REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 3259/2015

23/2/2016

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

SIGNATURE 23/2/2016 DATE

HARDUS OTTO	Applicant
and	
JOHANN CHRISTO FREDERICK OTTO SCHOLTZ	First Respondent
ALFEUS CHRISTO SCHOLTZ NO	Second Respondent
JOHANNES VOS N.0	Third Respondent
FARMACRES 25 (PTY) LTD	Fourth Respondent

JUDGMENT

AC BASSON, J

[1] The applicant is an elderly farmer. He approached this court for an order declaring that he is the owner of the entire issued share capital in the fourth respondent (Farmacres 25 (Pty) Ltd) being 100 fully paid up shares. The applicant further seeks an order declaring that the share certificates dated 4 December 2003 reflecting the first respondent (Mr Johann Scholz) and the Casee Trust to be the register proprietors of 10 and 15 ordinary shares respectively in the fourth respondent to be cancelled and that the fourth respondent be directed to reflect in its share register that the applicant (as a member of the fourth respondent) is the holder of 100 shares in the fourth respondent. The applicant is the sole director of the fourth respondent.

[2] The deciding issue in this case is whether or not ownership in the shares had passed to the first respondent and the Casee Trust.

[3] The first respondent is the brother of the second respondent and both are the nephews of the applicant. The second respondent (the deponent to the founding affidavit) was married to the applicants' late daughter who during her lifetime was a co-trustee of the Casee trust. The second respondent deposed to the answering affidavit in his capacity as a trustee of the Casee Trust.

[4] For reasons that will become clear herein below, I do not intend summarizing the facts in detail. Suffice to point out that the applicant bought three

immovable properties in the Western Cape from which farming operations are being conducted. A written agreement of sale was concluded pursuant whereto the applicant sold and transferred to the fourth respondent the three immovable properties. After this transaction 100 shares were transferred to the applicant's daughter who held the 100 shares as the applicant's nominee.

[5] On 29 January 2004 three security transfer forms were executed reflecting that the applicant's daughter transferred 10% of the shares to the first respondent and 15 % of the shares to the Casee Trust. The applicant is the registered proprietor of 75% of the shares. Three share certificates were issued reflecting the shareholding as aforementioned.

[6] It is the applicant's contention that notwithstanding the existence of the two share certificates indicating that the first respondent and the Casee Trust are the registered proprietors of 10% and 15% of the shares respectively, there is no basis in law pursuant whereto they acquired ownership of the shares which fall to be cancelled. According to the applicant the security transfer forms and the issuing of the two share certificates were done pursuant to informal negotiations which took place between the applicant and the first respondent and the trustees of the trust. The issuing of the shares was, according to the applicant, done in anticipation of concluding an agreement of sale in relation to the said shares and in anticipation of being paid the purchase price to be agreed for the shares.

[7] The applicant states that neither prior to the date reflected on the share certificates nor thereafter did he conclude a written or oral agreement with the first respondent and/or with the Casee Trust. According to him no agreement of sale was therefore concluded whether written or oral. In this regard the Court was referred to the draft sale of shares agreement drafted on 5 December 2008 between the first respondent, the Casee Trust and the applicant. In this agreement provision is made for the sale of 10% and 15% respectively of the shares in the fourth respondent for an amount of R 2 786 537.50. The draft agreement was signed by the applicant. This agreement was never signed by the first respondent and/or the trustees of the Casee Trust. Consequently, so it was submitted on behalf of the applicant, no agreement has come about relating to the sales of the shares in the fourth respondent.

[8] Although the draft sales agreement was never signed, it appears from some of the correspondence attached to the papers that at some point in time it was placed on record that an amount of R 2 786 53750 was placed on trust with the attorneys representing the first respondent and the Casee Trust. In a letter the attorneys on behalf of the respondents, the following is recorded:

> "Ons het opdrag om hierdie bedrag tesame met die rente aan u oor te betaal sodra ons kliënt 'n aandeelhouersooreenkoms van u ontvang het en hulle tevrede is met die ooreenkoms."

[9] In response to this letter, a letter was sent by the attorneys acting on behalf of the applicant placing the first respondent and the Casee Trust on terms to

sign the contract of sale within seven days. This letter further records that should the agreement not be signed –

> "is dit ons opdrag dat ons kliënt dan sal ag dat u kliënte nie belangstel om die aandele te koop op die terme en voorwaardes soos uitgeengesit in die koopkontrak nie.... In die alternatief sal ons kliënt die ooreenkoms met u kliënte kanselleer vanweë u kliënte se kontrakbreuk."

