject of this appeal. The sixth respondent is CMH Commercial Westmead, a Nissan Diesel franchise dealership (CMH). The seventh respondent is Unitrans Supply Chain Solutions (Pty) Limited (Unitrans).

[3] The facts are largely common cause. Roshcon was granted a contract in early September 2008, which required it to purchase five trucks which were to be fitted with specialized cranes to modify the trucks to suit the particular project. Roshcon ordered the five trucks from Toit's. Toit's in turn ordered the trucks from Nissan Diesel. This transaction was financed by Wesbank. Nissan Diesel supplied the vehicles under a 'supplier agreement' it had concluded with Wesbank in terms of which it sold and Wesbank purchased and paid for the vehicles that authorised Nissan dealers, such as Toit's, wanted for their customers. Toit's had a separate 'floor plan agreement' with Wesbank in terms of which Wesbank provided finance to Toit's for the acquisition of motor vehicles. The vehicles purchased by Wesbank from Nissan Diesel would be delivered directly to Toit's or to such person as Toit's may from time to time direct.

[4] Clause 6.1 of the 'supplier agreement' reads as follows:

‘6.1 It is recorded that it is the express purpose of this agreement to ensure that ownership in and to the vehicles shall pass to and remain vested in Wesbank until such time as payment has been received therefore from the relevant authorised dealer.’

Whereas Clause 8.1 of the ‘floor plan agreement’ reads as follows:

‘8.1 The sale of the goods is made on the suspensive condition that, until payment of the selling price be made by the Dealer in full in terms of the relevant invoice with interest thereon as shall from time to time be stipulated by the Bank and all other amounts, if any, due in terms of or in connection with the agreement, the ownership in the goods shall not pass to the Dealer but shall be and remain with the Bank, and nothing herein contained nor any act or omission of the Bank shall be deemed to vest ownership in the goods in the Dealer until such payment shall have been made’.

[5] The five trucks were delivered to Anchor on Toit’s’ instructions to have modifications undertaken to the sub-frames and load bodies to enable cranes to be fitted to the trucks. On 19 November 2008 two trucks were delivered to Roshcon having been modified. The other three trucks would be delivered on 21 November 2008. A handover sheet for the two trucks was signed by the representatives of Roshcon and Anchor. On 21 November 2008, Roshcon took delivery of the remaining three trucks, though it did not physically remove them, but only signed the handover sheet. There was apparently a technical misunderstanding which required the trucks to be modified further, in that the outrigger supports for the cranes would not fit in the trucks as modified, so that they would require further modification. This resulted in a further delay in the payment process by Roshcon to Toit’s. On 28 November 2008 the documentation constituting proof of delivery, was handed over to Roshcon and Roshcon effected payment for all five trucks to Toit’s. However, Anchor was not prepared to release the three trucks because Toit’s had not paid for the modifications. Then Roshcon paid for the work done by Anchor, but by then Toit’s had gone into liquidation, and Anchor refused to release the trucks on the

instructions of Wesbank, which claimed ownership of the trucks as Toit's had not yet paid for them.

[6] The matter was now in the hands of the attorneys who exchanged letters and emails. On 22 December 2009 Anchor released the three trucks to Wesbank. Wesbank then sold the two 14 ton trucks to Unitrans.

[7] Roshcon contended that the supplier agreement and the floor plan agreement were a disguise or simulation. It alleged that the floor plan agreement was a loan against the security of the trucks without Wesbank having to take possession thereof, thereby securing an advantage which the law would otherwise not allow. Wesbank contended that the onus of proving a simulated agreement rested on Roshcon and that Roshcon has failed to discharge such onus. Wesbank regarded this transaction as a simple arm's length agreement between a manufacturer which wished to sell its products and a bank which wanted to make money by financing transactions of this nature. Toit's on the other hand, a reputable dealer that was in the business of selling vehicles, including Nissan trucks, wanted to sell vehicles to its customers, but required finance. Wesbank further contended that this procedure is employed by most financial institutions in South Africa today in effecting asset based finance with the proviso to reserve ownership as security to protect itself.

