

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL PIETERMARITZBURG**

In the matter between

Case No 15527/08

AERTERNO INVESTMENTS 215 (PTY) LTD

PLAINTIFF

And

GALAXY MINERALS (PTY) LTD

1ST DEFENDANT

HONG WEI QU

2ND DEFENDANT

THE REGISTRAR OF DEEDS, KWAZULU-NATAL

3RD DEFENDANT

JUDGMENT

MURUGASEN, J.

Introduction

[1] The plaintiff herein seeks an order declaring an agreement of sale of immovable property binding on the parties thereto and directing that the transfer of the property be registered. In the alternative the plaintiff seeks an order against the first and /or second defendant for repayment of the purchase price in the sum of one million rand (R1 000 000), interest thereon and costs.

The Parties

[2] On 10 December 2006, the plaintiff, Aerterno Investments 215 (Pty) Ltd Registration No: 2006/23780/07 and the first defendant, Galaxy Minerals (Pty) Ltd Registration No: 1993/001625/07 entered into a written agreement of sale ('the agreement') of immovable property described as Lot 23 Umfolozi No.13734 Registration Division GU Province of KwaZulu-Natal in extent 129, 6143 (One Hundred and Twenty Nine Comma Six One Four Three)

Hectares held by the first defendant under Deed of Transfer No. T18095/93 ('the property').

[3] During the negotiation and conclusion of the agreement, the plaintiff was represented by Ranjini Naicker and its duly authorised representative, Rugunathan Naicker while the first defendant was represented by the second defendant, Hong Wei Qu, who acted as the agent of the first defendant by virtue of a special power of attorney dated 8 May 2002.

The third defendant, the Registrar of Deeds Kwazulu-Natal, is a party to the action by virtue of the interdict registered over the property by the first defendant and the relief sought by the plaintiff. The third defendant abides the decision of the court.

The Plaintiff's Cause of Action

[4] The plaintiff complied with all its obligations in terms of the agreement and paid the full purchase

price of R1 million (one million rand) to the second defendant by 9 June 2008. A material term of the agreement was that the transfer of the property would be effected by the first defendant's attorney upon compliance by the plaintiff with its obligations under and in terms of the agreement

[5] The first defendant has however repudiated the agreement and refused to effect transfer of the property to the plaintiff. Further, pursuant to an application by the first defendant, the third defendant registered an interdict against the property, in terms of which the third defendant may not register the transfer of the property or any mortgage bond over it or any other deed encumbering the property, until the interdict was cancelled by an order of court. The first defendant has refused to uplift the interdict in order to facilitate the registration the transfer of the property into the name of the plaintiff.

[6] The plaintiff therefore seeks an order compelling the first defendant to comply with its obligations to effect transfer of the property to the plaintiff and directing the third defendant to uplift the interdict and register the transfer.

Plaintiff's Alternative Claim

[7] The plaintiff alleges that it has effected payment of the full purchase price in the sum of R1 million rand to the second defendant, in his capacity as duly authorised agent of the first defendant, in the *bona fide* and reasonable belief that there was a valid written agreement, in terms of which the transfer of the property would be effected to the plaintiff by the first defendant. However as a result of the repudiation of the agreement by the first defendant, the first defendant alternatively the second defendant alternatively both defendants have been unjustly enriched at the expense of the plaintiff in the sum of R1 000 000 (one million rand) and are obliged to compensate the plaintiff in the aforesaid sum which they have refused to do.

[8] The plaintiff seeks therefore, in the alternative, judgment against the first defendant alternatively the second defendant alternatively both defendants, the one paying the other to be absolved, for payment in the sum of R1 000 000(one million rand), interest thereon *a tempore mora*, calculated from the date of service of summons, alternatively from other such date as the court deems fit to date of payment at the rate of 15.5% per annum; and costs.

The Defence

[9] The action is opposed by the first and second defendants.

The first defendant denies that the power of attorney on which the plaintiff relies was executed by Kuk Siu Wah ('Kuk'), and contends that what is purported to be Kuk's signature on the power of attorney is a forgery. It is contended further, that Kuk had no authority to bind the first defendant as set out in the power of attorney, that the directors and the shareholders of the first defendant had not resolved to sell the property nor authorized anyone to do so on its behalf. Consequently as the second defendant did not have any authority to represent the first defendant in concluding the agreement, there was no valid agreement between the plaintiff and the first defendant.

The first defendant contends further that payments made to the second defendant did not constitute payment to the first defendant and that the second defendant had not acted on its behalf in receiving any payments from the plaintiff; it therefore denies that it has been enriched by any payment made by the plaintiff for which it is obliged to compensate the plaintiff.

