IN THE GAUTENG DIVISION HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

49397/2012 DSM

Case Number: ~~31974/2011~~

Coram: Molefe J

Heard: 24 July 2014

Delivered: 9 October 2014

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

09/10/2014 DSMolefe
DATE SIGNATURE

9/10/2014

In the matter between:

CARL JACOBUS POTGIETER	**FIRST APPLICANT**
ROBERT PIERRE SOLE	**SECOND APPLICANT**

and

TRADE – OFF 149 (PTY) LTD	**FIRST RESPONDENT**
E' MHLUZI (PTY) LTD	**SECOND RESPONDENT**
ENGELBRECHT KHUMALO	
VAN DER BERG INC ATTORNEYS	**THIRD RESPONDENT**
THE REGISTRAR OF DEEDS	**FOURTH RESPONDENT**
STEVEN TSHWETE LOCAL MUNICIPALITY	**FIFTH RESPONDENT**
SCHEPPER, MAINE SIMON	**SIXTH RESPONDENT**
KUNENE, MNKONKONI SYDNEY	**SEVENTH RESPONDENT**

JUDGMENT

MOLEFE, J:

[1] The applicants apply for the following relief against the Respondents:

1.1 That it be declared that the transfer of the immovable properties known as Portions 2, 4 and 5 of Erf 12941 Mhluzi Extension 4, Registration Division JS ("the property"), from the First Respondent to the Second Respondent on 23 November 2009, be declared void and unenforceable;

1.2 That the Fourth Respondent be ordered and authorized to amend its records to reflect the First Respondent as the owner of the said property;

1.3 That the Second, Sixth and Seventh Respondents be ordered to pay the costs of this application jointly and severally on an attorney and client scale.

This application is only opposed by the Second Respondent.

[2] The relief sought is clearly final in nature and requires the adjudication of the application in accordance with the *Plascon-Evans* rule[1].

[3] The application is brought on the principle that the Sixth and Seventh Respondents failed to comply with Section 228 of the Companies Act, 61 of 1973 ("The Act") when they purported to represent the First Respondent in selling the property to the Second Respondent. Furthermore, that the Sixth and Seventh Respondents acted fraudulently when selling and causing transfer of the property to the Second Respondent in that they ignored and failed to observe the peremptory legislation and the rights of the shareholders of the First Respondent at the time of the sale of the property.

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[1] Plascon-Evans Paints LTD v Van Riebeeck (Pty) LTD 1984 (3) SA 623 (A), at 634 E – 635 C.

[4] The relevant portions of Section 288 of the Act provide as follows:

"(1) Notwithstanding anything contained in its memorandum or articles, the directors of a company shall not have the power, save by a special resolution of its members, to dispose of –

(a) The whole or the greater part of the undertaking of the company; or

(b) The whole or the greater part of the assets of the company;

(2).....

(3) A special resolution of a company shall not be effective in approving a disposal described in subsection (1) or (2) unless it authorizes or ratifies in terms the specific transaction.

(4) An undertaking or assets of a company, and the part to be disposed of, shall be calculated for purposes of subsection (1) and (2) according to the fair value of the undertaking or assets as described in financial reporting standards.

(5)....."

Applicant's Case

[5] It is common cause that the First Respondent was formerly the owner of the property, and that the property constituted the First Respondent's only asset. On 23 November 2009 the property was sold, transferred and registered in the name of the Second Respondent. The sale of the property thus constituted the sale of the greater part of the First Respondent's asset.

[6] The First Respondent had 17 shareholders with the Sixth and Seventh Respondents acting as the directors of the First Respondent. The First Applicant holds 164 of the 1000 issued and allotted shares of the First Respondent and the

Second Applicant holds 163 of the 1000 issued and allotted shares of the First Respondent. The Applicants jointly hold 32,7% of the First Respondent's share capital.

[7] No special resolution as prescribed by Section 228 of Act was obtained from the First Respondent's shareholders for the sale of the property to the Second Respondent.

[8] Sixth and Seventh Respondents purported to represent the First Respondent during the negotiations, sale and transfer of the property to the Second Respondent and wilfully acted contrary to Section 228 of the Act. Their conduct in this respect constitutes fraud against the First Respondent and all the shareholders of the First Respondent including the Applicants. The result of the fraud committed by the Sixth and Seventh Respondents has the consequences that transfer of the property is vitiated and should be restored to the First Respondent.

[9] Applicants' Counsel[2] submits that the principle of *concursus creditorum* is to be applied herein where the Second Respondent made no enquires to confirm that there was full and proper compliance with Section 228 of the Act before transfer of the property. The conduct of the Second respondent is regarded as conspiracy with the Sixth and Seventh Respondents and is in line with *concursus creditorum* principle.