[10] Correspondence was thereafter exchanged regarding the conclusion of a shareholding agreement. It is common cause that no shareholders' agreement was concluded.

[11] As already pointed out, the crux of the applicant's case is that no written or oral agreement has come about pursuant whereto the shares were sold: No amount of money was agreed upon and no amount of money has been paid to the applicant in respect of the shares.

[12] The second respondent states in his answering affidavit that that ownership in the shares has in fact been validly been ceded to the first respondent and the Casee Trust pursuant to an oral, alternatively tacit agreement concluded during the latter part of 2003. With reference to certain facts, the second respondent sets out in detail why he is of the view that such an agreement did in fact come into existence and concludes by stating that:

"I accordingly submit that there can be no question that an oral *alternatively* tacit agreement, with the terms as set out above, had come into existence between the parties (hereinafter referred to as "the 2003 agreement")."

[13] More in particular, the second respondent alleged that during the period 2009 to 2010, the Trust had make contributions to the fourth respondent on loan account in excess of R 3.4 million rand. Further according to the second respondent, it was never the intention of the parties that the applicant would be paid anything other than the nominal value of the shareholding that was transferred to the first respondent and the Trust. This amounted to R1 per share in 2003. The second respondent, with reference to the history leading up to this dispute, submitted that the applicant had at all material times actively recognised the first respondent and the Casee Trust as shareholders.

[14] In September 2014 the applicant approached the first respondent and the Trust with a proposed resolution that the farms be sold. Provision is made on the second page of the resolution for the first respondent and the trust representatives to sign. At that stage the second respondent made it clear that it was not prepared to consent to the sale without a firm guarantee that the Casee Trust would at least be reimbursed for the expenditures relating to the renovation of the house from the proceeds of the sale. With reference to these facts the second respondent submitted that it is apparent that he and the Casee Trust were at all relevant times recognised by the applicant as shareholders in the fourth respondent.

[15] On behalf of the applicant it was submitted that a dispute of fact has arisen on the papers as to whether or not a valid and binding agreement was concluded between the parties pursuant whereto the shares were transferred to the first respondent and the Casee Trust. It is to be noted that the second respondent also – at least on the papers - appears to be of the opinion that a "real and bona fide dispute of fact between the Applicant and the Respondents [exists] and to the extent that it cannot be resolved on these papers, the application falls to be dismissed on that ground alone".

[16] In essence the applicant contends that ownership did not pass to the first respondent and the Cassee Trust because of the absence of an underlying agreement or *justa causa*. In support hereof reference was made to the decision *In Inland Property Development Corporation (Pty) Ltd v Cilliers* [1] where Rumpf JA said the following regarding the process of transferring shares:

> "In regard to shares, the word 'transfer', in its full and technical sense, is not a single act but consists of a series of steps, namely an agreement to transfer, the execution of a deed of transfer and, finally, the registration of the transfer. As was put by Lord REID in the House of Lords in *Lyle and Scott Ltd.* v *Scott's Trustees and British Investment Trust Ltd.*, 1959 A.C. 763 (a case which dealt with the word 'transfer' in the articles of association of a company) at p. 778:
>
> > 'The word transfer can mean the whole of these steps. Moreover, the ordinary meaning of 'transfer' is simply to hand over or part with

[1] 1973 (3) SA 245 (A) at 251.

> something and a shareholder who agrees to sell is parting with something. The context must determine in what sense the word is used.'"

With reference to this case (and various cases that were decided subsequently), the applicant submitted that the court cannot disregard the clear authority and that this court must accept that a valid contract (a valid *justa causa*) must exist before shares may be transferred.

[17] As far as the transfer of ownership in the context of movable and immovable property is concerned, it appears that it is accepted that the approach to the *justa causa* principle is premised on the *abstract* theory of the passing of ownership as opposed to the *causal* theory. In this regard the Supreme Court of Appeals in *Legator Mckenna Inc and Another v Shea and Others*[2] held the following in the context of the passing of ownership of immovable property:

> "[20] This brings me to the next enquiry. Should the transfer of the house to the Erskines be regarded as valid despite the invalidity of the underlying sale which was the *causa* for the transfer? The appellants' contention that it should, was rooted in the assumption that the abstract theory - as opposed to the causal theory - of transfer has been adopted as part of our law. According to the abstract theory the validity of the transfer of ownership is not dependent upon the validity of the underlying transaction such as, in this case, the contract of sale. The causal theory, on the other hand, requires a valid

[2] 2010 (1) SA 35 (SCA).

underlying legal transaction or *iusta causa* as a prerequisite for the valid transfer of ownership (see eg *Trust Bank van Afrika Bpk v Western Bank Bpk en Andere NNO* 1978 (4) SA 281 (A) at 301H - 302H; Van der Merwe *Sakereg* 2 ed at 305 - 6). With regard to the transfer of movables our courts, including this court, have long ago opted for the abstract theory in preference to the causal theory (see eg *Commissioner of Customs and Excise v Randles, Brothers & Hudson Ltd* 1941 AD 369 at 398 - 399; *Dreyer and Another NNO v AXZS Industries (Pty) Ltd* 2006 (5) SA 548 (SCA) ([2006] 3 All SA 219) in para 17).

