THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 869/2023

In the matter between:

DIRK CORNELIS UYS N O	**FIRST APPELLANT**
CARL ALEXANDER GREATOREX N O	**SECOND APPELLANT**
HESTER SOPHIA UYS N O	**THIRD APPELLANT**

and

NATIONAL CREDIT REGULATOR	**FIRST RESPONDENT**
NATIONAL CONSUMER TRIBUNAL	**SECOND RESPONDENT**

Neutral citation: *Uys N O and Others v National Credit Regulator and Another* (869/2023) [2025] ZASCA 34 (1 April 2025)

Coram: MOKGOHLOA ADP, WEINER and KATHREE-SETILOANE JJA and MUSI and WINDELL AJJA

Heard: 21 February 2025

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website, and by release to SAFLII. The date and time for hand-down is deemed to be 11h00 on 1 April 2025.

Summary: National Credit Act 34 of 2005 (NCA) – impugned transactions – whether the impugned transactions constitute credit agreements as defined by s 8(1)*(b)* read with s 8(4)*(f)* of the NCA– whether the impugned transactions were simulated and intended to avoid the provisions of the NCA.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Potterill, Mbongwe and Kumalo JJ, sitting as a court of appeal):

1 The appeal succeeds with costs including the costs of two counsel where so employed.

2 The order of the full court is set aside and replaced with the following:

'1 The judgment and order of the second respondent is set aside.

2 The first respondent is ordered to pay the costs of the appeal including costs occasioned by the employment of two counsel.'

JUDGMENT

Weiner JA (Mokgohloa ADP and Kathree-Setiloane JA and Musi and Windell AJJA concurring):

Background

[1] On 21 May 2018, a Mr Seabi laid a complaint with the first respondent, the National Credit Regulator (the Regulator), concerning possible contraventions of the National Credit Act 34 of 2005 (NCA) by a company known as Loans Acceptable Funding (Pty) Ltd (LAF), which was a registered credit provider. The Regulator initiated an investigation into the conduct of LAF and

found that it had been acting as an agent and/or intermediary for the Cornelis Family Trust (the Trust), of which the appellants are the trustees. Upon recommendation of the investigator, an investigation was also initiated into the conduct of the Trust.

[2] During its investigation, the Regulator, in assessing the Trust's business model, in relation to the complaint, found that the Trust would purchase an immovable property from third party sellers and simultaneously conclude a lease with the seller at a monthly rental. The lease agreement provided the seller with an option to repurchase the property from the Trust, subject to the monthly rental being timeously paid, and the option being exercised within a period of one year from the date of the sale and lease agreements. Mr Seabi had concluded a sale and a lease agreement with the Trust on these terms. The purchase price paid by the Trust was R210 000 and, in terms of the lease agreement, the monthly amount payable was R3 500, which comprised R2 500 as rental and R1 000 for the option to re-purchase the property.

[3] Whilst this investigation was being conducted, a Ms Slabbert also laid a similar complaint with the Regulator. In her case, the purchase price for her property was R500 000 and, in terms of the lease agreement the monthly amount payable was R9 000, which comprised R8 000 as rental and R1 000 for the option to re-purchase the property.

[4] The two complaints received by the Regulator indicated that both complainants had owned fully paid-up immovable properties; they were seeking to obtain cash loans; they had approached third parties to obtain such loans; the loans were refused, and they were referred by LAF to the Trust for an alternative solution. Subsequent to negotiations with the Trust, the sale and lease agreements

were concluded. After consulting with the trustees, the Regulator established that the Trust had concluded similar agreements with six other sellers.[1]

[5] According to the complainants, they had understood that they were entering into loan agreements with the Trust and that their properties would serve as security for the loans obtained. They stated that they did not intend to sell their properties and contended that the Trust, which was not a registered credit provider, had contravened the NCA in various respects.

