REPORTABLE

IN THE SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

Case Number: A5015/2010

Date: 10/11/2010

In the matter between:

GERARDUS GOMES-SEBASTIAO Appellant/1st Respondent *a quo*

and

QUARRY CATS (PTY) LTD Respondent/Applicant *a quo*

JUDGMENT

C. J. CLAASSEN J:

[1] This is an appeal against the judgment and order handed down by Lamont J on 9 March 2010. The appeal is with leave of the court *a quo*.

[2] In the court *a quo* the respondent, as applicant, sought an order against the appellant, as first respondent, to be declared the owner of all the ordinary shares in the second respondent. The order sought was in the following terms:

> "1. That it be and is hereby declared that the applicant is the owner of all the ordinary shares in the second respondent ('the shares');

2. That the register of members of the second respondent be rectified in terms of section 115 of the Companies Act 61 of 1973, by deleting the name of the first respondent as a member of the second respondent and substituting the name of the applicant in the place of the name of the first respondent as the sole member of the second respondent;

3. That the first respondent's share certificate(s) be and is hereby cancelled and second respondent be and is hereby directed to issue a share certificate in respect (the) shares to the applicant in his name;

4. That the applicant bear the costs of this application, save in the event of opposition."

[3] The court *a quo* refrained from granting the order in paragraph 1 aforesaid and granted only the relief sought in paragraphs 2, 3 and 4 of the notice of motion.[1]

[4] For the sake of convenience and due to the absence of the second respondent in this appeal, reference will be made to the parties as follows: I will refer to the appellant as "Sebastiao", the respondent as "Quarry Cats" and the second respondent as "Laezonia".

THE FACTS

[5] Prior to 9 June 2004, Sebastiao was the holder of all the shares in Laezonia. On 9 June 2004 Sebastiao concluded an agreement in terms of which *inter alia* he sold his shares in Laezonia to Bitflow Investments 195 (Pty) Ltd ('Bitflow'). This agreement of sale was in writing and will

[1] The official order of court at p 266 of the record is incorrect and should be corrected to read as follows:

"1. The register of members of the second respondent is rectified in terms of section 115 of the Companies Act 61 of 1973 by deleting the name of the first respondent as a member of the second respondent and substituting the name of the applicant in the place of the name of the first respondent as the sole member of the second respondent.

2. The first respondent's share certificate(s) is cancelled and the second respondent is directed to issue a share certificate in respect of the shares in the name of the applicant;

3. The first respondent is ordered to pay the costs of the application including the costs consequent upon the employ of senior and junior counsel."

be referred to as "the Bitflow agreement".[2] The shares were sold for an amount of R12 000 000.00. The effective date was 1 April 2004 although the agreement was only signed on 9 June 2004. It would appear that a standard form of agreement of sale in respect of shares was used as certain clauses (clauses 5 and 6) were deleted with the words, "not used".

[6] Under the title "BENEFIT AND RISK", clause 7 states as follows:

> "Notwithstanding the provisions of 6 above, the benefit and risk in and to the subject matter and through it in the property and the assets shall pass to the Purchaser on the effective date and the parties shall have the same rights and obligations as they would have had if the property itself and the assets had been sold voetstoots by the Seller to the Purchaser with the risk passing on the effective date."

It will be noted that the reference to the provisions of clause 6 is incorrect as clause 6 was not used. It should also be noted that the clause does not refer to the "ownership" in the shares being transferred. The benefit and risk in the shares are to pass to the purchaser being Bitflow on the effective date (1 April 2004), "voetstoots".

[7] Attached to this agreement of sale is "Annexure 'A'" consisting of a list of assets purchased stipulating certain fixed assets, two crushing plants and a farm. Clause 2.1.4 defines "the assets" as the assets of the company listed in annexure "A". The reference to "assets" in clause 7 must therefore be interpreted as a reference to the assets mentioned in annexure "A".

[8] Of some moment is the fact that this sale agreement does not impose any duty upon Sebastiao to transfer the shares into the name of Bitflow by delivering a signed transfer form in respect thereof nor does it stipulate that the share register in Laezonia is to be corrected indicating

[2] See the agreement attached to the Founding Affidavit as Annexure PB3 at pp 31 – 44 of the Record

Bitflow as the holder of all the shares in Laezonia in the place of Sebastiao.

