REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA, WESTERN CAPE

CAPE TOWN

Case no: A 91/2012

In the matter between:

MARIANA BOSCH	**Appellant**
IAN McCLELLAND	**Second Appellant**
and	
THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES	**Respondent**

JUDGMENT

WAGLAY J

[1] I have had the pleasure of reading the judgment prepared by my brother, Davis J, and agree with his reasons and the order that he proposes to make. I have one difficulty with the judgment and that relates to Davis J's interpretation of the judgment referred to as the *NWK* judgment.

[2] In paragraph [78] of his judgment, he says:

> *"...there is nothing in the careful judgement of Lewis JA which supports the argument that the reasoning as employed in NWK was intended to alter the basic principles developed over more than a century regarding the determination of a simulated transaction for the purpose of tax".*

[3] After making the above point in paragraphs [79] to [83], Davis J feels obliged to restate the law as it exists (or existed before *NWK*) with respect to what constitutes a simulated transaction. Finally after referring to the analysis of *NWK* by E. Broomberg SC,[1] where Broomberg contends correctly in my view, that the *NWK* judgment seeks to hold previous judgments involving alleged simulated transactions as being wrong, Davis J states:

> *"...without an express declaration to that effect, NWK should be interpreted to fit within a century of established principle, rather than constituting a dramatic rupture"*[2]

[4] Such interpretation would be somewhat strained. *NWK* is a dramatic reversal of what has been a consistent view of what constitutes a simulated transaction.[3] *NWK*, considered in its entirely, not by extraction of words and phrases out of their real context, does in fact lay down the rule that any transaction which has as its aim tax avoidance will be regarded as a simulated transaction irrespective of the fact that the transaction is for all purposes a genuine transaction.

[5] There is no doubt that the scheme implemented by the Foschini Group which benefitted the applicants was a scheme devised at tax avoidance and not tax evasion. The fact that I agree that the transaction entered into between the applicants and the Foschini Group was a complete transaction without any

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[1] In his paper NWK and Founders Hill published in 2012 *The Taxpayer* (60) page 187
[2] See paragraph 86 (supra)
[3] This is dealt with earlier by Davis J.

suspensive conditions cannot save the applicants from the Commissioner's assessment because in terms of the *NWK* judgment, the transactions would amount to a simulated transaction. Respondents' reliance on the *NWK* judgment is therefore not without merit.

[6] The appellants on the other hand argue that the *NWK* judgment has no application in the present dispute because it deals with transactions that are concluded to evade tax rather than avoid it.

[7] Before one is bound to a precedent setting judgment and is obliged to follow it, the judgment must be clear and unequivocal, it must be plain, unmistakable and explicit in its rejection of previous judgments which it seeks to reverse and it must be applicable to the facts in the matter before the court confronted with its possible application. While I do not believe that the reversal must be express, the reasoning should demonstrate a departure from previous binding judgments. *NWK* does not in my view do so. It does not provide any reasons why the judgments aptly dealt with by Davis J in paragraph [79] to [83] are no longer good law. This is further compounded by the troubled equivalence in the judgment of the phrases "tax avoidance" and "tax evasion" two very distinct concepts.

[8] In *NWK*, the court goes on to say:

> *"...if the purpose of the transaction is only to achieve an object that allows the evasion of the tax, or a peremptory law, then it will be regarded as simulated". (My emphasis)*

[9] Having regard to the above, *NWK* cannot be read to serve as a precedent in this case where evasion is not the issue .In any event, any transaction which has its purpose tax evasion is unlawful as tax evasion constitutes a criminal offence in terms of the Income Tax Act,[4] *NWK* cannot therefore be authority for setting aside a transaction as simulated by reason of being a vehicle for tax evasion as this is automatic in terms of the law. On the other hand if the words "evasion of

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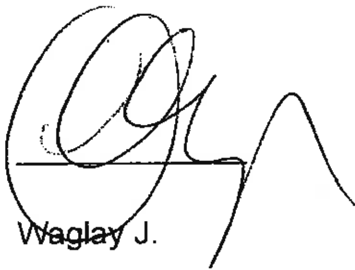
[4] Act 58 of 1962, and is punishable in terms of s104(1).

tax" are to be substituted with "avoidance of tax" then the dictum goes against the accepted practice in our Income tax law which permits transactions aimed at tax avoidance.[5] Furthermore the confusion created by the judgment,[6] mitigates against it serving as a precedent binding upon the lower courts.

[9] Save for the aforesaid, I agree with the order made by Davis J.



Waglay J.

[5] Practice note no3 of 1 April 1987 issued by the South African Revenue Services.

[6] This is demonstrated by the fact that Davis J holds that *NWK* does not intend to depart from the "century" old precedent whilst tax law commentator E Broomberg avers it does.