REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 3565/2013

In the matter between:

1.1.1.1. **PHILIPPUS VILJOEN ELLIS IN HIS CAPACITY**	**FIRST APPLICANT/**
1.1.1.2. **AS TRUSTEE OF THE ELDO TRUST**	**PLAINTIFF**
JURGENS JOHANNES BADENHORST IN HIS CAPACITY AS TRUSTEE OF THE ELDO TRUST	**SECOND APPLICANT/ PLAINTIFF**
ADAM IVO DOS SANTOS IN HIS CAPACITY AS TRUSTEE OF THE ELDO THE TRUST	**THIRD APPLICANT/ PLAINTIFF**

and

GODHARD NOABEB	**DEFENDANT**

Ellis in his Capacity as Trustee of Eldo Trust v Noabeb (I 3565/2013) [2014] NAHCMD 81 (12 March 2014)

Coram: SMUTS, J
Heard: 24 February 2014
Delivered: 12 March 2014

Flynote: Application for default judgment based upon an agreement where the consideration was stated to be for the defendant becomE sole trustee and sole beneficiary of a trust which owned immovable property. The court required that it be addressed as to whether the agreement was valid and enforceable on the grounds of being in faudem legis of the Transfer Duty or Stamp Duty Act or *contra bonos mores* by reason of the forfeiture instalments and because it contemplated that the defendant become sole trustee and beneficiary. The court found that the agreement was simulated and in fraudem legis of the Transfer Duty Act and set it aside.

ORDER

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a) The application for judgment by default is dismissed;
b) The agreement entered into between the parties attached to the particulars of claim is declared null and void and of no force and effect.

JUDGMENT

SMUTS, J

(b) At issue in this application for default judgment is whether the transaction relied upon by the plaintiffs is valid and enforceable.

(c) The plaintiffs are the trustees of the Eldo Trust ("the trust"). They sued the defendant in that capacity. The plaintiffs are also legal practitioners of this court and are either current or past partners of the firm of legal practitioners acting for them. The plaintiffs in their capacities as trustees are owners of immovable property, being Erf 1325, Hofmeyer Street, Khomasdal, Extension 5, Windhoek ("the property").

(d) During September 2012 the plaintiffs, in their capacities as trustees, entered into an agreement with the defendant ("the agreement"). Plaintiffs' counsel, Mr Tötemeyer SC assisted by Mr G Dicks, submitted that the effect of the agreement was in essence that the defendant would purchase the property from them for a consideration of N$815 000. But the transaction itself was structured in an entirely different way.

(e) The fairly lengthy agreement was structured in such a way that the consideration is stated in the agreement as one by the defendant to become the sole new trustee, (and replace with the plaintiffs as current trustees who then resign) and for the defendant to substitute them as beneficiaries and become the sole beneficiary upon payment in full of the consideration. This eventuality is called the consummation date. The defendant was also required to pay occupational rental for the period of occupation of the property until the resignation of the plaintiffs as trustees of the trust.

(f) The consideration was payable by way of instalments, one of N$200 000 and three further instalments of N$205 000 each. In exchange, the plaintiffs undertook to give undisturbed occupation and possession of the property to the defendant from the effective date as defined in the agreement of 1 May 2012.

(g) In the event of the defendant breaching the agreement by failing to pay any one instalment, then the plaintiffs were, on 7 days written notice to the defendant, entitled to cancel the agreement and repossess the immovable property, in which event the defendant would forfeit all monies already paid to the plaintiffs' attorneys and the plaintiffs would also be entitled to claim the consideration not yet paid. The agreement was attached to the particulars of

claim. But the deed of trust, executed in 2010, was not attached.

(h) In the particulars of claim, the plaintiffs alleged that they had complied with the obligations under the agreement and had given undisturbed occupation and possession of the property to the defendant from the agreed date. They also contended that the defendant was in breach of the agreement by failing to pay the amount of N$234 500 due under the agreement. The plaintiffs also allege that the defendant had failed to pay occupational interest, with an outstanding balance of N$24 500. It is also stated that they cancelled the agreement with the defendant by written notice dated 27 August 2013.