[21] Some uncertainty remained, however, with regard to the transfer of immovable property. In the High Courts that uncertainty has been eliminated in a number of recent decisions where it was accepted that the abstract system applies to movables and immovables alike (see eg *Brits and Another v Eaton NO and Others* 1984 (4) SA 728 (T) at 735E; *Klerck NO v Van Zyl and Maritz NNO and Related Cases* 1989 (4) SA 263 (SE) at 273D - 274C; and *Kriel v Terblanche NO en Andere* 2002 (6) SA 132 (NC) at paras 28 - 49). These decisions are supported by academic authors advancing well-reasoned arguments (see eg DL Carey-Miller *The Acquisition and Protection of Ownership* at 128 - 30 and 168; CG van der Merwe *Sakereg* op cit at 305 - 10; CG van der Merwe & JM Pienaar 2002 *Annual Survey* 466 at 481; Badenhorst, Pienaar & Mostert *Silberberg & Schoeman's The Law of Property* 5 ed at 76). In view of this body of authority I believe that the time has come for this court to add its stamp of approval to the viewpoint that the abstract theory of transfer applies to immovable property as well.

[22] In accordance with the abstract theory the requirements for the passing of ownership are twofold, namely delivery - which in the case of immovable property is effected by registration of transfer in the deeds office - coupled with a so-called real agreement or 'saaklike ooreenkoms'. The essential

elements of the real agreement are an intention on the part of the transferor to transfer ownership and the intention of the transferee to become the owner of the property (see eg *Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstein en 'n Ander* 1980 (3) SA 917 (A) at 922E - F; *Dreyer and Another NNO v AXZS Industries (Pty) Ltd* supra at para 17). Broadly stated, the principles applicable to agreements in general also apply to real agreements. Although the abstract theory does not require a valid underlying contract, eg sale, ownership will not pass - despite registration of transfer - if there is a defect in the real agreement (see eg *Preller and Others v Jordaan* 1956 (1) SA 483 (A) at 496; *Klerck NO v Van Zyl and Maritz NNO* supra at 274A - B; *Silberberg and Schoeman* op cit at 79 - 80)."

[18] The principles as set out in Legator was restated by the Supreme Court in *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading Cc And Others*[3] The Court further remarked that –

> *"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."*

See also Silberberg and Schoeman:[4]

> "If a legal system makes the transfer of a real right dependent on a valid underlying contract it is said to adhere to the causal theory, while the opposite approach is based on the so-called abstract theory. The causal theory lays down that, if the cause for the transfer of a real right is defective, the real right

[3] 2011 (2) SA 508 (SCA) at par [12].
[4] The Law of Property (5th edition) at 5.2.2.3.

will not pass, notwithstanding that there has been delivery or registration of a thing. In terms of the abstract theory, provided that the agreement to transfer a real right (the real agreement) is valid, the real right will, in general, pass in the pursuance and on implementation thereof, notwithstanding that the cause (underlying contract) is defective."

[19] This principle (in the context of movable property) was also confirmed by the Court in *Trust Bank van Africa Bpk v Western Bank Bpk*. In this decision the court gave a useful exposition of the principle that the validity of a transfer of ownership is independent of the validity of the underlying contract:[5]

"Hierdie gevolgtrekking is, na my mening, regtens ongegrond. Selfs al sou dit aanvaar word dat die Regter *a quo* tereg bevind het dat die koopkontrak nietig sou wees, as gevolg van onmoontlikheid van prestasie met betrekking tot 'n gedeelte van 'n ondeelbare verpligting ('n standpunt waaroor ek geen mening uitspreek nie), berus sy konklusie dat gedeeltelike prestasie nie eiendomsoordrag tot gevolg kan hê nie op 'n wanopvatting - aangaande die vereistes van die oordrag van eiendomsreg op roerende goed. Volgens ons reg gaan die eiendomsreg op 'n roerende saak op 'n ander oor waar die eienaar daarvan dit aan 'n ander lewer, met die bedoeling om eiendomsreg aan hom oor te dra, en die ander die saak neem met die bedoeling om eiendomsreg daarvan te verkry. Die geldigheid van die eiendomsoordrag staan los van die geldigheid van enige onderliggende kontrak. In die saak *Commissioner of Customs and Excise v Randles, Brothers & Hudson Ltd*

[5] 1978(4) SA 281 (A) at 301G – 302F.