[10] The second defendant did not file a plea although he was represented during the trial. However at the recommencement of the trial on the 15 November 2010, the second defendant

filed a notice in terms of which he indicated that he did not oppose the relief sought by the plaintiffs and elected to abide the decision of the court.

Summary of Facts

[11] The following was common cause:-

- 1 The property was owned by the first defendant.
- 2 The agreement of sale for the property was concluded on 10 October 2006 by the plaintiff and the second defendant acting on the ostensible authority granted to him in terms of the special power of attorney executed on 8 May 2002.
- 3 The plaintiff was given possession and occupation of the property in terms of paragraphs 4 and 8 of the agreement.
- 4 The purchase price was paid in full by the plaintiffs to the second defendant or his wife at his request. In paragraph 32 of page 101 of exhibit E the second defendant admits that the R1 million rand paid as purchase price for the property was 'consumed'.

The evidence of Devaranjinie Naicker and Ruganathan Naicker in respect of the payment of the purchase price as supported by the proof of payment as contained in Exhibit D remained uncontroverted.
- 5 Kuk had visited South Africa and the property in 2002, during the period when the special power of attorney was allegedly executed.
- 6 The directors of the first defendant as at the date of the agreement, 10 October 2006, were Yin Ping Cook and Siu Wah Kuk. Kuk was also the chief officer.
- 7 The sole shareholder in the first defendant as from 4 November 1997 is Forest Eight Limited.
- 8 The sole shareholder in the Forest Eight Limited is Yin Ping Cook, who is also the director thereof.
- 9 According to the Cipro records, the second defendant resigned as director of the first defendant on 13 February 2006.

10 An interdict prohibiting the transfer of the property is registered over the property.

The Plaintiff's Case

[12] The plaintiff relied on the evidence of an expert, and the parties who represented the plaintiff in the sale to prove that the agreement was a valid and binding document.

Mr Michael J Irving (Irving), a forensic document examiner testified that from a signature analysis he conducted of the signature purportedly that of Kuk ('the disputed signature') on the Special Power of Attorney and Kuk's undisputed signatures, he concluded that the signature on Special Power of Attorney was the original and authentic signature of Kuk. He conceded however that in creating the comparative chart he had used copies of documents, and the utilization of copies of signatures on these documents was not the ideal situation.

Irving was a clear and coherent witness. His expertise was apparent from the manner in which he explained the process he had employed in arriving at his conclusion. He was also an independent witness with no interest in the outcome of the dispute. His evidence remained uncontroverted despite his concession that the documents he examined were copies.

[13] Devaranjinie Naicker ('Naicker'), the director of the plaintiff, testified that after an inspection of the property, the sale of the property was negotiated by Naicker's husband (Mr Naicker) with the second defendant, and purchase price was agreed at R1 million (one million rand) which was to be paid in monthly instalments to the second defendant.

[14] The second defendant advised them that the property was owned by his grandfather and it was necessary for him to first discuss the sale with his grandfather. A meeting then took place at the offices of the second defendant's attorney, Chris van der Merwe (Van der Merwe). Present at the meeting were Naicker, her husband, Mr Van der Merwe, the second defendant and a Chinese gentleman who acted as interpreter.

The second defendant telephoned his grandfather on his cell phone; the speaker on the cellphone was activated to enable those present to hear the conversation. The conversation was in Chinese and the Chinese man who was present translated it into English. The grandfather agreed to the purchase price of one million rand, to be paid in instalments to the second defendant and to immediate occupation of the property by the purchaser.

[15] As the parties were satisfied with the arrangements, Van der Merwe drew up the

purchase and sale agreement (exhibit “D”) which was signed on 10 October 2006 by Mr Naicker as the duly authorised representative of the plaintiff, while the second defendant signed the agreement on behalf of the seller. The second defendant had shown them a power of attorney from which the Naickers had concluded that he had the authority to sell the property.

By August or September 2008 the plaintiff had paid the purchase price in full. The Naickers then approached the second defendant to effect the transfer of the property to the plaintiff. The second defendant agreed that the plaintiff’s attorneys, CKMG Attorneys, could attend to the transfer on behalf of the plaintiff. But when attorney Suren Moodley (Moodley) of CKMG Attorneys lodged the transfer documents in the Deeds office for registration, he discovered that there was a interdict over the property. The second defendant also had no knowledge thereof.

[16] As the Naickers had been informed during the telephonic discussion between the second defendant and his grandfather, that the grandfather was satisfied that the purchase price should be paid to the second defendant, payments were effected by them into bank accounts in the names of H Qu, the second defendant and Zong Qu his wife.