(i) The plaintiffs then instituted this action against the defendant, claiming payment in the amount of N$345 000, (which was presumably a typographical error, although the application for default judgment claimed N$245 000, an amount which was also unsupported by the summons), forfeiture of all payments made by the defendant to the plaintiffs in terms of the consideration and an order confirming the cancellation of the agreement. They also claimed interest at the legal rate of 20% per annum from 13 December 2012 to date of final payment. They also claimed payment in the sum of N$24 500 and an order ejecting the defendant from the property as well as costs of suit.

(j) The defendant did not enter an appearance to defend. The plaintiffs then applied for default judgment on 29 November 2013.

(k) In the application for default judgment, the plaintiffs claimed payment in the amounts of N$245 000 and N$24 500. In addition, they claimed the forfeiture of all payments made by the defendant, confirmation of the cancellation and an ejectment order in respect of the defendant from the property.

(l) When the matter was called in motion court on 29 November 2013, I requested counsel for the plaintiffs to address argument as to whether the agreement relied upon is valid or lawful and/or enforceable in view of the following:

(a) It would appear to contemplate that the defendant would become the sole trustee and sole beneficiary of the trust;

(b) On the grounds of being *in fraudem legis* of the Stamp Duties Act, 15 of 1993 or the Transfer Duty Act, 14 of 1993 or whether it is a simulated transaction devised to avoid the obligation to pay transfer or stamp duty;

(c) On the grounds of being *contra bonos mores* or in conflict with the conventional penalties set by virtue of the forfeiture referred to and relied upon in the particulars of claim (and in the application for judgment by default).

(m) Counsel representing the plaintiffs in motion court on 29 November 2013 sought a postponement for the purpose of addressing argument on those issues. The application for default judgment was postponed to 11 December 2013. On that date, it was again postponed to 24 February 2014 because the plaintiffs had engaged senior and junior instructed counsel to argue the matter.

(n)

(o) Shortly before the date of hearing and on 17 February 2014, the plaintiffs' legal practitioners addressed a letter to the defendant waiving the claim for ejectment and for forfeiture of all monies paid by the defendant pursuant to the agreement. (This letter had followed further payments made by the defendant.) The relevant portions of letter are as follows:

(p)

(q) '3. In terms of the combined summons we claimed *inter alia* for ejectment from the premises and forfeiture of all monies paid by yourself in terms of the agreement signed by you on 24 September 2012.

(r) 4. It is our instructions that our clients, in light of the payments made by you since the service of the combined summons, will waive their claims as set out in paragraph 3 above.' (sic)

(s) The letter concluded by stating that the plaintiffs held the defendant to

payment of the outstanding amounts in respect of the consideration and occupational rental as set out in the agreement.

(t) At the hearing, the plaintiffs also placed a letter before court received from the defendant's legal practitioners, requesting to be advised of the outstanding amounts referred to in the letter.

(u) It was then submitted by Mr Tötemeyer SC that the parties by their conduct wished to continue with the agreement and pointed out that the plaintiffs had abandoned their claim for cancellation of the agreement (or its confirmation).

(v) Mr Tötemeyer also correctly conceded that it would be *contra bonos mores* for the plaintiffs to claim forfeiture of all monies paid by the defendant as well as the outstanding balance and ejectment. Counsel stated that this issue had become academic by virtue of the waiver made by the plaintiffs in that regard. Mr Tötemeyer also pointed out that the plaintiffs only sought an order for the outstanding consideration payable and occupational rental being N$2000 and N$19 500 respectively.

(w) In the course of oral argument, Mr Tötemeyer submitted that the clause in terms whereof the plaintiffs were entitled to forfeiture of all monies paid as well as claiming the outstanding balance and ejectment was severable from the rest of the agreement by virtue of clause 19 of the agreement. It provides as follows under the heading of "Severability":

> 'Each provision in this agreement is severable from all others, notwithstanding the manner in which they may be linked together or grouped together grammatically, and if in terms of any judgment or order, any provision, phrase, sentence, paragraph or clause is found to be defective or unenforceable for any reason, the remaining provisions, phrases, sentences, paragraphs and clauses shall nevertheless continue to be of full force. In particular and without limiting the generality of the aforegoing, the parties hereby acknowledge their intention to continue to be bound by this agreement notwithstanding that any provision

> may be found to be unenforceable or void or voidable, in which event the provision concerned shall be severed from the other provisions, each of which shall continue to be of full force and the parties shall use their best efforts to find a suitable legal, valid and enforceable replacement to such provision to reflect the commercial and legal intent of the provision being replaced.'