[9] On 13 November 2006 Bitflow in turn concluded an agreement of sale with Quarry Cats in terms whereof Bitflow sold all the shares in Laezonia to Quarry Cats ('the Quarry Cats agreement').[3]

[10] The Quarry Cats agreement determined the effective date as 1 March 2006 although it was only signed on 13 November 2006. It further defined in clause 2.1.4 the term "the documents of title" as collectively meaning:

> "2.1.4.1 certificates in respect of the shares;
>
> 2.1.4.2 a transfer form in respect of the shares, duly completed and signed by the registered holder of the shares in accordance with the memorandum and articles of association of the company, dated not more than 3 (three) days prior to the signature date and blank as to transferee;
>
> 2.1.4.3 a resolution by the board of directors of the company authorising the sale of the shares to the purchaser;
>
> 2.1.4.4 a written and signed cession of the claims in favour of the purchaser;"

[11] The term "the shares" is defined as "100 ordinary par value shares of R1 each" as issued in Laezonia constituting 100% of the entire issued share capital of that company.

[12] Clause 3.1 declares the seller, being Bitflow in this case, to be the registered and beneficial owner of the shares. Clause 4 records the fact that the seller and purchaser agree to the sale and purchase of the shares upon the conditions of the contract. Clause 5 determines the price as being R100.00.

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[3] See the Agreement attached to the Founding Affidavit, Annexure PB2, on pp 19 – 30.

[13] In accordance with clause 6, the price had to be paid on the effective date against delivery of the documents of title to the purchaser. Clause 6 further requires the seller to deliver the documents of title to the purchaser on the effective date against payment of the purchase price. Of note is the fact that the actual delivery date for the documents of title was said to be 1 March 2006. Such delivery should therefore have taken place no less than nine and a half months prior to the actual date of signature. What is also of interest is that a similar provision did not appear in the Bitflow agreement.

[14] Clause 7 is of importance in this case and states:

> "**Ownership** of the risk in and benefit of the shares shall pass to the purchaser on the effective date against delivery of the documents of title to the purchaser." [Emphasis added]

Literally interpreted, this clause deals with the **ownership of risk** in the shares and **ownership of the benefit** in the shares. This would be absurd and such interpretation should be rejected. It will be accepted that the clause purports to deal with the time when ownership in the shares will pass. However, the clause thus interpreted, creates a further problem in that ownership is to pass on the effective date *pari passu* with the delivery of the documents of title. As indicated above, the effective date was 1 March 2006 which meant that ownership was to have passed on that date against the delivery of the documents of title. Thus interpreted, this clause introduces a fiction into the contractual relationship between the parties. It is, however, common cause that the documents of title as described in clause 2.1.4 were not delivered by Bitflow to Quarry Cats since these were still in the possession of Sebastiao. In fact, to the present day Sebastiao has failed to deliver these documents of title to Bitflow and/or Quarry Cats.

[15] The aforesaid conundrum is somewhat ameliorated by the warranties contained in clause 8 which states as follows:

> "8.1 The seller hereby warrants in favour of the purchaser that, on the signature date **and** the effective date –
>
> 8.1.1 the seller was **and will be** the true and lawful owner of the shares and the claims;
>
> 8.1.2 the seller was **and will be** entitled to dispose of the shares and the claims; and
>
> 8.1.3 no person has any right including (but without limitation) any option or right of first refusal to purchase any of the shares or the claims." [Emphasis added]

It seems clear that the parties contemplated past and future elements in their agreement regarding the sale of the shares.

[16] Quarry Cats performed all its obligations to Bitflow in terms of the Quarry Cats agreement. Notwithstanding the Bitflow and Quarry Cats agreements, Sebastiao is still currently reflected in Laezonia's share register as the registered holder of the shares. When called upon by the attorneys acting on behalf of Quarry Cats to hand over the documents of transfer in respect of the shares, Sebastiao refused. His refusal was based on the fact that he would only do so upon the return of the so-called "excluded assets", being all assets not mentioned in annexure "A".[4] Hence, Quarry Cats was compelled to seek relief through the courts by initiating the application in the court *a quo*.

JUDGMENT OF THE COURT *A QUO*

[17] The court *a quo* found that Quarry Cats indeed established that all its obligations in terms of the Quarry Cats agreement had been complied with. However, because Bitflow did not deliver the documents of title to

[4] See the letters in Annexure PB5 dated 9 March 2009 and Annexure PB6 dated 20 March 2009, Record pp 126 – 129.