[10] It is the contention of the Applicants' Counsel that there can be no reliance on Section 28 (2) of the Alienation of Land Act 68 of 1981 as the Second Respondent has not made payment of the full purchase price to the First Respondent. The Sixth and Seventh Respondents authorized the Third Respondent, as transferring

[2] Advocate C Zietsman.

attorneys, not to collect the purchase price from the Second Respondent. It is applicants' submission that this conduct indicates the objectives of self-enrichment of the Sixth and Seventh Respondents at the expense of the First Respondent's shareholders. No proof of payment of the purchase price has been proferred by the Second Respondent and in the result, it is the Applicants' contention that the sale transaction has not been perfected.

Second Respondent's defences

[11] The Second Respondent opposes the application on the following grounds:

11.1 The Applicants have no *locus standi in iudicio* to bring the application;

11.2 The application has been settled and the settlement agreement precludes the applicants from proceeding with the application;

11.3 The debt that the applicants seek to recover has been extinguished as a result of prescription;

11.4 The requirements of Section 228 of the Act were substantially complied with;

11.5 The remedy sought by the applicants is bad in law as ownership of the property concerned has already been transferred to the Second Respondent.

Applicants' lack of locus standi in iudicio

[12] The Second Respondent denies that the Applicants are shareholders as alleged by them. The background to the sale of the property to the First Respondent

is that during or about 2007, the First Respondent purchased the property from the Steve Tshwete Local Municipality for an amount of R448 362,00 and the property was transferred to the First Respondent and held by it in terms of Deed of Transfer T139594/2007.[3] The property was transferred to the First Respondent subject to the following condition of title:

> *"That the PURCHASER shall be obliged to erect and complete a building which will comply with and be permissible in terms of the conditions of Establishment and Conditions of Title of the township, as well as the Town Planning Scheme and any applicable municipal by-laws, to the value of at least 2,33 TIMES THE PURCHASE PRICE OF THE ERF. This building shall be commenced within a period of one year from the date of sale and must be completed within a period of three years from this date."*

[13] This title condition in the Deed of Transfer was aimed at uplifting the local community by means of the building of a shopping mall on the property. The intention was at all times that the First Respondent would be the special purpose vehicle whereby a group of 14 local Black persons would as shareholders, be empowered by obtaining and developing the property.

[14] However, not having access to the money required to construct the shopping mall, the 14 shareholders were enjoined to involve the other persons in the venture, being the First and Second Applicants and Mr David Hanney ("Hanney"). The First Applicant is a civil engineer involved in the property development industry in Mpumalanga; the Second Applicant is a property broker who trades *inter alia* as a letting agent and Hanney is an architect. An agreement was reached between the 14 shareholders, the Applicants and Hanney, in terms whereof the three (Applicants and Hanney) would be granted shares in the First Respondent. The allotment of

[3] Appendices "TR5 to TR7" to the bundle pages 154 – 156.

shares to the three was conditional upon them procuring finance for the development of the property within the time provided for by the deed of transfer. In consequence of the agreement, the 1000 issued shares of the First Respondent were on 14 September 2009, allotted to the 14 shareholders, the Applicants and Hanney.

[15] The Applicants and Hanney failed then and at all to procure financing for the development, and as a result they were divested of their shares. This fact is confirmed by the Seventh Respondent and Hanney who does not regard himself as a shareholder of the First Respondent.[4]

[16] Second Respondents' Counsel[5] submits that the transfer of the shares concerned, back to the First Respondent required no formalities and occurred by cession premised upon the consent of the parties and in this regard relies on ***Botha v Fick 1995 (2) SA 750 (A)***. It is on this basis that Second Respondent's Counsel submits that the Applicants are not shareholders of the First Respondent and have no *locus standi in iudicio* to obtain the relief claimed.

[17] Applicants' Counsel argues that the Second Respondent relies on the Seventh Respondent's Confirmatory Affidavit, which affidavit does not comply with the requirements of an affidavit as the information of the Commissioner of Oaths is not provided. It is on this basis that the Applicants' Counsel contends that the Seventh Respondent's affidavit is not a valid document and that it should be struck from the papers. It's Counsel's submission that the Second Respondent has no confirmatory evidence to support its allegations which are therefore inadmissible hearsay evidence.

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[4] Answering Affidavit bundle page 151.
[5] Advocate S D Wagner SC.