[8] Roshcon pleaded in the alternative that Wesbank was estopped from claiming ownership of the trucks. Wesbank contended that Roshcon failed to discharge the onus as it never made any representation to Roshcon that Toit's was the owner of the trucks or was entitled to dispose of them. Roshcon contended that by conduct Wesbank represented to it that Toit's had had the authority to transfer ownership. In claiming ownership Roshcon contended that it acquired ownership when it took delivery of the trucks and paid Toit's in full

for the five trucks. It contended that ownership claimed by Wesbank is based on simulated agreements contained in the supplier agreement and the floor plan agreement which are ineffectual. Roshcon further contended that the reservation of ownership in the floor plan agreement concealed a loan agreement secured by a pledge without possession, but purporting to be a sale agreement.

[9] The court a quo found:

'In my view there were sound reasons for the parties to structure their transactions in the way they did, and the agreements make commercial sense. A dealer needs vehicles to sell but doesn't have the money to pay for the vehicles. He will be able to pay for the vehicles when he sells them but needs finance in the interim. The financial institution (bank) agrees to provide the finance but requires security. Security in the form of a pledge is impractical because, for it to be effective, the bank has to be in possession of the vehicles. But the dealer needs to be in possession in order to offer the vehicle for sale to its customers. The supplier agreement and the floor plan agreement provide the bank with the security which it requires and enables the dealer to offer the vehicle for sale to its customers. Should the dealer dispose of a vehicle without first paying the bank, the bank will be entitled to vindicate the vehicle from whoever is in possession thereof.'

And I agree with this conclusion.

[10] For a court to declare a transaction a simulation it does not have to look at any particular legislation but has to look at the facts of each particular case. Both Roshcon and Wesbank referred to *Zandberg v Van Zyl* 1910 AD 302, at 309, in respect of the test to be applied when considering an agreement which may or may not be said to be a simulation. Innes J in *Zandberg* said:

'The inquiry, therefore, is in each case one of fact, for the right solution of which no general rule can be laid down. *Perezius (Ad. Cod.*, 4.22.2) remarks that these simulations may be detected by considering the facts leading up to the contract, and by taking account of any unusual provision embodied in it: of its real substance and purpose'.

In *CSARS v NWK* 2011 (2) SA 67 (SCA) para 55 Lewis JA postulated the test as follows:

'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 ….'

[11] There is a plethora of cases dealing with transactions capable of being, regarded as simulated and also containing reservation of ownership clauses, such as *Commissioner for Inland Revenue v Conhage (Pty) Ltd (formerly Tycon (Pty) Ltd)* 1999 (4) SA 1149 (SCA); *Bank Windhoek Bpk v Rajie* 1994 (1) SA 115 (A); *Nedcor Bank Ltd v ABSA Bank Ltd* 1998 (2) SA 830 (W); *Vasco Dry Cleaners v Twycross* 1979 (1) SA 603 (A). On the view that I take that it all depends on the facts of each case – it will not be necessary to compare and contrast all these cases. Some of them have facts which are distinguishable from the present case.

[12] It is appropriate at this stage to deal with the *Nedcor* case, supra, in which Cloete J relied on the minority judgment of Nienaber JA in *Bank Windhoek Bpk v Rajie* at 145C-D to conclude that the floor plan agreement was a simulated transaction that did not have the effect in law of transferring ownership in the vehicle. I am of the view that the facts in *Rajie* are distinguishable from the *Nedcor* case and consequently from the facts of the present case. *In Rajie* the motor dealer Hoosain, wished to donate a vehicle (which he already owned) to his wife. What then happened was the dealer sold the vehicle to the bank which in turn sold it back to the dealer for the same price, plus finance charges, in terms of an instalment sale agreement. In the present case Toit's did not own the trucks when they were financed by Wesbank. Wesbank instead paid Nissan Diesel for the trucks and implemented the transaction between itself and Toit's in terms of the floor plan agreement which reserved ownership to itself as security. The facts in the present case seem to be on all fours with the facts in

Nedcor. In as far as Cloete J considered the floor plan agreement in *Nedcor* – and perhaps all floor plan agreements which reserve ownership for purposes of security – as simulated I consider that decision, with due respect, to be clearly wrong.

