Republic of South Africa

IN THE TAX COURT OF SOUTH AFRICA
[WESTERN CAPE DIVISION, CAPE TOWN]

Coram: LE GRANGE, J

Assessor 1: MR DONOVAN BRINDERS

Assessor 2: DR JOACHIM VERMOOTEN

Case No: IT 13974 & 13993

In the matter between:

MS A	**FIRST APPELLANT**
MR B	**SECOND APPELLANT**

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	**FIRST RESPONDENT**

JUDGMENT DELIVERED – 24 MARCH 2017

LE GRANGE, J:

[1] This is an appeal against the decision of the First Respondent ("the Commissioner") who made an assessment for payment of transfer duty on a property which the Appellants purchased in terms of a written agreement entitled 'Offer of purchase (Sectional Title)' herein referred to as the Sale Agreement.

[2] The First Appellant, Ms A and the Second Appellant, Mr B are life partners. The Second Appellant is an admitted Attorney of this Court and appeared in person. The First Appellant was unable to attend court proceedings but filed

an affidavit associating herself with the principal submissions and contentions as advanced by Mr B. For ease of reference, I will refer to both as the Appellants.

[3] The material facts underpinning this matter in summary are the following. The Appellants entered into a Sale Agreement on 7 August 2009 as purchasers with KLM CC ("the Seller") for the purchase and sale of a sectional title unit described as Unit 100 in the sectional title scheme, together with 2 parking bays which are collectively known as "the Property".

[4] In the Sale Agreement it was *inter alia* recorded that Mr B would acquire the right of "*habitation"* and Ms A would acquire the *"bare dominium",* and that the Appellants would acquire (*"…the rights of habitatio and the bare dominium respectively but jointly…"*). The total purchase price was stipulated as R4 200 000.

[5] On 5 October 2009, the Appellants each signed a separate form titled "TD2 – Transfer Duty – Declaration by Purchaser – Transfer Duty Act, 1949 – Part 1" ("TD2"). The TD2 had been prepared by the Seller's attorneys and conveyancers. The salient features of the TD2 signed by Ms A are the following: Under the heading "Details of purchaser/transferee" the full names of Ms A is recorded and reflected "Ms A" as bare dominium holder.

[6] Under the headings "Consideration", "Total Consideration" and "Transfer duty payable on" the amount recorded is R2 869 103.40.

[7] The salient features of the TD2 signed by Mr B are the following: Under the heading "Details of purchaser/transferee" his full names are recorded as being "Mr B" as a right of habitatio. Under the headings "Consideration", "Total

Consideration" and "Transfer duty payable on" the amount recorded is R1 330 896.60.

[8] The standard use of notional rental income to determine the value of the right of habitatio by Mr B was not questioned and accepted by the Commissioner.

[9] The Appellants' calculated the transfer duty due and payable as follows:

Ms A (*bare dominium*)	**Consideration**	**Transfer Duty**
	R2 869 103.40	R174 526.77
Mr B (*habitatio*)	**Consideration**	**Transfer Duty**
	R1 330 896.60	R51 471.72

[10] The total amount according to the Appellants due and payable as transfer duty was in the amount of R225 998.49.

[11] The Commissioner did not accept this contention and proceeded to assess the transfer duty on the total purchase price of R4 200 000. The transfer duty as determined by the Commissioner, calculated on the total purchase price of R4 200 000, amounted to R281 000 which brings about a marginal difference in the amount of R55 001.51, more than what the Appellants calculated was payable as transfer duty to the Commissioner.

[12] The amount of R281 000 as assessed by the Commissioner was paid by the Appellants without prejudice.

[13] In the Appellants statement of grounds of appeal, the principal contention was that on a proper reading of the Sale Agreement both Appellants acquired two separate real rights, namely the right to habitatio and the right to bare dominium from the Seller, and as such transfer duty should be assessed on

two distinct and divisible transactions and not on the full consideration as recorded in the Sale Agreement.

[14] On appeal, Mr B elected to testify. He explained how it came about that Ms A and himself entered into the Sale Agreement and the rationale behind it. According to Mr B he is a director of a law firm and as such personally liable for debts of the firm. Mr B testified that the sole reason why the Appellants chose the structure of the transaction was to protect the Property against potential creditors of himself. Moreover, according to Mr B, the fact that the parties agreed the Appellants would acquire the rights of habitatio and the bare dominium respectively but jointly was to ensure a simultaneous formation of the Sale Agreement. Mr B further evidenced the effect of the manner in which the Appellants structured the transaction may comprise a substantially higher capital gains tax in the future and that the intention of both parties was not to reduce the incidence of paying tax. In fact, according to Mr B, the notional rental income was not readily available at the time of entering into the Sale Agreement to determine the appropriate consideration that must be attributed to the right of habitatio. Mr B also took umbrage against the suggestion in the Respondent's heads of argument that he is a specialist in property law.