(x) It is not surprising that a clause of this nature was inserted, given the offensive nature of the clause authorising both forfeiture of all monies paid and entitling the plaintiffs to claim the full outstanding amount as well as the ejectment of the defendant. Insofar as the agreement sought to authorise this course of action, it is in my view clearly *contra bonos mores*, as was correctly conceded by counsel. Being *contra bonos mores*, this portion of the agreement is certainly unenforceable as a consequence. What is however surprising is that a clause of this nature was included by legal practitioners. What was even more surprising and also disturbing is that they sought to invoke it in their application for default judgment, claiming both forfeiture and the outstanding amounts as well as ejectment.

(y) It is however also clear to me that this offensive clause can be severed from the rest of the agreement, given the term of the agreement relating to severability.

(z) The plaintiffs however no longer claim that form of relief, after having been properly advised by instructed counsel that it is *contra bonos mores*. It is thus not necessary to further dwell on this issue except to express my displeasure at the inclusion of the clause and the initial attempted reliance upon it in this court.

(aa) I turn to the other questions upon which argument was addressed.

Sole trustee and sole beneficiary

(bb) In respect of the first question raised, Mr Tötemeyer referred to

Groeschke v Trustee, Groeschke Family Trust and Others[1] where the court held:

> '[31] There can be no doubt that a trust with a sole trustee who is also the sole beneficiary cannot be validly created: Land and Agricultural Bank of South Africa v Parker and Others 2005 (2) SA 77 (SCA) ([2004] 4 All SA 261) in para 19. But that is not the case here. As shown below, although the deceased was, after the amendment, the sole beneficiary, he was not the sole trustee. But there is, as held in Parker, nothing that prevents a trustee from also being a beneficiary:
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> > "The core idea of the trust is the separation of ownership (or control) from enjoyment. Though a trustee can also be a beneficiary, the central notion is that the person entrusted with control exercises it on behalf of and in the interests of another. This is why a sole trustee cannot also be the sole beneficiary: Such a situation would embody an identity of interests that is inimical to the trust idea, and no trust would come into existence." [In para 19. My accentuation.]
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> [32] As is evident from a reading of Parker, if at some time after the creation of a trust the circumstances had changed so that the beneficiaries of that trust were also its trustees, that would not render the trust a failed trust. As submitted by counsel for the respondents in this case, when Cameron JA made the above-cited comments in Parker, he lamented the debasement of trusts as a means of protection from creditors. However, he found against the trustees of the Parker Trust for reasons which of necessity imply that the trust had not failed, but had continued in existence, despite the fact that all of the trustees were also the beneficiaries of the trust. Cameron JA was not called upon to decide it, but in my view, by the same token, if as a result of intervening circumstances after a trust's creation, a sole trustee is left as a sole beneficiary, then the position might be undesirable, but it would also not cause the trust to fail.'[2]

(cc) Mr Tötemeyer especially relied upon the last sentence of the second paragraph and submitted that a second trustee could be appointed to address the hiatus created by the contractual terms which contemplate that the defendant be appointed sole trustee and beneficiary. But this submission is

[1] 2013 (3) SA (GSJ).

[2] *Supra* at par [31] and [32].

misplaced and fails to appreciate the context of the presiding judge's obiter remarks – which are raised in the context of the facts of that matter which are distinguishable. When the *obiter* comment in the last sentence is viewed in isolation and taken out of its context, it does not in my view appear to be correct or follow from the exposition of the law of trusts in *Land and Agricultural Bank of South Africa v Parker and Others*[3] by Cameron, JA referred to in that judgment.