[17] Naicker was not a confident witness, but there was no reason to doubt the honesty of her testimony. It was apparent that the business affairs of the plaintiff were controlled and administered by her husband. Nevertheless she testified consistently about the negotiations with the second defendant and the telephonic discussion with his grandfather in China which culminated in the conclusion of the agreement. Her evidence was corroborated by Mr Naicker.

[18] Mr D Naicker testified that while his wife was the sole director of the plaintiff, he was the person who attended to the day to day running and business affairs of the plaintiff. When they inspected the property, the second defendant was managing the farm and conducting sand winning operations on the property. Although the farm was in a dilapidated condition he had been keen on acquiring the property as he was only interested in the mining of sand.

[19] Mr Naicker confirmed that events of the meeting held at Mr Van der Merwe’s office during which arrangements for the sale were finalised. From his recollection of the conversation as interpreted to them, the deal was considered to be good and the purchase price, the payment thereof in instalments to the second defendant and immediate occupation of the property by the plaintiff was agreed during the discussion.

[20] From the information provided by the second defendant, Mr Naicker had understood that the seller was the second defendant’s grandfather because he was the ‘head’ of Galaxy

Minerals. The second defendant had also advised Naicker that he was one of the directors of Galaxy Minerals and had shown him the power of attorney. As far as he was concerned the shareholders in the company were the second defendant and his grandfather. He had never seen the title deed to the property nor did he know that the only shareholder of Galaxy Minerals the first defendant was Forest Eight Ltd.

[21] Mr Naicker confirmed that the interdict was discovered by their conveyancer when he attempted to register the transfer of the property to the plaintiff after the last instalment of the purchase price had been paid in August 2008. No rates or taxes were payable on the property to any local authority, and no transfer costs had been incurred.

[22] Mr Naicker persisted that instructions were given by the second defendant's grandfather during the telephonic discussion that the money be paid into the second defendant's account and that they had paid the monies as instructed. He had not queried the contradiction between the relevant provision of the purchase and sale agreement that the purchase price be paid to the seller and the aforesaid verbal instructions.

Mr Naicker was a credible witness who testified in a frank and forthright manner. His responses were immediate and direct, indicating that he was testifying from his own knowledge. It was apparent from the evidence of the Naickers that they had viewed the purchase of the property as a lucrative business opportunity and had no doubts or suspicions that the second defendant was acting within his authority and with the knowledge of the first defendant.

That was the case for the plaintiff.

The First Defendant's Case

[23] Miss Yin Ping Cook (Cook) then testified on behalf of first defendant. Kuk who had passed away at the beginning of 2009 was her father. She denied that Kuk was the second defendant's grandfather or that they were related to each other at all. Kuk had come to South Africa in the late 1990's and had decided to invest in property in South Africa. He then acquired a number of properties which were held in the name of various juristic entities and the directors of the companies that owned those properties were Cook and Kuk.

Cook and Kuk were the active directors of Galaxy Minerals, the first defendant and were appointed on the 28 May 1993. From 1997, the shares in the first defendant were held by a

company, Forest Eight Ltd, which was registered in the British Virgin Islands.

[24] Although Kuk was in South Africa in May 2002 and she was in Hong Kong at the time, they maintained regular communication in respect of their business affairs by telephone and telefax. Kuk did not tell her about the power of attorney that he had allegedly signed or that he intended selling the property about which he would have consulted with her. Kuk had not returned to South Africa after 2002. From then he and Cook were resident in Hong Kong most of the time. They lived in close proximity to each other and discussed all their business interests including those in Hong Kong and South Africa.

[25] She was adamant that she and her father as directors of the first defendant had never discussed or agreed that the property be sold, or that the second defendant be authorized to act on behalf of the first defendant. Further, as the property was a major asset of the first defendant, she considered it 'impossible' that Kuk would have agreed that the purchase price be paid to the second defendant. Nor did Cook in her capacity as sole director of Forest Eight Ltd, intend or agree to sell the property.

Cook denied that Kuk did not accept several offers to purchase the property during the period 2002 to 2006 because the offers were not high enough, but persisted that the offers were not accepted because he did not intend to sell the property but to develop it.

[26] The operations that were conducted on the property were to win sand and supply water. There were some houses on the property which were rented out. Kuk had decided to expand this initial business and his intention was to build more houses on the property and perhaps cultivate a plantation. In order to develop the property, Kuk brought a group of Chinese from China to work on it.

Although she had not met the people who were recruited, the decision to send workers from China to South Africa was a joint decision and she was aware of the terms and conditions of their employment. Kuk had been advised that the entry of the recruits into South Africa would be facilitated if they were made directors. Kuk and Cook had discussed the issue and taken a joint decision on utilizing this method to get people into South Africa. The documentation appointing the workers as directors was prepared in South Africa before the recruits arrived.