Quarry Cats, the question arose whether ownership of the shares did in fact pass to Quarry Cats seen in the light of the provisions of clause 7 of the Quarry Cats agreement. The court *a quo* found that ownership of the shareholding vested in Bitflow but not in Quarry Cats. In this regard the court *a quo* held as follows:

> "It appears to me that absent delivery of the documents, the Applicant (Quarry Cats) did not become the owner of the shares. Currently in my view accordingly the ownership of the shareholding vests in Bitflow. This being so the Applicant has no real right to the shares, which he is able to exercise against the world. It has only personal rights which it is able to exercise against Bitflow. This however, is not the end of the matter as rights are conferred upon persons who are entitled to be registered by Section 115 of the Act. (Companies Act 61 of 1973)"[5]

The court also held that rectification of the share register in terms of section 115 is not reciprocal to the transfer of shares. As a result of the aforesaid finding the court *a quo* did not issue a declarator that Quarry Cats was the owner of the shareholding in Laezonia as petitioned for in paragraph 1 of the notice of motion.

[18] With reference to the provisions of section 115 of the Companies Act, the court concluded that the "crisp question is whether or not a person whose name is without sufficient cause omitted from the register, has the right to be so registered." After referring to certain case law, the court concluded that Quarry Cats established its entitlement against both Bitflow on the one hand and Sebastiao and Laezonia on the other for relief in terms of section 115. The court held that in those circumstances Quarry Cats was entitled to be reflected as the shareholder of the shares in the shares register of Laezonia.

[19] The court further rejected the contention that Quarry Cats failed to make out a case in the founding affidavit. The belated reliance by Sebastiao on

[5] See Record p 262, lines 13 – 16

the provisions of article 31 of Laezonia's Articles of Association was also rejected.

THE LAW

[20] The previous controversy[6] as to the manner in which ownership of incorporeal rights can be transferred and the requirements for a valid cession have now become settled law. In **Botha v Fick** 1995 (2) SA 750 (AD) it was held that ownership in shares can pass from the cedent to the cessionary in the absence of delivery of the instrument recording the rights and without the application of the "all effort" doctrine. In this regard the unanimous judgment in the **Botha** case, held at pp 778F – 779B as follows:

> "Om op te som:
> 1. Blote *consensus* is voldoende om sessie daar te stel.
> 2. Sessie geskied deur middel van 'n oordragsooreenkoms wat sal saamval met, of voorafgegaan word deur, 'n *justa causa*. Die *justa causa* kan 'n verbintenisskeppende ooreenkoms wees.
> 3. 'n Vorderingsreg wat in 'n dokument beliggaam word en wat nie onafhanklik van die dokument kan bestaan nie, soos 'n verhandelbare stuk, moet onderskei word van 'n vorderingsreg wat deur 'n dokument bewys word en wat onafhanklik van die dokument bestaan, soos 'n aandeel in 'n maatskappy ten opsigte waarvan 'n aandelesertifikaat uitgereik is.
> 4. Waar laasgenoemde soort vorderingsreg gesedeer word, is nóg lewering van die geskrif aan die sessionaris nóg voldoening deur die sedent aan die sogenaamde leerstuk van 'all effort' 'n geldigheidsvereiste vir die sessie.
> 5. Die regsplig wat op 'n geregistreerde aandeelhouer rus wat sy aandele verkoop om 'n aandelesertifikaat en 'n voltooide oordragsvorm aan die koper te lewer, spruit voort uit die verbintenisskeppende verkoopooreenkoms en is nie 'n geldigheidsvereiste van die sessie deur middel waarvan die reg en titel ten opsigte van die aandele oorgedra word nie.
> 6. Die reël waarna in *Labuschagne v Denny*[7] (*supra* te 543 *in fine* – 544B) verwys is, is nie 'n reël van die substantiewe reg nie en dit stel geen geldigheidsvereiste vir sessie daar nie.
> 7. Laasgenoemde reël kom slegs op 'n bewysaangeleentheid neer waarvolgens lewering as 'n belangrike faktor – moontlik 'n deurslaggewende faktor – beskou sal word waar die vraag ontstaan of

[6] See Scott "The Law of Cession" Second Edition paragraphs 4.1.2, 4.1.3, pp 27 – 44.
[7] 1963 (3) SA 538 (AD)

> sessie bewys is al dan nie. Hierdie benadering is van toepassing ook in 'n geskil tussen sedent en sessionaris *inter partes*.
>
> In soverre die hierbo vermelde *dicta* met hierdie uitspraak in stryd was, was hulle verkeerd en behoort hulle nie gevolg te word nie."