(dd)

(ee) Although the facts and context of the issues raised in the *Parke*r matter are vastly different from those in this matter, the basic principles governing trusts, so lucidly set out in it, are instructive and worthy of inclusion here:

> '[19] This disposes of the bank's contentions on the merits of the Full Court's judgment. But before proceeding to apply these conclusions to the bank's alternative argument, some observations are needed about the abuse of the trust form this case yet again brings to light. The core idea of the trust is the separation of ownership (or control) from enjoyment. Though a trustee can also be a beneficiary, the central notion is that the person entrusted with control exercises it on behalf of and in the interests of another. This is why a sole trustee cannot also be the sole beneficiary: Such a situation would embody an identity of interests that is inimical to the trust idea, and no trust would come into existence. It may be said, adapting the historical exposition of Tony Honoré, that the English law trust, and the trust-like institutions of the Roman and Roman-Dutch law, were designed essentially to protect the weak and to safeguard the interests of those who are absent or dead.
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> [20] This guiding principle provided the foundation for this Court's major decisions over the past century in which the trust form has been adapted to South African law: That the trustee is appointed and accepts office to exercise fiduciary responsibility over property on behalf of and in the interests of another.
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> [21] The first of those decisions, *Estate Kemp and Others v McDonald's Trustee*, arose because of difficulties stemming from a testator's bequest (in the words of Innes CJ) 'to persons who are not intended by the testator to have any enjoyment of the subject-matter, but are directed to possess and administer it on behalf of successive sets of beneficiaries'. Forty years later, in *Crookes NO and Another v Watson and Others*, Schreiner JA again emphasised that 'the

[3] 2005 (2) SA 77 (SCA).

ordinary case of a trust' was 'where the trustee is not beneficially interested in the trust property'. The last of the previous century's major cases adapting the trust form, *Braun v Blann and Botha NNO and Another*, arose because it was contended that our law did not allow the conferment of discretionary powers of appointment 'on trustees who have no beneficial interests in the property in question'.

[22] This has not changed. The essential notion of trust law, from which the further development of the trust form must proceed, is that enjoyment and control should be functionally separate. The duties imposed on trustees, and the standard of care exacted of them, derive from this principle. And it is separation that serves to secure diligence on the part of the trustee, since a lapse may be visited with action by beneficiaries whose interests conduce to demanding better. The same separation tends to ensure independence of judgment on the part of the trustee - an indispensable requisite of office - as well as careful scrutiny of transactions designed to bind the trust, and compliance with formalities (whether relating to authority or internal procedures), since an independent trustee can have no interest in concluding transactions that may prove invalid.

[23] The great virtue of the trust form is its flexibility, and the great advantage of trusts their relative lack of formality in creation and operation: 'the trust is an all-purpose institution, more flexible and wide-ranging than any of the others'. It is the separation of enjoyment and control that has made this traditionally greater leeway possible. The Courts and Legislature have countenanced the trust's relatively autonomous development and administration because the structural features of 'the ordinary case of trust' tend to ensure propriety and rigour and accountability in its administration.

[24] But this has changed in the last two decades. This is not simply because trusts have increasingly been used to transact business. So long as the functions of trusteeship remain essentially distinct from the beneficial interests, there can be no objection to business trusts, since the mechanisms of the trust form will conduce to their proper governance, which will in turn provide protection for outsiders dealing with them.

[25] The change has come principally because certain types of business trusts

> have developed in which functional separation between control and enjoyment is entirely lacking. This is particularly so in the case of family trusts - those designed to secure the interests and protect the property of a group of family members, usually identified in the trust deed by name or by descent or by degree of kinship to the founder.
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> [26] In *Nieuwoudt* Harms JA drew attention to this 'newer type of trust' where for estate planning purposes or to escape the constraints imposed by corporate law assets are put into a trust 'while everything else remains as before'. The core idea of the trust is debased in such cases because the trust form is employed not to separate beneficial interest from control, but to permit everything to remain 'as before', though now on terms that privilege those who enjoy benefit as before while simultaneously continuing to exercise control.'

(ff) Although the trust was not attached to the papers, it would appear from the agreement to be established for the purpose of holding the immovable property in question and suffers from the kind of debasement referred to by Harms JA and quoted with approval by Cameron JA with reference to the *Nieuwoudt* matter.[4] This is because of the lack of separation beneficial interest from control. This debasement and abuse is further explained by Cameron JA with reference to the facts in the *Parker* matter.[5] Cameron JA suggests that the debasement of trusts may require legislative intervention but points out that this does not mean that the courts and the Master are powerless to restrict or prevent abuses. But the means of trust supervision vested in the Master in applicable legislation in South Africa[6] are absent in Namibia. The Trust Monies Protection Act,[7] with minimal supervisory and oversight powers, applies in Namibia.