Five persons including the second defendant were recruited and brought to South Africa by the end of 2001. Three recruits, including the second defendant, were appointed directors of the first defendant and given signing powers on its bank account; the other two were appointed directors

of their other companies. All of them were aware that objective underlying the appointment was to facilitate their entry and the appointment was not permanent. They had signed the letters of appointment and resignation, and obtained work permits in 2001 before they left Hong Kong for South Africa.

Cook alleged that the resignation was only effected approximately four years later because of delay on the part of their attorneys. As the recruits knew that their directorships were for the sake of convenience they were not informed when their resignation was registered.

[27] The second defendant had therefore been a director of the first defendant from 14 May 2001 to 13 February 2006. They had decided to appoint him as he was young and had potential to be trained to run the operations on the property. There was a verbal agreement that his salary of R3000 per month, his accommodation and communication i.e. telefax and cellphone costs would be paid; but there was no formal written employment contract. Cook had stopped paying for the second defendant's cellphone account even prior to 2007 as he had failed to furnish her with the accounts. He had not been removed as a signatory to the account. Cook denied that the second defendant was authorized or entitled to set the purchase price off against the salary owed to him.

[28] The interdict was only obtained in 2008 because when they were unexpectedly served with summons in respect of a property held by another of their companies, Flourishing Trading, they instructed their attorney to investigate their other properties. It was then discovered that other properties had been sold despite the title deeds being in their possession, as Kuk had himself arranged for the title deeds to be held at the banks.

The title deed for the property was kept in a bank in South Africa before 2006 and thereafter in a bank in Hong Kong. It therefore became necessary to protect the properties and the interdict was registered as a safeguard. At the time when the interdict was registered over the property, she was not aware of the sale agreement and the second defendant had not informed her about it. There were currently a number of actions in respect of properties sold under similar circumstances by the second defendant.

[29] She was also certain that Kuk was sufficiently proficient in English to have understood the contents of the special power of attorney the second defendant relied on as authority to sell the property. But as Kuk had always utilized the same firm of attorneys, Webber Wentzel Bowens (WWB) to attend to their legal affairs in South Africa, had he required a power of

attorney he would have requested WWB to prepare the document. When a South African property was sold in South Africa in their absence, Cook and Kuk would execute a power of attorney in favour their attorneys.

[30] In December 2006 the second defendant had informed her that he had created a power of attorney, similar to the disputed document (Exhibit D) in respect of another company which authorized him similarly to deal with its property by utilizing a blank signed sheet of paper as Kuk had left blank signed pages with him. When she queried this with Kuk, he had responded that it was possible that he may have signed blank pages on condition that they would be used on his instructions and a copy of the complete letter was to be sent to him wherever he was. But he had not left a blank signed page authorising the second defendant to sell the property or to be utilized as a power of attorney.

[31] When Cook spoke to the second defendant about the transfer of the property owned by Oriental Products, she did not speak to him about the property owned by the first defendant because they had possession of the title deeds. The title deeds for the Oriental Products property had been given to the second defendant because they had attempted to sell that property.

The second defendant had also been authorized to sign the sale agreement in respect of two properties owned by another of their companies, Flourishing Trading, by way of a power of attorney prepared by attorneys Webber Wentzel Bowens. The sole shareholder in Flourishing trading was Forest Eight, the sole director of which is Cook. Those sales were also subject to litigation because the purchase price had not been paid to the seller.

[32] The property is the only fixed asset owned by the first defendant, Cook only had knowledge of the company's internal operational costs and that it was registered for VAT but she was unaware of the other taxes or dues payable because that was handled by the auditor.

Cook was not an impressive witness. Even allowing for the process of interpretation, her answers were frequently incoherent, rambling and convoluted. She rarely answered the questions put to her directly. It was apparent from her testimony that she was not involved in the day to day conduct of the affairs of their South African companies. It was also difficult to reconcile her apathy and ignorance about the property and the operations conducted on it by the second defendant with her allegations that she was actively involved and party to all decisions concerning all the business interests of their companies.

Issues for determination :

[33] The first issue that lies for determination is whether the special power of attorney dated 8 May 2002 constituted valid and binding authority conferred by the first defendant on the second defendant to represent the first defendant in the conclusion of the sale and registration of transfer of the property.

There are two legs to this determination:

- 1 whether Kuk had the authority to bind the first defendant by executing the power of attorney in favour of the second defendant; and
- 2 whether his signature on the power of attorney was genuine.

If the plaintiff were to prove on a balance of probabilities that the agreement was valid and binding on the parties, then the second issue for determination would be whether the plaintiff had complied with its obligations under the agreement and is entitled to an order for specific performance.