[21] Had the court *a quo* applied the aforesaid *dictum* in **Botha v Fick** to the facts of the present case, it may have led to a finding that Quarry Cats was vested with ownership. The court *a quo* did not refer to this judgment, nor applied the law as set out therein to the facts of the present case. No investigation was pursued to establish whether or not the aforesaid rules of law were ousted by the express agreement of the parties in clause 7 of the Quarry Cats agreement. The fiction in clause 7 and the interplay between such fiction and the warranties in clause 8 were not dealt with either. Be that as it may, since there is no cross-appeal against this particular finding of the court *a quo* in regard to Quarry Cats' ownership of the shares, nothing need further be said in regard to this aspect of the case.

[22] Section 115 of the Companies Act reads as follows:

> "**115. Rectification of register of members**. –
>
> (1) If –
>
> (a) the name of any person is, **without sufficient cause**, entered in or omitted from the register of members of a company; or
>
> (b) default is made or unnecessary delay takes place in entering in the register the fact of any person having ceased to be a member,
>
> the person concerned or the company or any member of the company, may apply to the Court for rectification of the register.
>
> (2) The application may be made in accordance with the rules of Court or in such other manner as the Court may direct, and the Court may either refuse it or may order rectification of the register and payment by the company, or by any director or officer of the company, of any damages sustained by any person concerned.
>
> (3) On any application under this section the Court may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the

> register, whether the question arises between members or alleged members or between members or alleged members on the one hand and the company on the other hand, and generally may decide any question necessary or expedient to be decided for the rectification of the register." [Emphasis added]

[23] It is trite law that section 115 is concerned with the title to be on the shares register and not with ownership of shares in a company, although the court is empowered by the provisions of section 115(3) to determine the issue of ownership.[8] The *causa* for rectification of the register under section 115 is, however, not the same as that for ownership of shares. A court's jurisdiction under section 115 is unlimited. It has a wide discretion in the circumstances of each case.[9] Section 115 creates a statutory right to apply to court for the exercise by it of a statutory discretionary power.[10] The court's jurisdiction in terms of section 115 extends to instances where the inscription in a company's register was initially correct, but subsequently rendered such entry "without sufficient cause", as is alleged in the present case by Quarry cats.[11] The court has both a discretion and jurisdiction to rectify a company's register even in instances where the company is incapable or unable itself to do so.[12] In **Botha v Fick** *supra,* the rectification of the company's share register was ordered in the context of the enforcement of a purchase of shares. The company was ordered to issue the purchaser with a certificate in respect of the shares since the original certificate had been lost. In effect, this decision bypassed the express provisions of

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[8]See **Verrin Trust & Finance Corporation (Pty) Ltd v Zeeland House (Pty) Ltd and Others** 1973 (4) SA 1 (C) at 9G – H where Corbett J said:

> "A Court hearing such an application may, therefore, quite properly confine itself to the minor and direct dispute as to whether the register should be rectified or not and leave it to the parties thereafter to debate the question of ownership in a trial action. On the other hand, in terms of sub-sec. (3), the Court is empowered to investigate all questions in dispute between the parties and would, accordingly, be entitled to determine the issue as to ownership, if so advised."

See also **Boorman v Steynberg NO and Another** 2001(2) SA 1116 (CPD) at 1123/4.

[9] See Henochsberg on the Companies Act, by Meskin, Volume 1, p 220; **Botha v Fick** *supra* at 780C - D

[10] As a general rule rectification ought not to be effected without an order of court.

[11] See **Re Imperial Chemical Industries Ltd** [1936] 2 All ER 463 (Ch) at 469.

[12] See Henochsberg *supra* at p 222 and cases there cited.

section 133(2)[13] of the Act which prohibits the registration of a transfer of shares in the absence of the delivery to the company of a proper instrument of transfer. When the prohibition in section 133(2) finds application, the absence of the name of the transferee in the share register is justified by law and therefore not "without sufficient cause".[14] Despite this legal position the Supreme Court of Appeal applied section 115 and ordered the rectification of the share register. The court may also order the rectification to take effect retrospectively provided no injustice would result.[15]

[24] The importance of a company's share register is to be found in the fact that all who are reflected therein are regarded as members of the company. In company law the members are regarded as entitled to vote at meetings, appoint directors, receive declared dividends and in general influence the affairs of the company. In this regard section 103 of the Companies Act No 61 of 1973 states the following:

