

SUMMARY OF THE JUDGMENT

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>> PROPERTY LAW UPDATE

TRANSFER DUTY CALCULATION: ARRANGEMENT TO SEPARATE BARE DOMINIUM AND *HABITATIO* MAY REMAIN A SINGLE TRANSACTION ATTRACTING HIGHER TRANSFER DUTY

Commissioner for the South African Revenue Service v Short and Another (A289/2017) [2018] ZAWCHC 9 (7 February 2018)

Structuring a property purchase so that you buy the property (the bare dominium) and your partner a right of habitatio, could be an effective way of protecting the former against business risks of the latter. But remember that in determining the amount of transfer duty, calculated on a sliding scale, it is not so simple to argue that such an arrangement is two separate agreements and hence justifying a lower rate of transfer duty (calculated in respect of the separate transactions). In this case the Court agreed with SARS's take that this was a single indivisible transaction and that transfer duty was payable on the whole amount of the transaction.

The Judgment can be viewed [here](#).

FACTS

The Commissioner for the South African Revenue Service (CSARS) has come on appeal from the judgment of the Tax Court (Cape Town) upholding the appeal by Short and Jacobs (who are life partners) to that court against the assessment by SARS of transfer duty on the value of the property acquired by them in terms of an agreement they concluded, as purchasers, with Morrow Investments 252 CC, as seller, in respect of an apartment in a sectional title development in Green Point, Cape Town.

Pursuant to the terms of the agreement, ownership of the apartment was transferred to Short subject to a right of *habitatio* registered in favour of Jacobs. The facts showed that Short and Jacobs bought the apartment to be their home. The idea that Short should be registered as the sole owner, with Jacobs having a registered right of *habitatio*, was intended to provide them with protection against the possibility of losing their home should Jacobs, who is a partner in a firm of attorneys, happen to be faced with a crippling liability in consequence of any large claim that might be made against the firm. The registered right of *habitatio* (which would endure for Jacobs' lifetime) would afford Jacobs security of occupation in respect of the property and by virtue of its legal character would not be exigible by his creditors. (It seemed implicit in the scheme that should the couple choose to sell the property and live elsewhere, Jacobs would renounce his right of *habitatio* so that full dominium of the property could be transferred to a purchaser.)

By reason of the definition of 'date of acquisition' in section 1 of the Transfer Duty Act 40

of 1949, transfer duty became payable by the purchasers within six months of the conclusion of the agreement. In terms of section 14 of that Act, the parties to any 'transaction' by which 'property' is acquired are required to furnish declarations in the prescribed form to the Commissioner for transfer duty purposes.

Short and Jacobs completed separate transfer duty declarations, thereby implying that two transactions had been entailed. SARS declared that Short had acquired the 'bare dominium' of the property for a consideration of R2, 869,103.40, and Jacobs separately declared that he had acquired the right of *habitatio* for a consideration of R1,330,896.60. No mention of any consideration in the aforesaid amounts was made in the deed of sale, but added together they make up the sum of R4,2 million that was stipulated in the contract as 'the purchase price'.

The seller, on the other hand, made a single transfer duty declaration in which, under 'Details of purchase transaction', it was indicated that transfer duty was payable on R4,2 million 'being total consideration'. The seller's declaration gave the details of the purchaser(s)/transferee(s) as follows: Short's name ('bare dominium holder') and Jacobs' name ('right of *habitatio*'). The fact that the seller made a single transfer duty declaration necessarily implied that it considered that its disposal of the property had involved a single transaction.

Treated as separate transactions in accordance with Short and Jacobs' transfer duty declarations, and because the rate of transfer duty is determined on a sliding scale in terms of section 2(1)(b) of the Act, the total amount of duty payable would be R225,998.49 (R174,526.77 in respect of the declared value of the 'bare dominium' and R51,471.72 in respect of the value imputed in respect of the right of *habitatio*). The Commissioner determined, however, that the transfer duty fell to be calculated on the amount of R281,000 with reference to the agreed consideration of R4,2 million in respect of a single transaction.

Short and Jacobs paid the transfer duty in the amount assessed by the Commissioner under protest. Their subsequent appeal against the Commissioner's determination was upheld by the Tax Board and thereafter also by the Tax Court.

This matter deals with the Commissioner's appeal.

HELD:

- The court *a quo* erred in being distracted by the fact that each of the purchasers stood to acquire separate and distinctive rights in the property under the agreement. The fact that separately registerable rights were to be acquired by the purchasers

was not determinative of the question, but rather begged the question whether the acquisitions were in terms of a single integral (or unitary) transaction or two transactions.

- In order for Short and Jacobs' contention to prevail, the reservation of a right of *habitatio* in favour of Jacobs would have had to be an acquisition that was independent of, and not integral to, the transfer of title of the property from the seller to Short. For transfer duty purposes, an objective determination had to be made whether one or two transactions were in fact involved, and that turned on the proper construction of the parties' contract.
- There were a number of salient pointers in the deed of sale supporting a deduction that the contracting parties contemplated a single indivisible transaction. These are, amongst others:
 - The agreement expressly refers to the purchasers as acting 'jointly' as parties to the contract.
 - The undertaking by the purchasers of joint and several liability 'for all obligations in terms [of the agreement]' is irreconcilable with the contention that the intention was to enter into two divisible transactions. It would serve no purpose if each of them undertook several liability for the full purchase consideration of R4,2 million if the whole contract did not fall to be performed integrally and indivisibly.
 - Only a single purchase price is given; there is no indication that separate prices had been agreed upon between the seller and the purchasers for the right of *habitatio* and the bare dominium.
 - The contract would fail to comply with the formalities prescribed in terms of the Alienation of Land Act if it were characterised as giving rise to two discrete transactions. In order to comply, the agreed price for each sale would have had to be expressed in the deed of alienation.
 - Transfer was to be given only against payment of the agreed consideration of R4,2 million; the agreement gives no indication that either of the purchasers would be entitled to part performance against payment of a lesser amount than the full stipulated price.

- Commission calculated at 3,5% of the stipulated R4,2 million purchase price was payable by the seller to the estate agent upon conclusion of the agreement. In clause 14(b) the parties agree that the estate agent was the effective cause of 'this sale'. The wording sensibly relates to only one, not two, transactions, having been involved.
- Whilst it is plain that the seller's object was to achieve payment of a contract price in the full amount of R4,2 million out of the transaction, it is equally evident that the scheme of Short and Jacobs to protect their intended home against the Jacobs' potential creditors could not be realised, other than incidentally, if the contract were not implemented as 'a unitary transaction'.
- The Court therefore concluded that the ordinary import of the language of the contract, when it is read as a whole, supported a deduction that this was one transaction. Any commercial sense as between the purchasers and the seller went against the meaning contended for by Short and Jacobs.

The appeal succeeded.

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