

## LIABILITY OF PARTIES TO A SHAM AGREEMENT

In the case of **Roazar CC v The Falls Supermarket CC 2017**, Falls Supermarket (hereinafter "**Falls**") leased a premises from Roazar Close Corporation (hereinafter "**Roazar**"). Apart from the main lease agreement, two other agreements between the parties were relevant, in terms whereof additional monies were agreed to be paid in cash by **Falls** to the individual members of **Roazar**. So-called off-the-record payments or "kickbacks".

The additional agreements were entered into when a previous lease agreement came up for renewal. **Roazar** demanded **Falls** to pay each member R65'000 per month in cash in order to renew the lease agreement. Faced with losing the premises, **Falls** acceded and paid the amounts. However, **Falls** took legal advice and was told that the cash payments constituted an unlawful scheme to avoid tax. **Falls** stopped paying the amounts and accordingly averred that the two additional agreements were not real and were sham agreements. **Falls** notified **Roazar** that it wished to exercise the right of renewal that it claimed it had in the main lease agreement. The only real obstacle to a renewal was the demand by **Roazar** for the payment of kick-backs. **Roazar** sought the eviction of **Falls** from the premises.

Both parties agreed that the main lease agreement granted **Falls** an option to renew, but **Roazar** contended that the entitlement to renew was constrained by the performance of the payment obligations in the additional agreements. The court considered the true nature of the main lease agreement and the additional agreements. The court accepted the argument that the additional agreements constituted an act of fraud by hiding monies from the tax commissioner. The true nature of these additional agreements was thus illegal. Non-performance under the additional agreements was therefore no bar to the exercise by **Falls** of its entitlement to renew the main lease agreement.