> "103. **Who are members of a company** –
>
> (1) The subscribers of the memorandum of a company shall be deemed to have agreed to become members of the company upon its incorporation, and shall forthwith be entered as members in its register of members.
>
> (2) Every other person who agrees to become a member of a company and whose name is entered in its register of members, shall be a member of the company.
>
> (3) A company shall, subject to the provisions of its articles, enter in the register as a member, *nomine officii* of the company, the name of any person who submits proof of his appointment as the executor, administrator, trustee, curator or guardian in respect of the estate of a deceased member of the company or

[13] Section 133(2) states: "Notwithstanding anything in the articles of a company, it shall not be lawful for the company to register a transfer of shares of or interest in the company unless a proper instrument of transfer has been delivered to the company; Provided that nothing in this section shall prejudice any power of the company to register as a member any person to whom the right to any share of the company has been transmitted by operation of law."

[14] See Konrad M Kritzinger "Share Transfer by mere Consensus?" (1995) 112 SALJ 389 at 398 – 400; J T Pretorius "Hahlo's South African Company Laws Through the Cases", 6th Edition (1999) at 166 – 167; Blackman, Jooste, Everingham, "Commentary on the Companies Act" Volume 1, p 5 – 319.

[15] See ***In re*** **Sussex Brick Co** [1904] 1 Ch 598 (CA); ***In re*** **MI Trust (Pty) Ltd v Morny's Motor Supplies (Pty) Ltd** 1952 (3) SA 262 (W); **Orr NO and Others v Hill and Others** 1929 TPD 885.

> of a member whose estate has been sequestrated or of a member who is otherwise under disability or as the liquidator of any body corporate in the course of being wound up which is a member of the company, and any person whose name has been so entered in the register, shall for the purposes of this Act be deemed to be a member of the company.
>
> (4) ....."

[25] It is evident from section 103(3) that the share register of a company renders those reflected therein as deemed members of the company. The names actually appearing in the register of members may not in fact be the actual owners of shares in the company. Hence, the provision for persons mentioned in the register to be deemed a member of the company. There is a clear distinction between membership of a company and ownership of shares in the company. Thus, the registration of transfer of shares must be distinguished from transfer of the rights of action (*jura in personam)* in the shares which, as between the seller and the purchaser, occurs (unless the terms of the contract indicate the contrary intention) merely upon an effective cession of such rights. Delivery of neither an instrument of transfer nor the share certificate is a requisite for such a cession.[16] Shares may be freely sold and assigned even though the original registration remains unaltered. They can pass from hand to hand and form the subject of many transactions without the original registration in the shares register being disturbed. In such instances, it is the mere naked registration that remains, and the fact that the original holder may still be in possession of the scrip or share certificates, makes no difference as such original holder no longer possesses any beneficial interest in the shares, or put differently, possesses no property in the rights of action which the shares represent.[17]

[26] As far back as 1922 it was recognised that the court was empowered to order the rectification of a company's share register subject only to the

[16] See **McGregor's Trustees v Silberbauer** [1891] 9 SC 36 at 38-9; **Randfontein Estates Ltd v The Master** [1909] TS 978 at 981-2; **Botha v Fick** *supra* at 778
[17] See **Randfontein Estates Ltd** *supra* at 982

conditions of the Companies Act. In **Adams v Central India Estates, Ltd and the Directors** 1922 (WLD) 135 at 139 this was held to be so by Ward J in circumstances where the transferor of shares had agreed to a clean transfer of the shares to the applicant as transferee. The court overruled the directors' refusal to rectify the share register and ordered that the applicant should be registered as a member of the company. This case was approved of by Coetzee J in **Herbert Porter and Another v Johannesburg Stock Exchange** 1974 (4) SA 781 (WLD) at 795H where the learned judge held as follows:

> "A body of substantive law has developed around company's legislation during the last century and one should be careful not to equate contractual with company situations when superficial likenesses appear. The case of *Adams v. Central India Estates Ltd. and the Directors*, 1922 W.L.D. 135… illustrates this danger. The *locus standi* of even the transferee of shares to seek such an order is confirmed, whereas it is quite unthinkable that, ***ex contractu*, a person who is not in privity with another could have a similar remedy**." [Emphasis added]

As I understand this decision, Coetzee J held that third parties, who are not privy to a contract of sale of shares, would not have *locus standi* to apply for a rectification of a company's share register.