[13] Turning to the facts of this case – Toit's approached Nissan Diesel, as per their agreement, ordering the five trucks – Nissan Diesel referred the order to Wesbank to vet and approve the transaction. In terms of the supplier agreement which existed between Nissan Diesel and Wesbank, Wesbank paid for the vehicles and invoiced Toit's – it stipulated, *inter alia*, that ownership of the trucks is reserved to it. This procedure was followed in compliance with the provisions of the supplier agreement and the floor plan agreement. In terms of clause 5.1 of the floor plan agreement:

'Goods purchased by the Bank from a Supplier, other than the Bank, shall be delivered by the Supplier direct to the Dealer who hereby agrees to accept delivery thereof, as agent for and in the name of the Bank, or shall be delivered to such person as the Dealer may from time to time direct as the agent of the Dealer and the Dealer or such person shall accept delivery of the goods and hold them, subject to the terms and provisions of this agreement.'

Delivery to Anchor on behalf of Toit's in consultation with Roshcon was in my view proper delivery which made Wesbank the owner of the trucks. Toit's handed over all the necessary documents to Roshcon – but could not in law hand over or transfer ownership to Roshcon. At some stage Roshcon became aware that Toit's had not yet paid for the trucks and therefore took the risk in paying Toit's the full amount. That in itself should have raised a red flag to Roshcon regarding the question of ownership.

[14] I agree with the court a quo that parties may arrange their affairs to avoid statutory prohibitions, provided their arrangement does not result in a simulated transaction and is consequently in *fraudem legis*. See *Dadoo and others v*

Krugersdorp Municipal Council 1920 AD 530 at 548 where Innes CJ reasoned that –

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

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

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

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

[15] The fundamental issue therefore is whether the parties actually intended that the agreement that they had entered into should have effect in accordance with its terms. Wesbank, Nissan Diesel and Toit's did not have a secret understanding between them, nor has Roshcon shown anything of that nature. In determining whether a transaction is simulated, a crucial and often decisive

question is whether the parties to the contract intended to give effect to it according to its tenor (see *Michau v Maize Board* 2003 (6) SA 459 (SCA) para 4). It is said that one of the most common forms of tax avoidance is where the parties to a contract attempt to disguise its true nature in order to qualify for a tax benefit that would not be available if the true contract between them were revealed. Our courts require no statutory powers to ignore pretence of this kind, and the law will always give effect to the real transaction between the parties. (See *Zandberg* (supra) at 309).

[16] On 3 March 2009 Toit's was placed under provisional liquidation. It failed to pay the purchase price of the trucks to Wesbank. Therefore it never became the owner of the trucks nor was it able to pass ownership thereof to Roshcon. I am of the view that Roshcon failed to discharge the onus of proving that the agreement is simulated or disguised. The ownership reserved to Wesbank in the floor plan agreement is good in law in the circumstances of this case. On this aspect the appeal must fail.

[17] I now turn to the question of estoppel. Roshcon pleaded in the alternative that in the event that this court finds that Wesbank became or remained the owner of the trucks after delivery to Toit's (or its agent), then Wesbank should be estopped from asserting ownership in respect of the two trucks in possession of Roshcon as well as the three trucks already in the possession of Wesbank. The correct position is that the estoppel principle will apply only to the three trucks, two of which were already in Roshcon's possession and the one in Wesbank's possession. The other two trucks had already been sold by Wesbank to Unitrans who in turn sold them to CMH Commercial. It is not in dispute that the onus is on Roshcon to prove estoppel – *B&B Hardware Distributors (Pty) Ltd v Administrator Cape* 1989 (1) SA 957 (A) at 964D.