[6] The Regulator approached the second respondent, the National Consumer Tribunal (the Tribunal). The Regulator contended that the agreements were credit agreements (the impugned transactions) as defined in the NCA and that the Trust was not registered as a credit provider. The Trust had thus contravened the following provisions of the NCA: Sections 40(1)[2], 40(3)[3] and 40(4)[4], ss 80(1)*(a)*[5],

[1]Margaretha Jacoba Liebenberg, Amurtham Thyagavathi Govender, Fatima Fredricks, Hendrick Mashao Matome, Marvin Charl Ross & Chantal Lavinia Roos, Coenraad Andries Chrisstoffol van der Berg.

[2] 40. Registration of credit providers:
(1) A person must apply to be registered as a credit provider if the total principal debt owed to that credit provider under all outstanding credit agreements, other than incidental credit agreements, exceeds the threshold prescribed in terms of section 42(1).

[3] A person who is required in terms of subsection (1) to be registered as a credit provider, but who is not so registered, must not offer, make available or extend credit, enter into a credit agreement or agree to do any of those things.

[4] A credit agreement entered into by a credit provider who is required to be registered in terms of subsection (1) but who is not so registered is an unlawful agreement and void to the extent provided for in section 89.

[5] 80 Reckless credit:
(1) A credit agreement is reckless if, at the time that the agreement was made, or at the time when the amount approved in terms of the agreement is increased, other than an increase in terms of section 119 (4)-
(a) The credit provider failed to conduct an assessment as required by section 81 (2), irrespective of what the outcome of such an assessment might have concluded at the time.

81(2)[6] and 81(3)[7], ss 89(2)*(d)*[8], 90(1)(2)*(a)*[9] and regulation 23A.[10] The Regulator sought interdictory relief against the Trust and a declaration that the agreements were void and fell to be set aside. The Regulator relied upon the version of the complainants that they understood that they were obtaining a loan, as against the security of their immovable property. The Trust on the other hand, contended that the complainants were well aware that they were signing a sale agreement, and a lease agreement, which contained the option for them to repurchase their properties from the Trust after a period of 12 months.

[7] The Regulator also sought an order for the appointment of an independent auditor to investigate all similar agreements entered into by the Trust within the previous five years. The purpose was to have all such agreements set aside with refunds to be made to the sellers. On 29 January 2021, the Tribunal found that the impugned transactions constituted unlawful credit agreements. It made the following orders:

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[6] 81 Prevention of reckless credit
(2) A credit provider must not enter into a credit agreement without first taking reasonable steps to assess-
(a) the proposed consumer's-
(i) general understanding and appreciation of the risks and costs of the proposed credit, and of the rights and obligations of a consumer under a credit agreement;
(ii) debt re-payment history as a consumer under credit agreements;
(iii) existing financial means, prospects and obligations; and
(b) whether there is a reasonable basis to conclude that any commercial purpose may prove to be successful, if the consumer has such a purpose for applying for that credit agreement.
[7] A credit provider must not enter into a reckless credit agreement with a prospective consumer.
[8] 89 Unlawful credit agreements
(2) Subject to subsections (3) and (4), a credit agreement is unlawful if-
(d) at the time the agreement was made, the credit provider was unregistered and this Act requires that credit provider to be registered;or
[9]90 Unlawful provisions of credit agreement
(1) A credit agreement must not contain an unlawful provision.
(2) A provision of a credit agreement is unlawful if-
(a) its general purpose or effect is to-
(i) defeat the purposes or policies of this Act
[10] Regulation 23A
Criteria to conduct affordability assessment
Application
(1) These Regulations apply to-
(a) current, prospective and joint consumers;
(b) all credit providers; and
(c) all credit agreements to which this Act applies, subject to Regulation 2.