1941 AA 369 het WATERMEYER AR (met wie FEETHAM AR saamgestem het) in verband met eiendomsoordrag van roerende sake, op 397 - 398 gesê:

> "On this issue the plaintiff contended that ownership in the material never passed from the importer to the manufacturer, and the reasons which he advanced in support of that contention were, *inter alia*, that there was no 'genuine sale' of the material and consequently ownership did not pass; that the legal effect of what the parties did was such that ownership did not pass and that the Court must give to the transaction the legal effects which the law gives it, no matter what the parties intended. Leaving aside for the moment the question of what is meant by the word 'genuine', I have some difficulty in understanding these reasons. Ownership of movable property does not in our law pass by the making of a contract. It passes when delivery of possession is given accompanied by an intention on the part of the transferor to transfer ownership and on the part of the transferee to receive it."

Hy sê dan verder aan op 398 - 399:

> "If the parties desire to transfer ownership and contemplate that ownership will pass as a result of the delivery, then they in fact have the necessary intention and the ownership passes by delivery. It was contended, however, on behalf of the appellant that delivery accompanied by the necessary intention on the part of the parties to the delivery is not enough to pass ownership; that some recognised form of contract (a *causa habilis*, as *Voet* 41.1.35 puts it) is required in addition, and reference was made to certain remarks made in the case of *McAdams v Fiander's Trustee* 1919 AD 207. I do not agree with that contention. The *habilis causa* referred to by *Voet* means merely an appropriate *causa*, that is, either an appropriate reason for the transfer or a serious and deliberate agreement showing an intention to transfer."

Dit was ook die sienswyse van CENTLIVRES AR wat op 411 van sy uitspraak in hierdie saak, met verwysing na die standpunt van sekere skrywers, die posisie soos volg stel:

> "From these passages it is clear, I think that a wide meaning must be given to the words '*justa causa* ' or '*causa habilis* ' (*voet* 41.1.35), and that all that these words mean in the context I am at present considering is that the legal transaction preceding the *traditio* may be evidence of an intention to pass and acquire ownership. But there may be direct evidenoe of an intention to pass and acquire ownership and, if there is, there is no need to rely on a preceding legal transaction in order to show that ownership has, as a fact, passed. To put it more briefly, it seems to me that the question whether ownership passed depends on the intention of the parties and such ihtention may be proved in various ways".

[20] Neither party could refer this Court to any authority confirming that the abstract theory (already applied to the transfer of movable and immovable property) has also been extended to apply to the transfer of ownership in shares. In this regard the respondent has urged this Court to extend the now widely accepted abstract theory to apply also to the transfer of ownership in shares.

[21] I can see no reason why this principle should not also apply in the context of the transfer of ownership in shares. Consequently there is no need for a formally valid underlying transaction pursuant to which ownership in shares may pass to another. What does, however, still needs to be determined is

what the intention of the transferor was – in other words what the contents of the real agreement was: Did the transferor intend to transfer ownership in the shares and was it the intention of the transferee to become the owner of the shares? According to the applicant it was his intention that the shares would be sold to the first respondent and the Casee Trust. In support of this contention the applicant referred to the correspondence between the attorneys confirming that an amount of R 2786 537.50 was paid into the trust account of the respondent's attorneys. This amount, according to the applicant, was to be paid as the selling price of the shares and the loan account. The second respondent's version is that the shares were sold in 2003 pursuant to an oral agreement for R 25.00.

[22] In light of the fact that there appears to be a dispute on the papers in respect of what the terms of the real agreement was, the matter should be referred to trail.

[23] In the event, the following order is made:

1. The matter is referred to trail.
2. The Notice of Motion shall stand as a simple summons.
3. The answering affidavit shall stand as a notice of intention to defend.
4. A declaration shall be delivered within 21 (twenty-one) days whereafter the Rules of Court shall govern the further conduct of the matter.

5. The costs of this application are reserved for the trail Court.

AC BASSON
JUDGE OF THE HIGH COURT

Appearances:

For the applicant	:	S L Joseph (SC)
Instructed by	:	Dadic Attorneys
For the 1st, 2nd and 3rd Respondent	:	A Janse van Vuuren
Instructed by	:	W A Du Plessis Attorneys