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CORPORATE & COMMERCIAL ALERT

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Double trouble: The limited application of the *in duplum* rule

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CLIFFE DEKKER HOFMEYR

Double trouble: The limited application of the *in duplum* rule

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In De Vasconcelos & others v Business Partners Limited (637/2018) [2019] ZASCA 80, De Vasconcelos approached Business Partners for funding for his businesses, for which he stood surety. Pursuant to the funding arrangement, the Eastprop Property Trust (Trust), represented by De Vasconcelos, and Business Partners entered into an interest-bearing loan agreement and a separate royalty agreement. In terms of the royalty agreement, a particular amount would become payable by the Trust to Business Partners (Royalty Payment) at the end of the seven-year period afforded to the Trust for repayment of the loan. Such amount would become immediately repayable if the Trust defaulted on its payments under the loan agreement.

The Trust defaulted on its loan repayments, requiring the Trust to pay the Royalty Payment immediately. The Trust settled the repayments under the loan agreement but objected to paying the Royalty Payment on the basis that, amongst other things,

under the *in duplum* rule Business Partners could not claim interest on the capital amount of the loan agreement in excess of the outstanding capital amounts. They contended that the Royalty Payment was equivalent to, and essentially “disguised”, interest on the capital amount under the loan agreement.

The SCA found that, albeit that the *causa* for both the loan agreement and the royalty agreement was the funding provided to the Trust, there was a clear distinction between the two agreements and the repayment obligation under the royalty agreement could not be added to the interest payment that accumulated under the loan agreement. The Royalty Payment therefore did not constitute arrear interest on the loan and the *in duplum* rule was therefore not applicable in the circumstances.

The defence raised De Vasconcelos – which was partially based on an argument that the Royalty Payment arrangement was a “simulation” – was probably always going to face a steep uphill battle. Many practitioners and academics, and a few recent SCA cases, have grappled with whether the law of simulated contracts was unsettled and expanded (and if so, to what extent) in *Commissioner for South African Revenue Service v NWK Ltd* (27/10) [2010] ZASCA 168, so at least from that perspective it is comforting to see that the simulation argument was given short shrift by both the SCA and the court *a quo*. This is especially so in an age where funding and concomitant profit-sharing type arrangements can be highly complex and nuanced.

Justin Roberts and Yaniv Kleitman

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