‘55.1 The Trust is interdicted from entering into any further credit transactions with consumers or operating as a credit provider while it is not registered as a credit provider;

55.2 All the credit transactions entered into between consumers and the Trust are declared reckless. All the consumer’s obligations in terms of these agreements are set aside. All the consumers are to be reimbursed with all payments made to the Trust in terms of those transactions;

55.3 The Trust is interdicted from proceeding with any current civil proceedings against consumers under the credit agreements. The Trust must rescind any judgments obtained against any consumers under those agreements.

55.4 The Tribunal further orders that the Respondents [the trustees] appoint an independent auditor at its own cost within 30 days of the issuing of this judgment. The auditor must be registered as a Chartered Accountant. The auditor must determine whether any further credit transactions (besides the six transactions identified) were concluded within the last five years. All the amounts paid by any consumers under those credit agreements must be reimbursed. If the Trust sold any property (which was the subject of a credit agreement), the sale value must be reimbursed to the relevant consumer (this includes the amount paid by Mr Seabi to buy-back his property). The auditor must provide a comprehensive report, regarding the consumers identified and the refunded amounts, to the NCR within 120 days of this judgment being issued;

55.5 The Respondent [the Trust]is to pay an administrative fine of R200 000.000 into the National Revenue fund within 30 days of this judgment being issued. . .’

[8] The Trust, aggrieved by the findings of the Tribunal, appealed to the full court of the Gauteng Division of the High Court, Pretoria (the full court) against the whole of the judgment and order of the Tribunal. The full court confirmed the findings of the Tribunal, but set aside and replaced paras 55.2 and 55.4 of the Tribunal’s order. Its order reads as follows:

‘26.1 The findings of the Tribunal are confirmed.

26.2 The sanctions in paragraphs 55.1, 55.3, 55.5 and 55.6 are confirmed.

26.3 The sanction in paragraph 55.2 is set aside and replaced with the following:

“The six credit transactions referred to in the papers entered into between consumers and the Trust are declared reckless. All the consumer’s obligations in terms of these agreements are set aside. All the consumers are to be reimbursed with all payments made to the Trust in terms of

those transactions. The auditor is to in his/her report set out comprehensively what amounts are to be repaid to the consumers."

'26.4 The sanction in paragraph 55.4 is set aside and replaced with the following:

"The Tribunal further orders that the Respondents [The trustees] appoint an independent auditor at its own cost within 30 days of the issuing of this judgment. The auditor must be registered as a Chartered Accountant. The auditor must investigate whether any further similar transactions (besides the six transactions identified) were concluded within the last five years from the date of the Tribunal's finding. The auditor must within 120 days submit a comprehensive report regarding such transactions and the amounts that could be reimbursed to the Regulator for assessment and referral to the Tribunal for a decision as to whether such transactions constituted reckless credit and whether reimbursement would be just and equitable."'

[9] Leave to appeal to this Court was granted by the full court on 10 August 2023. The primary issue to be considered is whether the impugned transactions constitute credit agreements as defined in s 8(1)(*b*) read with s 8(4)(*f*) of the NCA, and secondly whether they were disguised or simulated agreements, which were concluded on such terms so as to avoid the provisions of the NCA.

The legislative regime

[10] Section 8(1)*(b)* of the NCA, provides as follows:

'Credit agreements

(1) Subject to subsection (2), an agreement constitutes a credit agreement for the purposes of this Act if it is-

….

(b) a credit transaction, as described in subsection (4).'

Whereas s 8(4)*(f)*, provides as follows:

'(4) An agreement, irrespective of its form but not including an agreement contemplated in subsection (2), constitutes a credit transaction if it is-

….

(f) any other agreement, other than a credit facility or credit guarantee, in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest

is payable to the credit provider in respect of-

(i) the agreement; or

(ii) the amount that has been deferred.'

[11] Section 8(2)*(b)* of the NCA, provides as follows:

'(2) An agreement, irrespective of its form, *is not a credit agreement* if it is-

(b) a *lease of immovable property*;' (Emphasis added.)

In terms of s 2 of the NCA, its provisions are to be interpreted 'in a manner that gives effect to the purposes set out in section 3.'