[27] Section 115 provides a *sui generis* remedy for the rectification of a share register of a company, divorced from any actual ownership of shares in the company. It is a summary procedure akin to spoliation. The section provides for judicial intervention based largely on equitable principles in order to rectify the share register. It enables a court to go behind the share register and enquire what the true position is. The provisions of section 115 are intended to secure a reflection of the correct and/or *de facto* position in regard to membership of the company. It is not concerned with the formalities applicable to the sale and transfer of shares.

EVALUATION

[28] Sebastiao raised two points on appeal:

1. The first point relates to an alleged non-joinder of Bitflow to these proceedings;[18] and
2. The second point is whether, absent a finding that Quarry Cats is the owner of the shares, the relief ordered by Lamont J is competent.

Non-joinder

[29] From the outset, Sebastiao raised a defence of non-joinder contending that Bitflow allegedly had a substantial and legal interest in the present proceedings and should therefore have been joined since the court has no jurisdiction in this regard. Mr Gautschi for Sebastiao submitted that the finding of the court *a quo* that Bitflow was the owner of the shares, gives Bitflow such an interest so that the court could not grant an order in the absence of Bitflow. To do so would potentially cause conflicting decisions if Bitflow at some future date may wish to seek registration as a member of Laezonia. He submitted further that the affidavit of Mr Blackstock did not prove the current attitude of Bitflow to the application.

[30] Although Sebastiao denies it, Bitflow accepts that the Quarry Cats agreement came into effect and was implemented. Bitflow asserts no right in respect of the shareholding in Laezonia nor to be recorded in the share register as a member of Laezonia. Mr Brian Blackstock, a past director of Bitflow, confirms these facts in two confirmatory affidavits.[19] It is common cause that Blackstock acted on behalf of Bitflow and signed both agreements on its behalf.[20] On these facts, any substantial

[18] See Judgment, p 265, lines 5 – 15
[19] See Record pp 130 – 131 and pp 205 – 206.
[20] See paras 9 and 13 of the Founding Affidavit as read with paras 17 and 21 of the Answering Affidavit.

legal or other interest on the part of Bitflow is ousted. In my view, it is not the current attitude of Bitflow which is decisive, but the intention of the parties to the Quarry Cats agreement at the time of its conclusion. In that regard it is only Mr Blackstock who can testify to the attitude of Bitflow when the agreement was concluded.

[31] The notice of motion in paragraphs 2 and 3 seeks no relief against Bitflow. Quarry Cats' desire to be reflected as a member of Laezonia does not affect Bitflow, because Bitflow's name does not even appear on the current share register. The name of Sebastiao does so appear. It is the latter inscription which requires rectification according to Quarry Cats.

[32] In failing to grant the relief in prayer 1 of the notice of motion, the court *a quo* effectively removed the necessity to join Bitflow to these proceedings. The order can be executed without the participation of Bitflow. Such execution will not be to the prejudice of Bitflow. In any event, should Bitflow in future for some reason deem it entitled to be a registered member of Laezonia, the order granted by the court *a quo* would not affect Bitflow's rights to apply for a further rectification of the share register.

[33] The circumstances of the present case is comparable to the facts in the case of **Dreyer and MacDuff v New Marsfield Collieries Ltd** 1935 AD 318. In that case a party issued summons against a company to rectify its share register. But the company also wished to rectify its share register in conformity with the position prior to the taking of invalid special resolutions affecting entries in the share register. The appellants, Dreyer and MacDuff, were shareholders in the respondent company. They raised the question of the illegality of the resolutions. They sued for an order interdicting the directors of the company to proceed with

the execution of such resolutions. However, both the appellants and the respondent company agreed that proper legal steps to effect a reconstruction of the share register had not been taken. As such, the directors of the respondent company could not execute the special resolutions affecting the share register. At 321 *in fine*, Curlewis ACJ held as follows:

> "Now in the application before the court below there was no claim by the company against the appellants; the company merely sought to rectify its register of members in which certain entries had been made in pursuance of certain invalid special resolutions, to delete those names which had been illegally placed thereon, and to restore the register to its condition prior to the date of those resolutions. Nothing was claimed against appellants: there was no claim for anything due by them to the company. The appellants' names do not even appear on the list Y, and those whose names do appear there do not object to the rectification. There was no *contestatio* between the company and the appellants, no *lis* or suit or action. As was pointed out during the course of argument, an application to have a shareholder's name removed from, or placed on, the register of members might under certain circumstances imply a suit or action as between the company and the party, but those circumstances are not present here.
>
> As there was no claim *quod sibi debetur* by the company against the appellants, there was no suit or action pending between them in the court below, and no appeal lies to this Court against the decision of the court below."