[15] The Respondent elected not to call any *viva voce* evidence.

[16] The Commissioner's main contention in disallowing the Appellants objection is premised on the basis that the written sale agreement failed to make provision for separate considerations of the two distinct rights and as such deemed the transaction as indivisible. According to the Commissioner, more than one

"property" was acquired in one transaction with one composite consideration being the amount of R4 200 000.

[17] Counsel for the Commissioner, in argument advanced the proposition that on a proper reading of the Sale Agreement the rights purchased by the Appellants were not divided into separate considerations. Heavy reliance was placed on the ratio in the matter of *Prinsloo v Roets en Andere* 1962 (3) SA 91 (O) at 96 B-E, to support the contention that if one of the parties to the Sale Agreement wanted to cancel it, the Appellants could not do so individually but needed to act in concert. Furthermore, according to Counsel for the Respondent, the Seller in the present instance could only have sued for the composite purchase price as stipulated in the contract and not for the two separate considerations as stipulated in the transfer duty declarations. It was also contended that at the time of acquisition the amount stipulated in the contract was R4 200 000 and as such the liability for transfer duty in terms of the Transfer Duty Act 40 of 1949 as amended ("the Act") is payable at acquisition and not at transfer. Counsel for the Commissioner further argued, the fact that separate considerations were not reflected in the Sale Agreement must give rise to the inference that the Seller was not willing to bind himself to this arrangement as it could potentially have led to an encumbrance of his property.

[18] The Commissioner does not take issue that the right of habitatio is a real right for the purpose of the definition of "property" in terms of the Act and that transfer duty is payable on the granting of such a right. The formula used and the correctness of calculating the amounts as reflected by the Appellants for acquiring their respective real rights on their transfer duty declarations are also not in issue. In fact, Counsel for the Commissioner during argument

conceded, that had the amounts as reflected in the TD2 documents by the Appellants been apportioned in the Sale Agreement it would have been as correct for the payment of transfer duty by the Commissioner.

[19] The legal scheme in terms of the Act applicable in this matter can be summarised as follows:

Section 1 of the Act defines the term "property" as:

> **"property"** means land in the Republic and any fixtures thereon, and includes—
>
> (*a*) any real right in land but excluding any right under a mortgage bond or a lease of property other than a lease referred to in paragraph (*c*); […]

Section 2 of the Act provides as follows:

> **Imposition of transfer duty.**—(1) Subject to the provisions of section 9, there shall be levied for the benefit of the National Revenue fund a transfer duty (hereinafter referred to as the duty) on the value of any property (which value shall be determined in accordance with the provisions of sections 5, 6, 7 and 8) acquired by any person on or after the date of commencement of this Act by way of a transaction or in any other manner, or on the amount by which the value of any property is enhanced by the renunciation, on or after the said date, of an interest in or restriction upon the use or disposal of that property, […]

Section 3 of the Act provides by whom, when and to whom duty is payable.

Section 3(1) reads as follows:

> The duty shall within six months of the date of acquisition be payable by the person who has acquired the property or in whose favour or for whose benefit any interest in or restriction upon the use or disposal of property has been renounced.

Section 5(1) of the Act, at the relevant time read as follows:

> **Value of property on which duty payable**—(1) The value on which duty shall be payable shall, subject to the provisions of this section—
>
> (*a*) where consideration is payable by the person who has acquired the property, be the amount of that consideration; […]

[20] It is now well accepted in our law that the value on which duty must be paid is the consideration payable by the person who has acquired the right to acquire the ownership of the property. In this regard see *Commissioner for Inland Revenue v Freddies Consolidated Mines Ltd* 1957 (1) SA 306 (A) at 311 D.

[21] At the heart of the dispute between the parties is whether the rights acquired by the Appellants respectively comprised the composite amount as recorded in the Sale Agreement and therefore indivisible or whether it is two distinct transactions and divisible for the purposes of calculating the transfer duty.

[22] It is further accepted in our law that the determination whether a contract, as in the present instance, is divisible or not for the purpose of paying transfer duty is a matter of interpretation. Our courts have in deciding upon the divisibility of a contract always adopted the following approach: '*the appropriation of separate considerations is a crucial point in deciding upon the divisibility of a contract'* and where *'the parties have not divided the consideration and there is nothing to show what consideration should go to one portion of the subject matter and what should go to the other',* the contract would ordinarily be regarded as indivisible. In this regard see *Modder East Orchards Ltd v Receiver of Revenue* 1924 TPD 14 at 19; *Receiver of Revenue v Troye* 1923 TPD 14 and *Estate Wright v Registrar of Deeds* 1911 CPD 611.

[23] The current state of our law regarding interpretation of statutes or contracts has recently been fully discussed in the matter of *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para [18] where the following was held:

> Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, 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 light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. […] The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.