[34] In the event that the court determines the foregoing issues in favour of the first defendant then it lay to be determined whether the first defendant, alternatively the second defendant alternatively both defendants jointly and severally were unjustly enriched at the expense of the plaintiff and should be ordered to pay the purchase price together with interest to the plaintiff.

Argument

[35] In respect of the main claim, Mr Naidoo submitted on behalf of the plaintiff that the evidence by the Naickers to the effect that the plaintiff had complied with its obligations under the purchase and sale agreement between the plaintiff and the first defendant and that the full purchase price had been paid by them should be accepted as it was not seriously challenged or undermined by evidence in rebuttal.

Further, as Kuk was in South Africa at the time when the power of attorney was executed and this fact was supported by the conclusion of the expert Irving that the signature on the document was that of Kuk and not a forgery, the court ought to find that the power of attorney was valid,

and the second defendant was duly authorized to sign the agreement on behalf of the first defendant.

[36] Consequently the court ought to exercise its discretion in favour of the plaintiff and order specific performance, particularly as the first defendant could not rely on S228 of the Companies Act as it had not furnished documents in support of Cook's evidence that the property was the only fixed asset of the company. Alternatively the probabilities favoured the finding that Kuk had authorized the sale with the knowledge of Cook, which constituted substantial compliance with S 228.

The final submission in respect of the main claim was that the Turquand rule ought to be applied in favour of the plaintiff.

[37] In respect of the alternative claim Mr Naidoo contended that the first defendant was liable for the actions of its duly authorized agent, the second defendant and that the parties ought to be held jointly and severally liable to repay the purchase price to the plaintiff.

[38] On behalf of the first defendant, Mr King submitted that there were three possibilities in respect of the power of attorney: that it was a genuine document, or that it was a forgery, or that the signature was genuine but the rest of the document was created out of a blank signed page.

However even if the power of attorney were found to be genuine, the plaintiff had failed to discharge the onus on it to prove that the second defendant was properly authorized to conclude the sale of the property on behalf of the first defendant. As the power of attorney only authorized the second defendant to act on behalf of Kuk acting alone, it did not confer the authority on him to represent the first defendant as there was no resolution by its two directors to sell the property. Nor was there a resolution in compliance with S228 of the Companies Act as the property was the only asset of the first defendant. The only shareholder in the first defendant is a company Forest Eight Ltd, and Ms Cook as the only director of the shareholder, testified that there was no decision or resolution to sell the property. Consequently the power of attorney does not constitute authorization of the second defendant to conclude the agreement, and the agreement cannot be enforced against the first defendant. He therefore submitted that the action against the first defendant should be dismissed with costs.

The onus on the plaintiff

[39] As the relief for specific performance sought by the plaintiff is premised on the existence of a valid agreement of sale of the property, the onus lies on the Plaintiff to prove that :-

1 Kuk had the authority to execute the power of attorney on behalf of the first defendant and to bind the first defendant by his signature on the document and the signature on the power of attorney was that of Kuk .(**Scala Café v Rand Advance (Pty) Ltd 1975 (1) NPD 28**);

2 the second defendant was therefore duly authorized by first defendant in writing under a valid power of attorney to execute the formalities on behalf of it as seller and transferor of ownership in the property, and that the authority existed at the time of the sale; the agreement was therefore valid and binding on the parties thereto;

3 the plaintiff had complied with its obligations under and in terms of the agreement., but the first defendant failed to effect registration of transfer of the property to the plaintiff. The plaintiff is entitled to claim specific performance.

The Special Power of Attorney: Legal requirements for validity

[40] Section 2 (1) of the Alienation of Land Act 51 of 1983 prescribes that:-

‘ No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.’

'Deed of alienation' is defined in the Alienation of Land Act is a document or documents under which land is alienated.

The agreement is therefore a deed of alienation, but as it was signed by the second defendant who purported to an agent of the first defendant, it can only be of force and effect if the second defendant acted on the written authority of the first defendant.

Although it has been held that the provisions of S 2(1) of the Alienation of Land Act are circumscribed by S69 of the Companies Act No 61 of 1973, in terms of which a company may be bound by a person acting on its express or implied authority which need not be in writing (**Myflor Investments (Pty) Ltd v Everett 2001(2) SA 1083 (C) at page 1096**), the plaintiff and the second defendant have relied specifically on the special power of attorney to constitute the

express written authority conferred by the first defendant on the second defendant to conclude the sale.

[41] *Ex facie* the special power of attorney, it was executed by Kuk in his capacity as director and major shareholder in the first defendant. In terms of the wording of the power of attorney Kuk in his 'capacity as director and major shareholder in the company' authorized the second defendant 'to be my duly authorized agent acting for and on my behalf and especially to do the following as I could have done'.