Section 3 of the NCA describes its main purposes, which are:

'…to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers, by-

(a) promoting the development of a credit market that is accessible to all South Africans, and in particular to those who have historically been unable to access credit under sustainable market conditions;

(b) ensuring consistent treatment of different credit products and different credit providers;

(c) promoting responsibility in the credit market…'

[12] The Trust contended that the Regulator ignored the circumstances under which each of the individuals to the impugned transactions required finance. The complainants were in some kind of financial distress and could not get loans through conventional credit providers. Mr Seabi required funding to make payments for his motor vehicle and his children's private boarding school fees. He signed the Deed of Sale and arranged bridging finance to obtain a loan pending the transfer of the property. Ms Slabbert was experienced in property transactions and required funds to purchase a flat that was up for auction the following week. She was well versed on the nature of the transactions involved in a sale agreement as opposed to an agreement of loan, and had, according to her, written a book on the NCA.

[13] The Trust contended that Mr Seabi and Ms Slabbert could not have intended to disguise the transactions that they considered to be loan agreements as sale and lease agreements when, according to them, they did not believe that the transactions they were concluding purported to be sale and lease agreements. Thus, the Trust submitted, the common intention of the parties to disguise the true nature of the agreements is absent. If the version of the complainants is accepted, then there was clearly no intention on the part of the complainants to disguise the transactions.

[14] The Trust provided comprehensive details in its answering affidavit in relation to the negotiations it had with both Mr Seabi and Ms Slabbert leading up to the sale and transfer of their respective properties. This evidence was not disputed. In each case, the properties sold to the Trust were transferred to and registered into the name of the Trust. The transfers were enabled by conveyancers who required Mr Seabi's and Ms Slabbert's full participation in the transfer process. This would have included submitting the title deed of the property to be transferred and obtaining their signatures for the relevant transfer documents.

[15] The Regulator contended that there are several features of the impugned transactions that are convoluted and peculiar, and which make no commercial sense unless the impugned transactions were credit agreements in disguise, namely:

(a) None of the lease agreements require payment of a deposit;

(b) The sale agreements do not make provision for any suspensive conditions for the manner and time within which to secure finance for the purchase price of the property;

(c) The purchase price of the property was far below the market value of the property and corresponded to the amount the seller wished to borrow from the Trust;

(d) The risk did not pass to the Trust and the sellers retained possession of the property and had to keep the property insured;

(e) The Trust used advertising materials that offered consolidated loans for homeowners to attract customers;

(f) There was no justification for the lease of the properties or the calculation of rental apart from the amount allegedly 'borrowed' from the Trust;

(g) A comparison of the impugned transactions to a genuine sale agreement reveals striking differences, in particular, differences relating to payment clauses and estate agent commission clauses.

[16] According to the Trust, each one of these 'features' of the impugned transactions have an appropriate explanation:

a) It is not unusual for a deposit not to be included when the purpose of a deposit is generally to provide security for damages to the leased property and/or security for outstanding rental owed in respect of the leased property. If the lessor was satisfied that a lessee would not damage the property and/or would pay rental on time, a lessor may conclude that no deposit was necessary. The sellers of the properties were already in occupation thereof and it would be unusual to require a deposit in such circumstances;

b) The transactions were structured as cash sales and thus there was no reason to include any suspensive conditions;

c) In relation to the purchase price being substantially below the market value of the property:

i) There was no corroborating evidence of the true market value of any of the properties;

ii) The Regulator relied upon the unsigned and disputed letter from an estate agent attached to Ms Slabbert's complaint;

iii) There were sound commercial reasons why the Trust would purchase properties below market value, and why a seller would be prepared to sell their

property for a discounted price. Where a cash sale is certain, and the seller is in urgent need of funds, and is not willing to delay the sale of their property to obtain an uncertain higher price, or where the seller is given an option to re-purchase the property, and where a purchaser is prepared to allow the seller to remain in occupation after the sale, such benefits have a monetary value that could justify a reduced purchase price.

d) Risk in the property did pass to the Trust. There was an agreement containing all the material terms and there were no unfulfilled suspensive conditions;

e) The Trust denied that they utilised any advertising materials to attract customers and do not employ any agents on its behalf;

f) There was nothing peculiar in requiring a lessee or a seller of property who is remaining in occupation thereof to pay the homeowner insurance premium.