[18] Regulation 4 (2) of the Regulations Governing the Administering of an Oath or Affirmation provides that:

> *"(2) The commissioner of oaths shall-*
>
> *(a) sign the declaration and print his full name and business address below his signature; and*
>
> *(b) state his designation and the area for which he holds his appointment or the office held by him if he holds his appointment ex officio."*

[19] The Seventh Respondent's confirmatory affidavit is signed by a police officer in the South African Police Services and his force number and office held is stated as the Commissioner of Oaths. In my view, the Applicants' argument is without any merit and on what is before me, it cannot be said that the Seventh Respondent's affidavit is invalid.

[20] It is the Applicants' submission that there were no requirements or conditions imposed on them for their shareholding in the First Respondent, wherefore they could not and have not been divested of their shares. Applicants' Counsel contends that due to the fact that the Second Respondent confirmed that it has no personal knowledge of the events that occurred within the First Respondent at the time of the sale of the property, the Second Respondent's allegations are inadmissible hearsay and should be struck from the papers. Furthermore, the Applicants contend that as Hanney is not a shareholder of the First Respondent, he is therefore an uninterested person with no evidentiary value. It was also Applicants' argument that Hanney's

confirmatory affidavit is unsigned and does not confirm with the requirements of a sworn affidavit.

[21] It is noteworthy that Hanney's signed original confirmatory affidavit supporting the Second Respondent's affidavit was served on the Applicant's attorneys on 26 September 2013. In my view, the Applicants' submission in this aspect is without merit as Hanney's affidavit before me confirms with the requirements of a sworn affidavit and is admissible. I do not agree with the Applicants' contention that because Hanney is not a shareholder, he is an uninterested person with no evidentiary value.

[22] The first issue that lies for determination is whether there were conditions imposed on the Applicants for their shareholding. It is noteworthy that the Second Respondent's version is supported by three witnesses. Accordingly, on this aspect of the dispute, the *Plascon-Evans* principle has to be adjudicated on the version of the Second Respondent. The facts stated by the Second Respondent, together with the admitted facts by the Applicants must be regarded as admitted. The Applicants confirmed in their founding affidavit that the property was to be developed as a shopping mall and that the shareholders all had a contribution that they had to make towards this goal. It is noteworthy that the Applicants do not dispute the fact that they failed to make a contribution towards the development project. The reason given by the Applicants for the not complying with the title deed condition is that development of a shopping mall takes a long time due to electricity shortage in the country. In my view, the Applicants' version supports the Second Respondent's version that there were conditions imposed on the Applicants for their shareholding which the Applicants failed to satisfy and were as a result divested of their shares.

[23] In ***Botha v Fick 1995 (2) SA 750 (A)***, the Court held that the legal duty resting on a registered shareholder of a company who has sold his shares to deliver a share certificate and a completed share transfer form to the purchaser arises from the obligatory agreement (between the parties) and is not a requirement for the validity of the cession whereby the right and title to the shares are transferred (At 778 I-J).

Due to the above-mentioned, I agree with the Second Respondent's submissions that the Applicants are not shareholders of the First Respondent and have no *locus standi in iudicio* to obtain the relief claimed.

Application has been settled

[24] The application was initially brought by the Applicants on or about 24 August 2012. Shortly thereafter, on a date between 24 August 2012 and 17 September 2013, an undated agreement was entered into between the First Applicant and the Sixth and Seventh Respondents, the terms whereof were the following:[6]

> *"(1) That Jaco Potgieter had agreed to withdraw his lawsuit against E. Mhluzi (Pty) Ltd; Trade – Off 149 (Pty) Ltd, Maime S. Scheppers, Sidney M. Kunene and all the other respondents subject to NPK Consultants being appointed as a Civil Consultant for a sum of R667 000 (excl VAT) and this condition having been met, Jaco Potgieter has withdrawn this action;*

[6]Appendix "TR14" page 206 of the bundle.

(2) In respect of travelling cost for the Cape Town trip, Jaco Potgieter will be paid a sum of R50 00 in full and final settlement of this claim. Payment will be structured as follows:

(i) Jaco Potgieter will receive R25 000 on or by 20 November 2012; and

(ii) Jaco Potgieter will receive R25 000 on or by 15 December 2012."

It should be noted that NPK Consultants ("NPK") is the First Applicant's company.

[25] Although the agreement indicates that the parties thereto were the First Applicant, the Sixth and Seventh Respondents, the First Applicant at all material times informed the Sixth and Seventh Respondents that he was also acting on behalf of the Second Applicant and that the Second Applicant was bound by the agreement. Subsequent to the agreement being entered into and on 17 September 2012, the application was removed from the court roll.

[26] Subsequent to the removal of the application from the Court roll, the Second Respondent appointed the First Applicant's Company (NPK) as a Civil Contractor to the project, the Second Applicant as a letting agent and Hanney's company as the architect.