[18] It is trite that the requirements of proving estoppel are, (a) representation by the owner, by conduct or otherwise, that the person who disposed of his property was the owner or was entitled to dispose of it, (b) the representation must have been made negligently in the circumstances; (c) the representation must have been relied upon by the person raising the estoppel, and (d) such person's reliance upon the representation must be the cause of his detriment. (See *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* 2011 (2) SA 508 (SCA) para 19 and *Oakland Nominees Ltd v Gelria Mining & Investment Co Ltd* 1976 (1) SA 441 (A) at 452 D-G). In *Electrolux (Pty) Ltd v Khota* 1961 (4) SA 244 (W) at 247B-E Trollip J warned that:

'To give rise to the representation of *dominium* or *jus disponendi*, the owner's conduct must be not only the entrusting of possession to the possessor but also the entrusting of it with the *indicia* of the *dominium* or *jus disponendi*. Such *indicia* may be the documents of title and/or of authority to dispose of the articles …'.

[19] In the present case Wesbank could not have made any representation to Roshcon because the trucks were delivered to Anchor, through the request of Roshcon. Anchor was to effect certain modifications to the trucks. At that stage Roshcon was not even aware of the involvement of Wesbank. Toit's was well aware of the floor plan agreement and the fact that ownership had been reserved in favour of Wesbank – therefore the *indicia* of the *dominium* was absent. The facts in *Quenty's Motors (Pty) Ltd v Standard Credit Corporation Ltd* 1994 (3) SA 188 (A) are distinguishable from this case. *Quenty's* dealt with goods sold on consignment and I endorse the findings of the court a quo in this regard. The requirement of negligence is also absent as Toit's was contractually barred from disposing of the trucks without first paying for them. Wesbank could not reasonably have suspected that Toit's may be wound up or that it may breach the floor plan agreement. Wesbank and Toit's had been doing business together for 10 years and therefore an element of trust and professionalism existed

between them. Clearly Roshcon could not have relied upon any representation by Wesbank. The undisputed evidence shows that Roshcon relied on the representation made by Toit's. For these reasons the defence of estoppel must fail. It is not necessary to deal with the last requirement.

[20] The appellant's case throughout was that it became the owner of the trucks upon delivery and handing over to Toit's. The evidence clearly shows that ownership was indeed reserved to Wesbank in both the supplier and floor plan agreements. Wesbank could not have transferred ownership to Roshcon expressly or by conduct. On a conspectus of all the evidence Roshcon failed to prove that the floor plan agreement and the supplier agreement are a simulation or disguise. Nor did Roshcon prove that Wesbank is estopped from claiming the three trucks. The result is the appeal is dismissed.

[21] The following order is made:
The appeal is dismissed with costs including costs of two counsel.

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J B Z SHONGWE
JUDGE OF APPEAL

Wallis JA (Maya, Shongwe, Petse and Saldulker JJA concurring)

[22] I have read the judgment of Shongwe JA with which I agree. I add something of my own merely because it appeared from the submissions made to

us that there may be a misconception regarding the proper approach to simulated transactions. In Roshcon's heads of argument it was submitted that in *South African Revenue Services v NWK Limited*,[1] this court developed or clarified the test laid down in previous judgments of this court and thereby took our law in that regard in a new direction.

[23] The foundation of our law in regard to simulated transactions is the classic statement by Innes J in *Zandberg v Van Zyl*[2] that:

'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.'

[24] In *Zandberg v Van Zyl* a woman who owed £50 to her son-in-law purported, some 18 months after incurring the debt, to sell a wagon to him in exchange for her discharge from the debt. However, she retained the use and possession of the wagon at all times and it was agreed between her and her son-in-law that she could repurchase the wagon at any time for £50. When her son-

[1] *South African Revenue Services v NWK Limited* 2011 (2) SA 67 (SCA).