All of these factors, the Trust submitted, compel one to arrive at the conclusion that there was no intention on the part of both parties to simulate the transactions.

Legal Principles

[17] The proper approach to interpretation of contracts has been well established by this Court. In the oft-quoted matter of *Natal Joint Municipal Pension Fund v Endumeni Municipality*,[11] the process of interpretation was defined as: '. . .[t]he process of attributing meaning to the words used in a document… having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence… Whatever the nature of the document consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the

[11] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA).

light of all these factors.'[12]

[18] In *Zandberg v Van Zyl,*[13] this Court stated:

'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*. . . 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.'[14][emphasis added]

[19] There is nothing impermissible about arranging one's affairs so as to evade the provisions of the NCA. As held in *Commissioner of Customs and Excise v Randles Brothers and Hudson Ltd*[15]

'A transaction is not necessarily a disguised one because it is devised for the purpose of evading the prohibition in the Act. . . 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.

…

A disguised transaction in the sense in which the words are used above is something

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[12] Ibid para 18.
[13] *Zandberg v Van Zyl (Zandberg)* 1910 AD 302.
[14] Ibid at 309; *Skjelbreds Rederi A/S and Others v Hartless* (Pty) Ltd 1982 (2) SA 710 (A) at 733A-E; *Roshcon (Pty) Ltd v Anchor Auto Body Builders CC* [2014] ZASCA 40; [2014] 2 All SA 654 (SCA); 2014 (4) SA 319 (SCA) paras 35-37.
[15] *Commissioner of Customs and Excise v Randles Brothers and Hudson Ltd (Randles Brothers)* 1941 AD 369.

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. . . 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.'[16]

[20] In *Roshcon (Pty) Ltd v Anchor Auto Bodybuilders CC (Roshcon)*,[17] Wallis JA explained:

'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*, 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."'[18]

[21] This brings me to the simulation argument. Wallis JA in *Roshcon*, stated as follows:

'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.'[19]

[22] In *CSARS v NWK Ltd*,[20] Lewis JA held that:

"In my view the test to determine simulation cannot simply be whether there is an intention to give effect to a contract in accordance with its terms. Invariably where parties structure a

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[16] Ibid at 395-396.
[17] *Roshcon (Pty) Ltd v Anchor Auto Body Builders CC* [2014] ZASCA 40; [2014] 2 All SA 654 (SCA); 2014 (4) SA 319 (SCA).
[18] Ibid para 26.
[19] Ibid para 27.
[20] *Commissioner for the South African Revenue Service v NWK Ltd (NWK)* ZASCA 168; 2011 (2) SA 67 (SCA); [2011] 2 All SA 347 (SCA); 73 SATC 55.

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."[21]

[23] Wallis JA explained in *Roshcon* that Lewis JA's judgment in *NWK* had been misinterpreted. He referred to Lewis JA's statement that '(i)f 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.' This statement had been interpreted to mean that any and all contractual arrangements that enable the parties to avoid tax or the operation of some law would be seen as simulated. This was contrary to the position established in *Zandberg* (referenced above) that:

"The inquiry, therefore, is in each case one of fact, for the right solution of which no general rule can be laid down".[22]

[24] Both Wallis JA in *Roshcon* and Lewis JA (in *Sasol Oil Proprietary Limited v The Commissioner for the South African Revenue Service)*[23]found that the judgment in NWK did not change the law. As Lewis JA stated:

'. . . .[I]t pointed out merely that in order to establish simulation one could not look only at the terms of the disputed transaction. And it suggested that simulation was to be established not only by considering the terms of the transactions but also the probabilities and the context in which they were concluded.'[24]

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[21] Ibid para 55.
[22] Op cit fn 17 para 35.
[23] *Sasol Oil Proprietary Limited v The Commissioner for the South African Revenue Service (Sasol)* [2018] ZASCA 153; [2019] 1 All SA 106 (SCA); 81 SATC 117 para 59; 2018 JDR 1953 (SCA).
[24] Ibid para 59.