[27] During or about June 2013, a year after the court application had been settled, the Second Respondent terminated the services of NPK, after its failure to do the work contracted to them in a proper and work manlike manner, which resulted in a massive damages for the Second Respondent estimated at R1,9 million.

[28] Less than a month after the dismissal of NPK by the Second Respondent, the application was again enrolled on 24 June 2013. After the re-enrolment of the application, during June 2013, the Applicants again demanded payment of R645 00 to the First Applicant and R350 000 to the Second Applicant against the withdrawal of the application before court.

[29] Applicants' Counsel denies that the Second Applicant was a party to the agreement of the settlement (Appendix "TR 14") and argues that to date the Second Applicant has not withdrawn the previous application. However, Counsel admits that NPK Consultants were appointed but "clearly as a smoke screen" and were never paid in terms of the agreement. There is however no explanation by the Applicants' Counsel for the First Applicant's withdrawal and settlement of the application.

[30] It is noteworthy that the Second Applicant allowed the application to be removed from the roll on 17 September 2012 despite his denial to being a party to the settlement agreement. Even after this date, the Second Applicant did not proceed with the application until after the Second Respondent had terminated their services. This in my view, confirms the Second Applicant's involvement in the settlement agreement. The sequence of events, the Second Respondent's version and the documentation before me, in my view shows on a balance of probabilities that the application was settled and cannot now proceed.

Prescription

[31] The sale of the property occurred on 28 November 2008. The application was brought on 24 August 2012, (3 years and 9 months) after the sale. In terms of section 11(d) of the **Prescription Act, 1969** the applicable period of prescription is 3 years.

[32] Counsel for the Second Respondent submits that the Applicants were fully aware of the sale of the property to the Second Respondent as early as November 2008 and assuredly not later than 5 February 2009 due to the following reasons:

> 32.1 Immediately after the sale of the property, the Second Respondent appointed the Applicants and Hanney to provide professional service to the Second Respondent in developing the property even before the transfer of the property to the Second Respondent took place. It was therefore impossible for the Applicants not to have known about the sale;
>
> 32.2 On 5 February 2009, Applicants attended a design meeting regarding the development of the property, at which the sale of the property to the Second Respondent was expressly discussed.[7]

[33] Applicants' Counsel submits that the registration of transfer of the property was affected in the Deeds Office on 23 November 2009, which should be the effective date in terms of this application for the determination of prescription. Applicants concede that they were appointed to provide services to the Second Respondent but submit that all the relevant times they were under the impression that the Second Respondent was only the developer of the property and not the owner thereof.

[34] The application before court is to seek that the registration of the transfer of the property be declared void with the result that the property be restored to the First Respondent. The applicants' claim does not in my view relates to a "debt" within the ambit of Chapter III of the Prescription Act, 1969. In my view, it cannot be said that

[7] Appendix "TR16" page 210 – 215 of the bundle.

the application should be dismissed on the basis that the claim has prescribed. In the result, this defence is rejected.

Claim bad in law

[35] Counsel for the Second Respondent submits that the Applicants have made out no case in their founding affidavit that the real agreement giving effect to the transfer of the property concerned was in anyway defective and that the Applicants' attempt to contrive vindication is ill-founded and bad in law. In this regard, Second Respondent's Counsel relied on ***Oriental Products (Pty) Ltd v Pegma 178 Inv Trading CC 2011 (2) SA 508 (SCA)*** at paragraph [12]. The Court stated the following:

> *"It is trite that our law has adopted the abstract system of transfer as opposed to the causal system of transfer. Under the causal system of transfer, a valid cause (iusta causa) giving rise to the transfer is a sine qua non for the transfer of ownership. In other words, if the cause is invalid, e.g. non-compliance with formal requirements, the transfer of ownership will also be void..... Under the abstract system the most important point is that there is no need for a formally valid underlying transaction, provided that the parties are ad idem regarding the passing of ownership....."*

[36] I am satisfied that the requirements of a valid real agreement are present *in casu* and that the transfer of ownership to a *bona fide* purchaser is valid. In my view, the Applicants have not made out a case that the transfer of the immovable property to the Second Respondents was anyway defective. The property could not be

vindicated, irrespective of the validity of the underlying transaction as ownership of the property has already been transferred to the Second Respondent.

Section 228 Compliance

[37] Having regard to the fact that Applicants' case is based on the non-compliance of Section 228 of the Act, I would like to deal with this dispute more fully. It is common cause that the First Respondent was registered on 29 January 1998 but remained dormant until 2 January 2007, on which date, the Sixth and Seventh Respondent were appointed as directors thereof.