[2] *Zandberg v Van Zyl* 1910 AD 302 at 309.

in-law wished to use the wagon for his own purposes he was permitted to do so, but always accompanied by one of Mrs van Zyl's other sons, and on the basis that the wagon would be returned to her immediately he had finished his business with it. The court held, having regard to all the circumstances, that the parties intended to dress up what was in reality a pledge as a sale. The case is but one of a number in which our courts have held that the device of a sale has been used by a creditor, frequently one who is in a close personal relationship with the debtor, to seek to secure the benefits of a pledgee, without depriving the debtor of the use of the goods that are the subject of the transaction.[3]

[25] There is a common feature to many of these cases in that prior to the transaction in question the goods that were the subject matter of the purported sale were in the possession of the debtor and remained in their possession after the sale. In other words they were cases where it was contended that delivery had occurred by way of *constitutum possessorium*. That is a form of delivery that is always carefully scrutinised by courts because it affords scope for third parties dealing with the possessor of the goods to be deceived into thinking that the possessor is also the owner thereof.[4] In each case the court was not satisfied that the debtor had truly intended after the purported sale to hold the goods on behalf of the purchaser. That was the foundation in all but one of these cases[5] for the decision that the sale was a simulated transaction.

[3]See, for example, *Hofmeyr v Gous* (1893) 10 SC 115; *Goldinger's Trustee v Whitelaw & Son* 1917 AD 66; *McAdams v Fiander's Trustee & Bell NO* 1919 AD 207; *Vasco Dry Cleaners v Twycross* 1979 (1) SA 603 (A) and *Bank Windhoek Bpk v Rajie en 'n ander* 1994 (1) SA 115 (A). There are also cases in which money-lending transactions have been disguised as sales in order to avoid the application of statutes governing money-lending and rates of interest. *Lawson & Kirk v South African Discount and Acceptance Corporation (Pty) Ltd* 1938 CPD 273; *R v Port Shepstone Investments (Pty) Ltd and Another* 1950 (4) SA 629 (A) at 632; *S v Friedman Motors (Pty) Ltd and Another* 1972 (1) SA 76 (T) at 79D-E.

[4]*Goldinger's Trustee v Whitelaw & Son* at 74 and *Bank Windhoek Bpk v Rajie en 'n ander* at 145C-D.

[5]The exception is *McAdams v Fiander's Trustee & Bell NO, supra,* fn 3 where the court held there was no intention to buy or sell..

[26] On the other hand the law permits people to arrange their contractual or business affairs so as to obtain a benefit for themselves that a different arrangement would not permit or so as to avoid a prohibition that the law imposes. That principle was laid down in *Dadoo Ltd and others v Krugersdorp Municipal Council*,[6] where Innes CJ said:

'… parties may genuinely arrange their transactions so as to remain outside [a statute's] provisions. Such a procedure is, in the nature of things, perfectly legitimate.'

[27] These two principles are but two sides of the same coin, as is apparent from the fact that in both *Zandberg v Van Zyl* and *Dadoo* Innes CJ relied on the principle embodied in the maxim *plus valet quod agitur quam quod simulate concipitur* (the real intention carries more weight than a fraudulent pretence). Whether a particular transaction is a simulated transaction is therefore a question of its genuineness. If it is genuine the court will give effect to it and, if not, the court will give effect to the underlying transaction that it conceals. And whether it is genuine will depend on a consideration of all the facts and circumstances surrounding the transaction.

[28] These principles were considered and applied in *Commissioner of Customs and Excise v Randles, Brothers & Hudson Ltd*.[7] The difference of views between the majority and the minority in that case turned on a difference of opinion between the judges as to the genuineness of the disputed transactions. The respondent had previously imported cloth under rebate of duty and delivered it to cut, make and trim manufacturers to be made up into goods that it thereafter sold. Under amended regulations this could no longer be done

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

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

without incurring a liability to pay customs duty, but it was legitimate for an importer to import cloth under rebate of duty and sell it directly from bond to a manufacturer. The respondent accordingly made arrangements with five manufacturers to import cloth and sell it to them at cost. The cloth would then be made into garments, which the respondent undertook to purchase from the manufacturers at cost plus the manufacturers' cut, make and trim charges. The Commissioner for Customs alleged that the transactions were not genuine and the respondent disputed this.