[25] Wallis JA concluded in *Roshcon* that '[t]he 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.'[25] To succeed in proving a simulation, the parties must have intended when entering into the agreements of sale and lease to do so 'on terms other than those set out in the scheme.'[26]

[26] In *CIR v Conhage (Pty) Ltd*[27] Hefer JA confirmed that 'a taxpayer must show on a balance of probabilities that the agreements reflect the actual intention of the parties. . .'[28] The facts in *Conhage* are very similar to those in the present case. The reasoning and conclusion of this Court there is, therefore, of great assistance in dealing with the present matter. Conhage (formerly Tycon) required capital to expand its business. Firstcorp Merchant Bank Ltd (FirstCorp) agreed to make funds available through the conclusion of sale and leaseback agreements. The parties were aware that certain tax benefits would result from those agreements and they were concluded. In terms thereof, Tycon sold some of its equipment to Firstcorp. It then leased the equipment from Firstcorp for a set time with an option to renew. The Commissioner contended that the sale and leaseback agreements were simulated and were loans. The Commissioner disputed Tycon's right to deduct the rentals paid in terms of the leaseback agreements as expenditure in the production of income under s 11*(a)* of the Income Tax Act. He submitted that, despite the form of the agreements, Tycon did not, in fact, sell its equipment and lease it back, but took a loan in the amount of the purchase price from Firstcorp. The Commissioner conceded that the parties had not acted in

[25] Op cit fn 17 para 37.
[26] *Commissioner, South African Revenue Service v Bosch & Another* [2014] ZASCA 171; 2015 (2) SA 174 (SCA); [2015] 1 All SA 1 (SCA); 77 SATC 61 para 41.
[27] *Commissioner for Inland Revenue v Conhage (Pty) Ltd (formerly Tycon (Pty) Ltd)* (*Conhage*)[1999] ZASCA 64; 1999 (4) SA 1149 (SCA).
[28] Op cit fn 23 para 54.

fraudem legis by deliberately disguising their transactions. The Commissioner argued that the agreements should not be applied according to their tenor as:

'. . .although Tycon and Firstcorp might honestly have believed that it would be sufficient to go through the formality of concluding that kind of agreement in order to procure tax benefits for themselves, they had no real intention to enter into agreements of sale and leaseback.'[29]

[27] The question posed in *Conhage* was what did the parties genuinely intend. Did they genuinely intend ownership of the equipment to pass upon conclusion of the agreements? If not, the agreements would have been simulated and concluded in order to unlawfully evade tax. The evidence demonstrated that the parties did intend to conclude the sale and leaseback agreements, and intended to pass transfer of the equipment and acted in terms of the agreements. This was not contradicted by the Commissioner. Tycon contended that it was not unusual for certain provisions to be specified in a sale and leaseback agreement which are not typical in a usual contract of sale or lease.

[28] These facts align with those in the present case. For the Court to determine the real intention of the parties and whether an agreement is simulated, it must first be satisfied, on the available and admissible evidence, that there was some unexpressed or tacit agreement between the parties, which was not reflected in the agreement. In the case of a simulated agreement, such as that contended for by the Regulator in the present matter, the parties to the impugned transactions must have agreed to and intended two things, namely that (i) their transaction is in reality a loan agreement and (ii) they will either frame or disguise their transaction to appear to be a sale and leaseback agreement.[30] 'The court must make a finding of a real intention, definitely ascertainable which differs from the simulated intention found in the tenor of the agreement.'[31]

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[29] Op cit fn 27 at 1156F-G.
[30] Op cit fn 16 at 396.
[31] Op cit fn 13 at 309.