Any person who has capacity to enter into a contract may appoint an agent to act for him; provided that he has the capacity to execute personally the act authorized. Therefore he must have the contractual capacity necessary to enter into a contract creating the relationship of principal and agent. (**The Law of Agency in South Africa J M Silke 3rd edition 1981 at page 38**)

[42] It is common cause that at the date of signature of the agreement the first defendant was the registered owner of the property and its directors were Kuk and Cook. An individual director has no authority to bind a company unless the company is a private one and he is the sole director (**Henochsburg on the Companies Act 5th Edition page 129**).

The same principle was expressed by **Nicholas J** in **ROSEBANK TELEVISION & APPLIANCE CO (PTY) LTD v ORBIT SALES CORPORATION (PTY) LTD 1969 (1) SA 300 (T)** at page 303

'But even if it be assumed that Ginsberg was a director of the defendant during the months of July and August, 1966, when the purchases were made from the plaintiff, it would not, of course, follow from that fact alone that he was authorised to act on behalf of the defendant company. A director is not as such an agent of his company. (See *Robinson v Randfontein Estates Gold Mining Co. Ltd.* , 1921 AD 168 at pp. 217 - 218, and *Wolpert v Uitzigt Properties (Pty.) Ltd. and Others* , 1961 (2) SA 257 (W) at pp. 267 - 268). It must be proved that he was authorised to act as the agent.'

Therefore Kuk himself did not have the status or authority to confer on the second defendant the authority to act as set out in the power of attorney. Any decision taken in connection with the property of the first defendant had to be by way of a resolution by both directors.

In the agreement the seller is 'Galaxy Minerals (Pty) Ltd Registration No. 93/01625/07 authorised hereto by a resolution of directors of the company and duly represented by Hong Wei Qu'.

[43] Cook's evidence that no resolution had been taken to sell the property must be evaluated against the conspectus of evidence. The uncontroverted evidence of Cook was that all business decisions were taken jointly after she and her father discussed them. Although she had not actively investigated the condition of the property or even visited it, and her evidence belied her assertion that she was involved in all the affairs of the companies held by her and Kuk, she nevertheless remained steadfast that their intention to develop the property and not to sell it had remained unchanged. Such intention is consistent with her further testimony that workers including the second defendant were brought to South Africa in 2001, ostensibly as directors of the first defendant and employed on the property; a bank account was opened and three of the employees were given signing powers on the account. It is in any event common cause that the second defendant was appointed a director of the first defendant and employed on the property by the first defendant.

[44] Her version is also consistent with the observation of Mr Naicker when he inspected the property in 2006 prior to conclusion of the contract, that the property was still being utilized for the benefit of the first defendant as the sand winning operation was in place.

[45] The fact that the title deeds to the property had been retained and were still in the bank in Hong Kong, where Kuk had left it for safekeeping also supports Cook's evidence that there was no intention or decision to sell the property, particularly as when Cook and Kuk had decided to sell a property owned by another company, Flourishing Trading, the title deed had been handed to the second defendant. This also calls into question the reason for the provision in the special power of attorney authorizing the second defendant to bring an application for a duplicate original title deed, when it was Kuk who had arranged the safekeeping of the title deeds.

Cook's evidence that all property transactions for their companies were handled by their usual attorneys, WWB, who even attended to the preparation of the necessary power of attorney if the directors were not in South Africa, was not disputed. The same attorneys had prepared the power of attorney for the sale of the property held by Flourishing Trading. However there was no involvement of WWB in the sale of this property; the purchasers were taken to the second defendant's attorneys and then the second defendant agreed that the plaintiff's attorneys could

attend to the transfer of the property, despite the contention that Kuk was aware of the sale. There is no cogent reason suggested or apparent as to why he did not utilize the services of his regular legal representatives in respect of this sale if it were authorized by him.

[46] Furthermore although the capacity of Kuk is described as that of 'major shareholder' he was according to the company documents furnished by the first defendant (Exhibit H), not a shareholder. The sole shareholder in the first defendant as from 4 November 1997 was Forest Eight Limited and the sole shareholder in the Forest Eight Limited is Yin Ping Cook, who is also the director thereof. Therefore any decision taken in connection with the alienation or disposal of the assets of the first defendant, in particular the sale of the property, which according to the undisputed evidence of Cook was its only fixed asset, had to be by way of a resolution duly taken by Cook in her capacity as the only member of the first defendant in accordance with Section 228 of the Companies Act No 61 of 1973 ('Section 228'), which as at date of the agreement read as follows:

'S228 Disposal of undertaking or greater part of assets of company

(1) Notwithstanding anything contained in its memorandum or articles, the directors of a company shall not have the power, save with the approval of a general meeting of the company, 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) No resolution of the company approving any such disposal shall have effect unless it authorizes or ratifies in terms the specific transaction. '

(3) The requirements contained in this section in respect of transactions falling within the provisions of subsection (1), shall be in addition to any other requirements, including the limitation of voting rights, relating to such transactions that may be imposed by the Securities Regulation Panel in terms of Section 440c or in terms of any other law."