[34] The Y list showed the entries which had been made in the register subsequent to the passing of the illegal special resolutions. Neither of the appellants' names appeared on this list. Similarly, in the present case the name of Bitflow also does not appear in the share register. If the appeal court in the **Dreyer and MacDuff** case held that potential shareholders whose names are not on the share register or list have no interest in the litigation, then I see no reason why Bitflow should have been joined in the present case. In the **Dreyer and MacDuff** case the matter was simply removed from the roll with costs as Dreyer and MacDuff had no legal or substantial interest in the rectification of the share register in that case. For the aforesaid reasons, I am of the view that the point *in limine* was correctly dismissed by the court *a quo*.

Relief in terms of Section 115 absent ownership of the shares

[35] When applying the legal principles[21] to the present case, the court *a quo* was correct in exercising its wide discretion when it ordered rectification of the share register of Laezonia to reflect the name of Quarry Cats in place of Sebastiao. The *de facto* position is that Sebastiao neither claims ownership in the shareholding of Laezonia nor a right to be reflected as a shareholder in its share register. He no longer alleges any beneficial interest in the shares. The mere naked registration of his name in the share register did not afford him any rights, only duties, i.e. to act as trustee for and on behalf of the person who does have a beneficial interest in the shares. As such, he has no valid basis to oppose the rectification applied for by Quarry Cats. His motivation in refusing delivery of the documents of title also has no basis in law or fact. Whether or not Sebastiao is entitled to the return of the so-called "excluded assets" in terms of his agreement with Bitflow, has no bearing whatsoever on Quarry Cats' entitlement to be reflected as the proper shareholder in Laezonia's share register. The dispute regarding the excluded assets is *res alios inter acta* as far as Quarry Cats is concerned. On Sebastiao's own showing, his rights against Bitflow regarding the excluded assets depend upon a rectification of the Bitflow agreement first being successful. Whether the Bitflow agreement is to be rectified or not, the rights of Quarry Cats cannot be influenced by it since its rights flow exclusively from the Quarry Cats agreement.

[36] The contentions of Sebastiao on appeal seem to fly in the face of the law in regard to the sale of shares as set out in the **Botha v Fick** case and the other authorities cite above. The contention is that no delivery took place of the shares either from Sebastiao to Bitflow or from Bitflow to Quarry Cats. As stated in the **Botha v Fick** case, such delivery of the

[21] See paragraphs [20] to [27]

share certificates is no longer a precondition for a valid cession in regard to such shares. Sebastiao has divested himself of all beneficial interest in the shares in Laezonia when he took receipt of the R12, 000,000-00 from Bitflow. In circumstances where neither Bitflow nor Sebastiao claim any beneficial interest in the shares, I see no reason why the name of Quarry Cats should not be reflected as a member in the share register of Laezonia. The position taken by Blackstock seems to be the true intention of both Quarry Cats and Bitflow, despite the failure to comply with the exact provisions of clause 7 of their agreement. Failure to comply with clause 7 is no impediment to relief under section 115 of the Act. Further more, it does not lie in the mouth of Sebastiao to rely on any alleged breach of the Quarry Cats agreement, to which he is not a party.[22] It is of no concern to him if the parties to another contract to which he is not privy, do not seek to enforce any of its terms. Hence, the court *a quo* was correct in holding that rectification of the share register is not reciprocal to the actual transfer of the shares.

[37] Mr Gautschi further contended that no allegation of any cession was made by Quarry Cats in its founding affidavit. In my view, this argument has no substance. It is unnecessary to expressly refer to a cession when reliance is placed upon an agreement of sale of shares to which the parties had reached consensus. It is this agreement of sale which constitutes the *justa causa* for the cession of the shares from the cedent to the cessionary. The facts clearly indicate that Bitflow and Quarry Cats had the *animus transferendi* and the *animus acquirendi,* respectively. This much is confirmed by the fact that the Quarry Cats agreement (as in the Bitflow agreement) determines the delivery date at a point in time several months prior to the actual signing of the agreement of sale. It cannot be said that the agreement contemplated a future transfer of rights which had not yet occurred, thus preventing the

[22] See **Herbert Porter** *supra* at p 795H

transfer of ownership. The agreement was merely the written recordal of the consensus which had already been reached in the past regarding their intention to pass transfer of ownership in the shares.