(gg)

(hh) After referring to the powers which the Master can invoke to address certain abuses, Cameron JA proceeded to state the following:[8]

> '[37] The courts will themselves in appropriate cases ensure that the trust form

[4] *Nieuwoudt NO v Vrystaat Mielies (Edms) Bph* 2004 (3) SA 486 (SCA).

[5] Supra at par [31].

[6] The Trust Property Control Act, 57 of 1988.

[7] Act 34 of 1934.

[8] At par [37].

> is not abused. The courts have the power and the duty to evolve the law of trusts by adapting the trust idea to the principles of our law (*Braun v Blann and Botha NNO and Another*). This power may have to be invoked to ensure that trusts function in accordance with principles of business efficacy, sound commercial accountability and the reasonable expectations of outsiders who deal with them. This could be achieved through methods appropriate to each case.'

And further in the context of the protection of creditors – relevant to the *Parker* case:

> '[37.1] As mentioned earlier, within its scope the rule that outsiders contracting with an entity and dealing in good faith may assume that acts performed within its constitution and powers have been properly and duly performed, and are not bound to inquire whether acts of internal management have been regular, may well in suitable cases have a useful role to play in safeguarding outsiders from unwarranted contestation of liability by trusts that conclude business transactions.'

(ii) In the agreement, the transaction is expressly structured so that the trustees resign and are substituted by the defendant. That is specified as the counter prestration by plaintiffs for payment of the consideration. They are also replaced and substituted by the defendant who becomes sole beneficiary.

(jj)

(kk) As was made abundantly clear in *Parker,* a sole trustee cannot become sole beneficiary. This is correctly expressed as inimical to the entire notion of a trust, as is so amply explained by Cameron, JA in *Parker*.

(ll) The structure contemplated by the agreement thus regates the whole notion of trust and results in a failure of the trust in the transaction.

(mm) I have quoted at some length from the helpful summary by Cameron, JA as it soon becomes self evident that the agreement in this matter does violence to the nature of trusts.

(nn) The agreement in my view amounts to a clear instance where a trust has been debased and abused to achieve the transfer in ownership of immovable

property without the consequence attendant upon such a transaction by paying transfer duty under the Transfer Duty Act.[9]

In fraudem legis?

(oo) The question arises as to whether the agreement is *in fraudem legis* of the Transfer Duty Act by seeking to impermissibly avoid the payment of transfer duty by a simulated transaction.

(pp) The test in determining whether an agreement or scheme is *in fraudem legis* was recently restated by the Supreme Court[10] with reference to leading earlier decisions:[11]

> 'Although there is no doubt that people may arrange their affairs to avoid statutory prohibitions, the arrangement of their affairs must not result in a simulated transaction. As Innes CJ reasoned in *Dadoo and Others v Krugersdorp Municipal Council* 1920 AD 530 at 548–
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> > " … 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 the parties intend to avoid the operation of the law, and that 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 statute, 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."
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> [45] The question that arises is whether the contractual scheme here is a guise "calculated to escape" the provisions of the Land Reform Act. As Innes J discussed in *Zandberg v Van Zyl* 1910 AD 302 at 309:

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[9] 14 of 1993.

[10] In *Strauss and Another v Labuschagne* (case no. 44/2009) delivered 21/06/2012, as yet unreported.

[11] Supra at par[44] to par [48], footnotes excluded.

> "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 circumstance, that the same object might have been attained in another way will not necessarily make the arrangement other than it as purports to be. The enquiry, therefore, is in each case one of fact, for the right solution of which no general rule can be laid down."

[46] The nature of a simulated transaction that would be held to be *in fraudem legis* was further described in *Commissioner of Customs and Excise v Randles, Brothers and Hudson Ltd* 1941 AD 369 at 395 - 6*:*

> "In essence, it is a dishonest transaction: dishonest, inasmuch as the parties to it do not really intend it to have, *inter partes*, the legal effect which its terms convey to the outside world. The purpose of the disguise is to deceive by concealing what is the real agreement or transaction between the parties. The parties wish to hide the fact that their real agreement or transaction falls within the prohibition or subject to 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.
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> 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."

[47] Determining whether the contractual scheme in this case is a disguised or simulated transaction will require a consideration of whether the parties actually intended that the agreements they entered into would have the legal effect as drafted, or whether, in fact, they intended their agreement to have a different consequence which they could not express because it would be in conflict with the provisions of the Land Reform Act.