The evidence of Cook is clear and consistent in this respect – she did not authorize or ratify any decision to sell the property. Kuk therefore did not himself have the authority to sell the property or to authorize the second defendant to do so on his behalf as is purported in the special power of attorney. It must therefore follow that as the second defendant was not authorized to deal with the property on behalf of the first defendant, he could not enter into an agreement of sale of the property purporting to be the duly authorized agent of the first defendant.

[47] I am unable to find as urged by Mr Naidoo that the probabilities favour the finding that the requisite meetings did take place and the provisions of Section 228 were complied with as there is nothing to gainsay the assertions of Cook to the contrary.

The Turquand Rule :

[48] Mr Naidoo has also contended that the Turquand Rule should be applied in favour of the plaintiff, despite the provisions of Section 228. The rule is generally expressed by saying that a person dealing with a company in good faith is entitled to assume that all internal formalities or acts of management have been duly performed and carried out by the company.

[49] While there is controversy as to whether a third party to whom the invalid disposal was made is entitled to enforce it against the company by means of the application of the rule in the *Turquand* case (**Royal British Bank v Turquand (1856) 119 ER 474**) since the invalidity does not entail that the related contract between the company and the third party is, as between them, void or unenforceable, the issue of whether Section 228 may be made subservient to the Turquand rule is comprehensively considered and in my view properly decided in **Farren v Sun Service SA Photo Trip Management 2004 (2) SA 146 (C)** and I therefore find the reliance of Mr King on **Farren** more persuasive.

[50] The judgment acknowledges that Section 228 was introduced for the protection of the shareholders who have placed the control of the company in the hands of the directors. Hence the requirement that the shareholders must approve, authorize or ratify a transaction when the whole or greater part of the company's assets are being disposed of. Relying on the judgment of **EM Grosskopf JA in Bevray Investments (Edms) Bpk v Boland Bank Bpk 1993 (3) SA 597 (A) at 622–623**, the learned judge concluded that the Legislature intended the provisions of the

section to prevail while the application of the *Turquand* rule would negate the provisions of S228.

[14] If it is accepted that the objective of the Legislature was to protect the shareholders, then surely that intention should be given effect to, for otherwise 'admitting the application of the *Turquand* rule may resolve the dilemma, but will nullify the efficacy of s 228 and will defeat the object of the Legislature' (L Hodes 'Disposal of Assets - s 228' 1978 *The South C African Company Law Journal* F - 6, F - 13). As pointed out by Prof *Fourie* , *Von Willich's* view, by implication, is that the Legislature intended to curb the authority of directors well knowing that the *Turquand* rule would effectively neutralise the provisions of s 228 and that this could never have been the intention. I agree.' (page 155)

I am in agreement with the learned judge that the *Turquand* rule should not prevail over the provisions of Section 228.

[51] Consequently the sale of the property entered into by the second defendant on the fallacious authority evinced by the power of attorney and in contravention of the prescriptive provisions of Section 228 is not a valid transaction which is binding on the parties thereto.

[52] There is in the premises no need for the determination by this court of the authenticity of the signature of Kuk on the power of attorney. It does seem appropriate however to note that although the evidence of Mr Irving that the signature on the power of attorney was genuinely that of Kuk was very persuasive and uncontroverted, it must be weighed against the uncontroverted evidence of Cook that the second defendant admitted to her that he used pages blank except for the signature of Kuk to create complete documents, similar to the power of attorney in this case. Furthermore, the incorrect description of Kuk as major shareholder of the first defendant in the document supports the inference that the power of attorney was drafted by a person or persons who did not have knowledge of the actual status of Kuk within the structure the first defendant.

[53] The first defendant may however be held liable if it represented in some way that the second defendant was its authorized agent.

‘One of the requirements for holding a principal liable on the basis of the ostensible authority of its acknowledged agent is a representation, by words or conduct, made by the principal, and not merely by the agent, that the agent had authority to act as he or she had done. Assurances by the agent as to the existence or extent of his or her authority are therefore of no consequence.’