[24] With these stated principles as guidelines, in the present instance, the contention by the Commissioner that in terms of the Sale Agreement the "property" was acquired in one transaction with one composite consideration and that the purchase of the right of *habitatio and* the *bare dominium* was indivisible, is in my view misguided.

[25] On a plain reading of the Sale Agreement in *casu*, the Seller sold two distinctive rights albeit jointly in one Sale Agreement respectively to the

Appellants. Viewed objectively, having regard to the purpose of the provision and the background to the preparation of the document, although one composite amount of R4 200 000 was reflected in the contract, two different persons acquired two different forms of property distinctively from each other.

[26] It is now well established in our law that the liability of transfer duty is determined with reference to the date of acquisition of the right to acquire ownership of the property and as contemplated in the Act, transfer duty must be paid within six months from that date. See also *Freddies Consolidated Mines Ltd*, supra at 311 D, it follows that transfer duty would become payable on the value of the property so acquired (see *Minister of Finance v Gin Bros and Goldblatt* 1954 (3) SA 881 (A) at 885).

[27] In the present instance it is not in dispute that the value of the right to habitatio by the parties was correctly computed and the standard method of valuation as stipulated in the 'Transfer Duty Guide' by the Commissioner was adhered to.

[28] In my view on the facts of this case, it cannot be that the mere absence of an appropriation of separate considerations to the different portions of the subject matter in the present Sale Agreement must only be interpreted to mean that the contract is indivisible. Each case must be decided on its own facts.

[29] There are many instances where properties are sold with a composite amount and it is only at the signing at the 'declaration stage' for the payment of transfer duty that an allocation is made. In this regard see *Rosen v Ekon* 2001 (1) SA 199 (W) at 212. Moreover, the purchase price in a deed of sale at most serves as a guideline on what transfer duty is payable. Indeed, the Commissioner is in terms of section 5(6) of the Act obliged, if he or she is of

the opinion that the consideration payable or the declared value is less than the fair value of the property in question, to determine the fair value of the property for the proper calculation of duty payable thereon. See also *Brink v Wiid* 1968 (1) SA 536 (A) at 543 G.

[30] The Appellants did indeed apportion the consideration in the transfer duty declaration. Moreover, each of the Appellants did not acquire the full property in terms of the Sale Agreement and therefore could not be individually assessed on the full purchase price to pay transfer duty.

[31] Much has been made by Counsel for the Commissioner regarding the issue of cancellation and if one of the parties to the Sale Agreement wanted to cancel it, the Appellants could not do so individually but needed to act in concert. It was also contended that the Seller in the present instance could only have sued for the composite purchase price as stipulated in the contract and not for the two separate considerations as stipulated in the transfer duty declarations, to give force to the argument that the Sale Agreement is indivisible.

[32] This argument in my view loses sight of the rights the Appellants acquired in terms of the Sale Agreement and that the composite purchase price can only be regarded as a guideline for the purposes of paying transfer duty. Furthermore, Mr B could in terms of the Sale Agreement only be able to claim from the Seller the granting of the right of *habitatio* and could do so independently of Ms A. If the Seller had counter-claimed for payment from Mr B, the Seller could not have (absent clause 9(a) of the Sale Agreement) been able to claim the aggregate amount of R4 200 000 from Mr B, but only the proportionate amount which was stipulated in TD2. The suggestion that the Seller probably did not want the separate considerations be reflected in

the Sale Agreement as it may potentially have led to an encumbrance of his property, is in my view, based on pure speculation. That suggestion was also not put to Mr B when he gave oral evidence. There is nothing on the objective facts and evidence before this Court to support such a conclusion. On the contrary, all the evidence suggests that the Seller was in agreement with the Appellants.

[33] On the stated facts of this case, to enforce the contentions of the Commissioner would in my view undermine the purpose of the particular contract between the parties. There is also no evidence that the apportionment as recorded in the Appellants TD2 declarations are less than the fair value for their individual property acquired.

[34] It follows that the Sale Agreement between the parties is divisible for the purpose of paying transfer duty.

[35] For these reasons the Appellants objection against the Commissioner's assessment to pay transfer duty on the property acquired by them must succeed. The Appellants are therefore entitled to pay transfer duty on their respective acquired property as calculated in their TD2 declarations.

[36] It follows that the appeal must succeed.

Costs

[37] The Appellants are seeking a costs order in their favour for a variety of reasons. It is unnecessary to repeat all the stated reasons.

[38] It is well accepted that a Court may grant an order of costs in favour of a party if *inter alia* the Commissioner's grounds of assessments are unreasonable or if the tax board's decision is substantially confirmed on appeal.

[39] In this instance it would only be just and equitable that the Appellants be awarded an order of costs. Moreover, the Appellants appeal was also upheld by the Tax Board.

[40] In the result, the following order is made:

The Appeal succeeds with costs.

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LE GRANGE, J