[29] The dispute came to this court after a lengthy trial at the end of which the trial judge held that the respondent's officials had honestly arranged the company's affairs in a way that fell within the amended regulations and so as to avoid payment of the duty. They had done so after careful discussion with the Commissioner's staff and after being advised that provided the transactions they concluded with the manufacturers were genuine they would have the desired effect of avoiding the imposition of duty. It was in the light of that advice that the respondent entered into the impugned agreements with the manufacturers. The majority held that ownership of the cloth passed from the respondent to the manufacturers when the cloth was delivered to the latter as reflected in the documents when they were released from bond. They were strongly impressed by the point that there was no purpose in the parties entering into a simulated transaction when only a genuine sale by the importer to the manufacturers would have the effect of avoiding the duty. A simulated transaction would not only attract liability for the duty, but also liability for penalties and criminal sanctions. There was accordingly no incentive for them to engage in deceit or simulation.

[30] It is against that background that the well-known passages in the judgment of Watermeyer JA must be read. Having cited both *Zandberg v Van Zyl* and *Dadoo* he said:[8]

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

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

[31] The minority judgment of De Wet CJ does not in any way qualify these principles. Instead it focussed on a number of features of the evidence and the underlying transactions that were unusual. For example, it was entirely up to the

[8] At 395-6.

respondent to determine how much cloth was imported and what garments should be made. The manufacturers were not at any immediate financial risk because they did not have to pay for the cloth until they had delivered and were entitled to be paid for the garments. Furthermore the evidence on behalf of the manufacturers was equivocal in regard to their intention to become owners of the cloth. De Wet CJ's conclusion was that they had no genuine intention to purchase the cloth but simply fell in with the arrangements made by the respondent in order to obtain the cut, make and trim work, which was the staple of their businesses.

[32] Nothing said subsequently in any of the judgments of this court dealing with simulated transactions[9] alters those original principles in any way or purports to do so. However, in a number of them dealing with income tax, the courts have been called upon to apply these principles in a different context. The earlier cases dealt with cases of agreements being dressed up in a particular form where the underlying intention of the parties was inconsistent with that form. In the income tax cases a different problem arises.

[33] In the income tax cases, the parties seek to take advantage of the complexities of income tax legislation in order to obtain a reduction in their overall liability for income tax. There are various mechanisms for doing this, but they all involve taking straightforward commercial transactions and adding complex additional elements designed solely for the purpose of claiming increased or additional deductions from taxable income, or allowances provided

[9] *Du Plessis v Joubert* 1968 (1) SA 585 (A); *Vasco Dry Cleaners v Twycross* 1979 (1) SA 603 (A); *Skjelbreds Rederi A/S and Others v Hartless (Pty) Ltd* 1982 (2) SA 710 (A); *Hippo Quarries (Tvl) (Pty) Ltd v Eardley* 1992 (1) SA 867 (A); *Bank Windhoek Bpk v Rajie en 'n ander* 1994 (1) SA 115 (A); *Erf 3183/1 Ladysmith (Pty) Ltd and Another v Commissioner for Inland Revenue* 1996 (3) SA 942 (A); *Relier (Pty) Ltd v Commissioner for Inland Revenue* (1997) 60 SATC 1; *Commissioner for Inland Revenue v Conhage (Pty) Ltd (formerly Tycon (Pty) Ltd)* 1999 (4) SA 1149 (SCA); *MacKay v Fey NO and Another* 2006 (3) SA 182 (SCA).

for in the legislation. The feature of those that have been treated as simulated transactions by the courts is that the additional elements add nothing of value to the underlying transaction and are very often self-cancelling. Thus in *Erf 1383/1* Hefer JA said that 'there is a distinct air of unreality about the agreements'.[10] In *Relier* Harms JA referred to the 'unusual and unreal aspects' of the transactions.[11] The analysis by Lewis JA of the transactions in *NWK*[12] 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.[13]

[34] The problem dealt with in *NWK* was the contention that, irrespective of the unreality of most of the elements of the arrangement under scrutiny, provided the parties intended to take all the steps provided for in the contractual documents, in other words to jump through the contractual hoops as a matter of form, the court could not find that the transaction was simulated. That is what Lewis JA was dealing with, in para 55 of her judgment, when she said:

'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

[10]At 954D.

[11]At 123.