(Glofinco v ABSA Bank Ltd t/a United Bank 2002 (6) SA 470 (SCA))

‘But the fact of agency, or the extent of the authority of an agent, cannot generally be proved by the declarations of the alleged agent. In considering whether the plaintiff has discharged the onus on it, a court cannot rely upon statements, conduct and admissions of the agent himself to establish authority where that is the very fact in issue. The evidence must be sought elsewhere.’

(The Law of Agency in South Africa J M Silke 3rd edition 1981 at page 91)

[54] There is no evidence that any such representations that the second defendant was its agent were made by the first defendant whether by way of words or conduct. It was the second defendant who assured the Naickers that he was duly authorized to represent the first defendant by way of the power of attorney and as a director of the first defendant.

In the premises, the first defendant cannot be held liable for the acts of the second defendant.

[55] The plaintiff’s prayer for an order declaring the agreement of sale valid and binding on the parties and specific performance therefore lies to be refused.

Unjust Enrichment

[56] The Naickers’ evidence that the full purchase price was paid in installments to the second defendant or his wife on his instructions was supported by vouchers and not denied by the second defendant. He in fact admitted that the purchase price had been ‘consumed’.

Clause 1 of the agreement provides for payment of the purchase price to the seller, the first defendant. The Naickers testified that the second defendant had informed them that his grandfather had agreed that the purchase price should be paid to him, which is clearly contrary to the agreement. Nor was the agreement varied in this respect in compliance with the nonvariation clause (ie clause 11) in the agreement.

Mr Naidoo sought to persuade the court that as the second defendant was the duly authorized agent of the first defendant, the first defendant is liable for the actions of its agent and is accordingly liable to compensate the plaintiff to the value of the purchase price.

[57] I am unable to find any merit in this submission, particularly as it has already been determined that the second defendant was not the duly authorized agent of the first defendant. Furthermore, by the plaintiff's own testimony, the purchase price was not paid to the first defendant but to the second defendant. Mr Naicker testified that every time he made a payment he called the second defendant to confirm which account the money should be paid into, and some of the payments were made at the request of the second defendant into the account of his wife. Nor has it been disputed by the second defendant that he received the sum of R1million (one million rand) from the plaintiff.

The plaintiff's alternative claim against the first defendant must fail as it has not proved that the first defendant has been unjustly enriched at the expense of the plaintiff.

[58] On the other hand the second defendant received the payments from the plaintiff in his personal capacity as he was not the duly authorized agent of the seller and 'consumed' same. He was the only party that was unjustly enriched at the expense of the plaintiff and is consequently solely liable to compensate the plaintiff in the sum of R1 000 000 (one million rand).

Costs

[59] The first defendant has submitted that a costs order in its favour should include the costs occasioned by the engagement of senior counsel. Given the issues for determination, the significance of the outcome to the first defendant, and the value of the property subject to the disputed sale, I am satisfied that the engagement of senior counsel was warranted.

[60] This action was necessitated as a result of the conduct of the second defendant. Not only did he misrepresent to the plaintiff that he was duly authorized to sell the property on behalf of the plaintiff, but he also accepted payment of the purchase price ostensibly on behalf of the first defendant, which he utilized for his own benefit. In the *bona fide* belief that the second defendant was the duly authorized agent of the first defendant, the plaintiff sought to implement its right to take transfer of the property against the first defendant, alternatively to recover the purchase price from the first defendant.

The first defendant on the other hand was compelled to defend the action of the plaintiff as it sought not only to preserve its asset, but also to resist payment of a substantial sum of money which it had not received. This was also a consequence of the conduct of the second defendant.

In the premises the second defendant ought to bear the costs of the action.

Order

- 1 The Plaintiff's action against the First Defendant is dismissed.**
- 2 The Second Defendant is ordered to pay the costs of the First Defendant, such costs to include the costs of senior counsel.**
- 3 Judgment in favour of the Plaintiff is granted against the Second Defendant for :**
 - 3.1 Payment in the sum of R1 000 000 (one million rand)**
 - 3.2 Interest on the aforesaid sum at the rate of 15,5% per annum calculated from date of service of summons to date of payment**
 - 3.3 Costs of suit**

Date of Hearing : 16th November 2010

Date of Judgment : 13th May 2011

Counsel for Plaintiff : Advocate D Naidoo

Instructed by : CKMG Attorneys c/o Udesb Ramesar Attorneys

Counsel for 1st Defendant : Advocate JC King SC

Instructed by : Shepstone & Wylie Attorneys c/o Tomlinson
Mnguni James

Counsel for 2nd Defendant : Advocate HK Gunase

Instructed by : Vinay Yetwaru Attorneys

c/o Udesb Ramesar Attorneys

Counsel for 3rd Defendant : no appearance