[38] Mr Gautschi also submitted that the articles of association, clause 31, prevented the transfer of shares and thus the rectification of the share register. Clause 31 states the following:

> "31. The instrument of transfer of any share in the company shall be in writing, and shall be executed by or on behalf of a transferor and, if the director so decide, by or on behalf of the transferee. The transferor shall be deemed to remain the holder of such share until the name of the transferee is entered in the register in respect thereof."

[39] It is noticeable that the deeming provision refers to "the holder of such shares". It does not deal with membership. In any event, it is a mere deeming provision. This entire case is concerned with the intention of Quarry cats to set the record straight by applying for a court order rectifying the register. In my view, clause 31 is a restatement of the principle that the seller, prior to transfer of a share to the purchaser, is in fact a trustee on behalf of such purchaser.[23] As trustee, the transferor is bound to act upon the instructions of the transferee. In this instance Sebastiao would be obliged to transfer the shares on the instructions of Quarry Cats as beneficial holder of the shares to Bitflow alternatively to Quarry Cats itself. In ***In Re*** **Joint Stock Discount Company v Nation's Case** [1866-67] L.R. 3 Eq 77 the articles of association had similar wording. These read:

> "8. The instrument of transfer of any share in the company shall be executed both by the transferor and transferee, and the transferor shall be deemed to remain a holder of such share until the name of the transferee is entered in the register book in respect thereof."

[23] See **Moosa v Lalloo** 1956 (2) SA 237 (D) at 239

Despite the deeming provision, the court rectified the share register of the company in line with the true facts in accordance with a Companies Act section similar to section 115 of our Companies Act.[24] In that case the Articles of Association contained a clause empowering the directors with a veto entitling them to decline the register of transfer of shares. Despite such veto the court rectified the share register.

[40] Finally, Mr. Gautschi submitted that section 115 finds application in cases which are limited to instances where the examples listed in section 103(3) apply and where the applicant for relief under section 115 was previously registered as a member in a company's share register. There is no substance in this argument. Section 115 is not exhaustive of the court's powers to order rectification of a share register. It does not negative all cases of alteration of the register other than those enumerated therein.[25]

[41] All told, this appeal proceeds on the curious premise that a party with no right to the shares, and with no significant interest in the relief sought, is the party actually seeking to prevent the court from ordering the company's register to be amended in order to record the current *de facto* position. The correct *de facto* position is indeed that Quarry Cats is the sole member of Laezonia. I agree with the submission made by counsel for Quarry Cats that Sebastiao attempted to steal a march on Bitflow by seeking to extract a benefit from Bitflow and/or Quarry Cats in opposing this application for the rectification of Laezonia's share register. In so doing, Sebastiao attempted to obviate the necessity for itself to institute an action for rectification of the Bitflow agreement and specific performance in terms of such rectified agreement. It would appear to me

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[24] See also ***In Re* Joint Stock Discount Company v Fyfe's Case** [1868-69] L.R. 4 Ch App 768.

[25] See Blackman Jooste and Everingham, "Commentary on the Companies Act" p 5 – 310 and the cases there cited.

that the opposition to Quarry Cats' application was ill-motivated and subject to ulterior motives which borders on the vexatious.

[42] Taking into consideration the aforesaid facts, I am of the view, that the court *a quo* correctly exercised its equitable discretion in granting the orders it did in regard to the rectification of Laezonia's share register.

CONCLUSION

[43] For the reasons aforesaid I am of the view that the appeal against the judgment of Lamont J cannot succeed and I therefore make the following order:

> The appeal is dismissed with costs which include the costs occasioned by the employment of two counsel.

DATED THE _____ DAY OF NOVEMBER 2010 AT JOHANNESBURG.

_____
C. J. CLAASSEN
JUDGE OF THE HIGH COURT

I agree

_____
D. S. S. MOSHIDI
JUDGE OF THE HIGH COURT

I agree

_____

C. E. NICHOLLS
JUDGE OF THE HIGH COURT

It is so ordered.

Counsel for the Appellant: Adv A. Gautschi SC and Adv N. Konstantinides
Counsel for the Respondents: Adv A. Subel SC and Adv M. F. Welz

Attorney for the Appellant: Van Hulsteyns Attorneys
Attorney for the Respondents: Rudolph, Bernstein & Associates

The appeal was argued on 27 October 2010

Date of Judgment: 10th November 2010