[12]Paras 56 to 90.

[13]*Kilburn v Estate Kilburn* 1931 AD 501 at 507.

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.'

[35] It appears that in some circles this, and particularly the statement that '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', has been understood to condemn as simulated transactions any and all contractual arrangements that enable the parties to avoid tax or the operation of some law seen as adverse to their interests.[14] But that fails to read this sentence in the context of both the particular paragraph in the judgment and the entire discussion of simulated transactions that precedes it. If it meant that whole categories of transactions were to be condemned without more, merely because they were motivated by a desire to avoid tax or the operation of some law, that would be contrary to what Innes J said in *Zandberg v Van Zyl* in the concluding sentence of the passage quoted above, namely that:

'The inquiry, therefore, is in each case one of fact, for the right solution of which no general rule can be laid down.'

That was manifestly not Lewis JA's intention.

[36] The problem with general statements of this type is apparent from those by Cloete J in *Nedcor Bank Ltd v Absa Bank Ltd*,[15] about floor plan agreements being simulated transactions. My colleague rightly holds those statements to be incorrect, based as they are, not on a consideration of a particular agreement in its own commercial context, but on generalisations about the nature of such agreements. For the avoidance of doubt, for so long as our law does not

[14]Trevor Emslie SC 'Simulated transactions – A new approach?' (2011) 60 *The Taxpayer* 2 at 5-6; Eddie Broomberg SC '*NWK* and *Finders Hall*' (2011) 60 *The Taxpayer i187 at 197-8;* C J Pretorius 'Simulated agreements and commercial purpose – Commissioner for the South African Revenue Service v NWK Ltd' (2012) 75 *THRHR* 688 at 696; Andrew Hutchinson and Dale Hutchinson 'Simulated transactions and the *fraus legis* doctrine' (2014) 131 *SALJ* 69.

[15]*Nedcor Bank Ltd v Absa Bank Ltd* 1998 (2) SA 830 (W) at 836H-838G.

recognise a pledge of movables without delivery of the item pledged to the pledgee and its continued possession thereafter by the pledgee, commercial arrangements directed at finance houses securing their interests by taking ownership of the property that is the subject of a financing agreement, serve an entirely legitimate commercial purpose. Lewis JA recognised that in her acceptance that the transactions described in *S v Friedman Motors (Pty) Ltd*[16] and *Conhage*,[17] served legitimate commercial purposes.[18]

[37] For those 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.[19]

[38] In the present case, the reason for Wesbank and Nissan Diesel concluding the supplier agreement was to provide Wesbank with the security of being the owner of the vehicles, before providing finance to motor dealers. The agreement said so explicitly and had a clear commercial purpose namely the provision of appropriate security for a financial transaction, in the form of ownership of the *merx*. Obtaining security in that way is no different from any commercial seller stipulating that ownership of the goods sold will not pass until the full purchase price is paid (*pactum reservati domini*). That is the foundation for hire purchase

[16] Footnote 1 supra at 80G-H.

[17]Footnote 9 supra.

[18]*NWK* paras 53 and 54.

[19]This accords with the conclusion of Davis J in *Bosch and Another v Commissioner, South African Revenue Services* 2013 (5) SA 130 (WCC) paras 78 to 92.

contracts and financial leases. Similarly the floor plan agreement concluded with Toit's was designed to ensure that, until Toit's discharged its obligations to Wesbank in respect of a particular vehicle, Wesbank's security remained intact. The contention that these are simulated transactions ignores the commercial legitimacy of a finance house seeking security for the financing transactions that they conclude.

[39] For these further reasons I concur in the judgment of Shongwe JA.

M J D WALLIS JA

JUDGE OF APPEAL Appearances

For the Appellant:	P Beltramo SC (with him T D Prinsloo)
	Instructed by:
	Bowman Gilfillan, Pretoria
	Lovius Block, Bloemfontein
For the Respondent:	A Gautschi SC (with him C van der Spuy)
	Instructed by:
	Lanham-Love Attorneys, Pretoria
	McIntyre & van der Post, Bloemfontein