[29] An important corollary of these principles is that if the Court concludes, on the available and admissible evidence, that one of the parties genuinely intended to conclude a contract of type 'X' and did not intend to disguise it as a contract of type 'Y' then there can be no finding of simulation.[32]

[30] For the impugned transactions to be brought within the ambit of s 8(1)*(b)* read with s 8(4) *(f)* of the NCA, the transaction must provide for the deferral of the amount owed by one party to another and payment of a charge, fee or interest in respect of the agreement or the amount that is deferred.

[31] A review of the disputed transactions shows that they do not create, reflect, or suggest any legal obligation for the individuals to repay the property's purchase price to the Trust. Instead, the transactions merely grant an option to purchase the property, which may be exercised by the individual if certain conditions are met. Accordingly, there is no basis to conclude that any of the disputed transactions, on their face are simulated and qualify as credit agreements as defined in s 8 of the NCA.

Relief

[32] The Regulator was seeking wide-ranging and final relief in motion proceedings before the Tribunal. There was no confirmatory evidence from either of the complainants. Nor did the Regulator deliver a replying affidavit in response to the Trust's answering affidavit. No oral evidence was led by the Regulator. In the absence of supporting evidence on the papers, the Tribunal/Regulator should have summonsed the complainants to give oral testimony. The content of Mr Seabi's and Ms Slabbert's complaints, on their own, did not support a conclusion

[32] *Absa Ltd v Moore* [2015] ZASCA 171; 2016 (3) 97 (SCA) paras 26-27; Op cit fn 23 paras 144-145.

of simulation. At best for them, they were each misled as to the legal nature and import of the impugned transactions.

[33] On the well-known principle cited in *Plascon Evans (TVL) Ltd v Van Riebeeck Paints (Pty) Ltd*, [33] in seeking final relief the Trust's version must be accepted and as it was not far-fetched, inherently improbable, or capable of being dismissed on the papers alone. It was submitted by the Trust that when the cumulative factors are taken into account, there was no evidential basis for the Tribunal or the full court to conclude, on a balance of probabilities, that the impugned transactions were simulated credit agreements.

[34] The Regulator sought, and the Tribunal granted, the same relief in respect of the six other transactions, which the Trust volunteered it had concluded on similar terms and conditions with other sellers. In the case of those transactions, there is absolutely no evidence of those individuals' intentions regarding the conclusion of those transactions.

[35] The individuals who were the contracting parties in the other transactions did not deliver any complaints to the Regulator and were not parties to the proceedings before the Tribunal. There was, thus, no evidence to dispute the Trust's contentions in its answering affidavit regarding the other transactions.

[36] In the absence of such evidence, neither the Tribunal nor the full court was in a position to determine that they were simulated or tainted in any way. For all of these reasons, the Regulator has failed to show that the impugned agreements were disguised credit agreements, which fell to be set aside. The appeal must therefore succeed.

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[33] *Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd.* [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623; 1984 (3) SA 620 para 55.

[37] The following order is made:

1 The appeal succeeds with costs including the costs of two counsel where so employed.

2 The order of the full court is set aside and replaced with the following:

‘1 The judgment and order of the second respondent is set aside.

2 The first respondent is ordered to pay the costs of the appeal including costs occasioned by the employment of two counsel.’

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S E WEINER

JUDGE OF APPEAL

Appearances

For the appellants:	N Redman SC with E Fasser
Instructed by:	B Karolia Inc Cape Town Webbers Attorneys, Bloemfontein.
For the respondent:	M Makgato with V Qithi
Instructed by:	Lebethe Attorneys & Associates Inc, Johannesburg MM Hattingh Inc, Bloemfontein.