[38] The allotment of shares to the Applicants and Hanney, in light of the above-mentioned title condition, was imperative that the Applicants and Hanney obtain financing to enable the development of the property. This is confirmed by an agreement entered into between the First Respondent, the Applicants and Hanney on 17 October 2008[8]; the Applicants and Hanney represented by Hanney and the First Respondent represented by the Sixth Respondent. The terms of the agreement provided *inter alia* as follows:

> 38.1 The First Respondent intends to develop the property for which purpose it requires development finance;
>
> 38.2 The financier is to arrange the development finance in consideration for which the professionals (the Applicants and Hanney) are to transfer shares in the First Respondent to the financier. The finance for the development must be provided within 30 days from date of signature of the agreement;

[8] Appendix "TR 1-" page 166 & 167.

38.3 The professionals agree to transfer to the financier the issued shared held in the First Respondent on written approval by a financial institution of the development finance for the development of the property;

38.4 The professionals and the financier shall be joint ventures in the development of the property, the objective of the joint venture being to develop the property as envisaged in the plans and feasibility study already prepared.

[39] On 17 October 2007, the financier had not been identified at that time. The Applicants and Hanney failed to provide the finance for the development of the property project. It is noteworthy that the original title deed already compelled the First Respondent to develop the land within three years, at the insistence of the municipality concerned. When it became clear that the Applicants and Hanney had failed to procure development finance and that the First Respondent would not be able to comply with the above-mentioned title conditions, there was little option but for the First Respondent to do a joint venture with other investors and that necessitated the sale of the property concerned. It must be emphasized that at that time, the Applicants (and Hanney) were no longer the First Respondent's shareholders and then consent for the sale of the property was not required.

[40] Transfer of the shares back to the First Respondent required not formalities and occurred by cession premised upon the consensus of the parties, and this is confirmed by Hanney **(See Botha v Fick supra)**. The Applicants were aware of the impending transfer of the property to the Second Respondent as they were appointed as professionals to act for the joint venture between the Second Respondent and Empowerprop (Pty) Ltd. This is evident from the design minutes

held on 5 February 2009[9], where both the First and Second Applicants were present as civil structural engineers and letting agents respectively. NPK was already rendering invoices to the Second Respondent for work already done on the project.

[41] Section 228 of the Companies Act 46 of 1926, was introduced for the protection of shareholders who have given general control of the company to its directors. It is the shareholders themselves who should exercise control over the disposal of the company's major assets. The authorities to this effect are discussed by Cleaver J in ***Farren v Sun Service SA Photo Trip Management (Pty) Ltd***[10]. In Farren the Court held that the *Turquand* rule did not operate to override the provisions of Section 228. While a contract entered into without the shareholders' consent was not void, Cleaver J held it could not be enforced until the shareholders had consented or ratified the contract for the disposal of the major part of the company's assets. The reason for this is the purpose of Section 228: to protect the shareholders.

[42] In *casu*, I am satisfied that the provisions of Section 228 are not applicable. At the date of the sale of the property and at all times leading up to this sale, the Applicants were no longer shareholders of the First Respondent and their consent to the sale of the property was not required. In my view, the Applicants have not made out a case to justify that the transfer of the property be declared void and unenforceable. When I have regard to the affidavits in their entirety it cannot be said that the preponderance of probabilities favour the Applicants.

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[9] Appendix "TR 16" page 210
[10] 2004 (2) SA 146 (C) par. 10

Costs

[43] The Second Respondent has requested that in the event that the application is dismissed, the Applicants should be ordered to pay costs on an attorney and client scale. The Second Respondent's request is based on its contention that the Applicants have abused the Court process by misleading the Court and also by the Applicants' attempt to extort money from the Second Respondent.

[44] An order of costs is a matter wholly within the Court's discretion, but this is a judicial discretion and must be exercised on grounds upon which a reasonable person could have come to the conclusion arrived at. An award of attorney-and-client costs will not be granted lightly, as the Court looks upon such orders with disfavour and is loath to penalise a person who has exercised a right to obtain a judicial decision on any complaint such party may have[11].

[45] In the premises, I accordingly make the following order:

The application is dismissed with costs on a party and party scale.

D S MOLEFE

JUDGE OF THE HIGH COURT

[11] Rantenbach v Sumington 1995 (4) SA 538 (O)

APPEARANCES:

Counsel on behalf of Applicants	:	Adv. C Zietsman
Instructed by	:	**Desiré Koch Attorneys**
Counsel on behalf of Second Respondent	:	Adv. S D Wagener SC
Instructed by	:	**Strydom Britz Mohulatsi Inc.**