[48] In determining as a matter of fact, whether a particular contractual arrangement is simulated or not, the courts have considered whether the

> arrangement has an “air of unreality”12, “accords with reality”13 or contains anomalies14 or is “startling”.15 Where an arrangement seems anomalous or unreal, it is more likely that a court will conclude that it is a simulated arrangement disguising a different but tacit agreement.’

(qq) As apparent from this helpful articulation of the applicable principles, the *Strauss* matter was decided in the context of a contractual scheme ultimately found to be simulated and *in fraudem legis* of the Commercial Land Reform Act, as amended.[12] I respectfully agree with the approach followed and conclusion reached in that matter.

(rr)

(ss) The Supreme Court also in that matter referred to the restatement of the test in a slightly different manner in *Commissioner for the South African Revenue Service v NWK Ltd.*[13] The Supreme Court referred to the fact that this test was articulated in the context of the question whether certain agreements had been simulated to reduce the amount of tax payable. The court in *NWK* concluded, after its own survey of many of the cases referred to by the Supreme Court, as follows:

(tt)

> ‘ [55] 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.’

(uu) The Supreme Court in *Strauss* further referred to this conclusion in the

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[12] 6 of 1995, as amended.

[13] 2011 (2) SA 67 (SCA).

NWK matter in the following way:

> *'NWK,* concerned as it was with the question of tax avoidance and evasion, shifts the focus of analysis from the question whether the parties intend to give effect to the actual terms of the impugned transaction, to the question whether the impugned transaction makes any commercial sense at all. It is not necessary now to decide whether the difference of emphasis that underlies the approach in *NWK* should be adopted in Namibia. For the purposes of this case, it is appropriate merely to consider, on the approach established in *Dadoo's* case and followed since, whether on the factual record before it, the respondent has shown that the contractual scheme was more likely than not a simulated transaction.'

(vv) This matter concerns the question as to whether the contractual scheme amounts to a transaction simulated to disguise the real agreement between the parties to avoid the obligation to pay transfer duty. This is first considered upon an application of the test in *Dadoo,* as restated by the Supreme Court.

(ww)

(xx) Mr Tötemeyer submitted that the starting point in any consideration as to whether the transaction was simulated and *in fraudem legis* would be that taxpayers are entitled to arrange their affairs so that they pay the least tax.[14] That is well accepted, as was reiterated by the Supreme Court in Strauss.[15]

(yy) Mr Tötemeyer further pointed out that in terms of s 2 of the Transfer Duty Act[16] transfer duty is payable upon the date of acquisition. He submitted that in the case of a trust with trust property not forming part of the private estate of a trustee, the new trustee would not acquire immovable property held by the trust within the meaning of s 3 of the Transfer Duty Act. He further submitted that even if that were to be incorrect, then transfer duty would be payable. Either way, he submitted, transaction would not be a simulation. It would rather be a matter where the transfer duty is applicable or it is not. He submitted that the

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[14] *IRC v His Grace, The Duke of Westminster* 1936 AC 1 (HC); *Commissioner for Inland Revenue v Conhage (Pty) Ltd (formerly Tycon (Pty) Ltd)* 1999 (4) SA 1149 (SCA) par [1].

[15] Supra at par [45].

[16] 14 of 1993.

transaction is what it purported to be and that there was no disguised transaction.

(zz) Mr Tötemeyer further submitted that any avoidance of transfer duty would be perfectly legitimate under the arrangement created by the agreement and that the parties were entitled to avoid payment of transfer duty by arranging the affairs in that way. He submitted that the same argument would apply with reference as to whether stamp duties are avoided.

(aaa) Mr Tötemeyer further submitted that the practice of immovable properties being registered and held by companies or close corporations with the beneficial ownership being frequently transferred by means of a transfer of shares or members' interest, respectively was analogous. He submitted that these transactions did not attract transfer duty and did not result in the transactions being simulated or *in fraudem legis*. He referred to the fact that the legislature in South Africa had amended legislation so as to render transactions of that nature being subject to transfer duty. He also referred to the further amendment in South Africa to the Transfer Duty Act which included the definition of a trust and also amended the definition of a transaction so as to address the substitution or addition of beneficiaries with a contingent right to any property of a discretionary trust.

(bbb)

(ccc) The parties in this matter plainly structured their transaction as a consideration for appointment as trustee and beneficiary of a trust. The trustees in that capacity owned the property. This scheme was to achieve a real objective other than that set out in the agreement, namely the sale and transfer of immovable property. That is the real substance and underlying purpose of their transaction. It is done so to achieve an object that allows the evasion of tax, having been artificially engineered to achieve that by the abuse of the trust. This scheme, as I have said, negates the notion of separation of control and beneficial interest inherent to a trust. But it even goes further and results in the failure of the trust by expressly contemplating that the defendant becomes sole trustee and sole beneficiary.

(ddd)

(eee) This scheme is clearly at the very least anomalous and 'exudes an air of unreality' – so much so that the trust fails as it expressly contemplated that the defendant becomes the sole trustee and sole beneficiary. It is thus to be regarded as simulated for the purpose of evading the payment of Transfer Duty under the Act requiring payment of duty when immovable property is sold and transferred. The agreement is thus a nullity. I reach this conclusion upon an application of the principles recently restated by the Supreme Court in *Strauss*. But as this matter concerns the evasion of a tax or duty, the same conclusion would follow upon an application of the approach in *NWK* which, I consider should be followed in cases of alleged tax evasion. The conclusion in this case would be the same and more evidently so because the real object is clear, even if the parties act upon their trust construct. Its commercial sense and real purpose is the evasion that duty.

(fff)

(ggg) I understood Mr Tötemeyer to argue that, even if I were to find that the trust failed, then effect should be given to the effective sale of the immovable property. Although it was not specifically referred to in argument, this may have been with the reference to clause 15 of the agreement which provides:

> '15.1. The parties agree that in the event of the Transaction and/or this agreement being void and declared void or declared null and void or otherwise terminated or cancelled ("Event of Nullity") – their intention remain that, and to this extent they agree that, the Immovable Property be sold and transferred by the Trust the New Trustee or his nominee, upon the terms and conditions applicable to such Immovable Property and as contained herein (the Intention).
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> 15.2. Should an event of nullity arise:
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> 15.2.1. the parties agree that they shall execute and sign all such documents and agreements and in such capacities as may be required of them by the Attorneys to give effect to the intention including in the event of the Second Amendment Agreement to the Deed of Trusts in terms of which inter alia, the beneficiaries will replace the new beneficiary of the trust furthermore to vary the deed of trust to reflect the intentions of the Original Trustees, who if necessary, shall be reappointed as trustees, and where

after the new trustee shall individually resign as trustee and cause the resignation of any additional trustees nominated and appointed by him;

15.2.2. the new trustee agrees that the consideration already paid or still to be paid shall then be regarded as the purchase price of the Immovable Property and that same may as such be retained by the attorneys for the benefit of the trust and for its account. To the extent that the consideration has not been paid at the time the event of nullity arises the new trustee agrees and undertakes to pay same without delay, on the aforesaid basis into the trust account of the attorneys;

15.2.3. the new trustee furthermore agrees and undertakes, in addition to the consideration, to pay on demand by the attorneys as may be required to effect transfer of the Immovable Property from the trust to the new trustee or his nominee and to register same in the name of the new trustee or its nominee; and

15.2.4. the parties agree that this 15 (unwinding provisions) shall be severable form the rest of this agreement.'

(hhh) It would seem that the plaintiffs cynically foresaw that their artificially engineered construct may be declared void and in this clause sought to cater for that eventuality. It would be for the parties to seek to invoke this clause in view of the conclusion I have reached in this matter.

(iii)

(jjj) In short, the contractual scheme devised by the parties is a sham and designed to disguise the underlying contract in order to avoid legislation in the form of the Transfer Duty Act and the consequence which is to impose a duty upon the transfer of immovable property. The scheme is thus *in fraudem legis* of the Transfer Duty Act and is void *ab initio*. The following order is thus made:

a) The application for judgment by default is dismissed;
b) The agreement entered into between the parties attached to the particulars of claim is declared null and void and of no force and

effect.

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DF Smuts

Judge

APPEARANCES

APPLICANTS/PLAINTIFFS:	R. Totemeyer SC (with him (G. Dicks) Instructed by Ellis Shilengudwa
RESPONDENT/DEFENDANT:	None Appearance