



IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION MBOMBELA (MAIN SEAT)

CASE NO.: 1019/2021

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

12/11/2021

[SIGNED]

DATE

SIGNATURE

In the matter between:

J.J BADENHORST N.O

(Executor in The Estate Late Ernst Hendrik De Witt)

Applicant

and

MANYATTA PROPERTIES CLOSE CORPORATION

First Respondent

PHILLIPUS CORNELIUS DE WITT

Second Respondent

MASTER OF THE HIGH COURT, NELSPRUIT

Third Respondent

NIKIFON (PTY) LTD	Fourth Respondent
SWANEPOEL AND PARTNERS INCORPORATED	Fifth Respondent
CHRISTELLE DE WET	Sixth Respondent
DAVID BENNETT	Seventh Respondent
THE REGISTRAR OF DEEDS, MBOMBELA	Eight Respondent
ANNA MAGDALENA ASHBURNER	Ninth Respondent
ANNA MAGDALENA ASHBURNER N.O	Tenth Respondent
RONALD ASHBURNER N.O	Eleventh Respondent
CAROLINE ELIZABETH VERMEULEN N.O	Twelfth Respondent
ANDRE ASHBURNER N.O	Thirteenth Respondent
ROANI ASHBURNER N.O	Fourteenth Respondent
ODUSSEE TRADING CLOSE CORPORATION	Fifteenth Respondent

This judgment will be delivered over the zoom platform on 12 November 2021 at 09:00 and electronically distributed to the parties. A signed version will be filed in the court file.

JUDGMENT

Roelofse AJ:

INTRODUCTION

[1] The dispute in this application concerns the sale and transfer of a farm and the

subsequent registration of servitudes over a farm.¹

[2] The applicant, in a vindicatory action, on behalf of the former owner of the farm, Manyatta Properties Close Corporation (hereinafter referred to as “Manyatta”), seeks to annul the sale, transfer and the servitudes and the re-transfer of the farm to Manyatta.

[3] This court must decide whether the applicant has established a cause of action for the relief he seeks that is, whether the applicant must be suited in circumstances where he reclaims property which belonged to a close corporation from a third party in a vindicatory action on behalf of the close corporation in his capacity as executor of the estate of a deceased member of the close corporation.

Background

[4] I commence with a brief background to the dispute.

[5] Manyatta had two members. The second respondent holds 50% members’ interest in Manyatta. Mr. Ernst Hendrik De Witt held the other 50% members’ interest. Mr. Ernst Hendrik De Witt (“*the deceased*”) passed away on 21 March 2010. Despite the deceased’s passing, the Companies and Intellectual Properties Commission’s records still reflect that the deceased together with the second respondent hold the members’ interest in Manyatta. The deceased’s members’ interest must still be dealt with in terms of section 35 of the Close Corporations Act 69 of 1984 (“*the Corporations Act*”).²

[6] The applicant is the present executor of the deceased’s estate, being appointed as such by the Master of the High Court, Johannesburg on 5 November 2020. The erstwhile

executrix was removed by order of court on 27 August 2020. In terms of the deceased's will, the deceased's son, Ernst Hendrik De Witt Jnr. (*“the heir”*) is the sole beneficiary of the deceased's estate.

[7] On 18 September 2014, Manyatta sold the farm to the fourth respondent, Nikifon (Pty) Ltd³ (hereinafter referred to as *“Nikifon”*). Ownership of the farm was transferred to Nikofin on 24 October 2014.

[8] On 26 January 2016 and on 19 April 2016, two Notarial Deeds of Servitude were registered in respect of the farm. In the first instance, the farm is the servient tenement and in the second instance, the farm is the dominant tenement.

[9] The sixth and seventh respondents are conveyancers and directors of the fifth respondent (to whom I shall refer to as *“the conveyancers”*). The sixth respondent prepared the documents for the transfer and the first notarial deed of servitude. The seventh respondent appeared before the Registrar in order to effect the registration of transfer and acted as notary for purposes of the registration of the first servitude.⁴

THE APPLICANT'S CLAIM

[10] The applicant, in his capacity as executor of the deceased's estate, approaches this court in motion proceedings on notice of motion. The application was issued on 24 March 2021.⁵

Relief sought

[11] In his notice of motion, the applicant seeks the following relief: that the sale agreement and the registration of the servitudes be cancelled and set aside and declared void *ab initio*, alternatively null and void; that Manyatta be declared as the lawful and rightful owner of the farm; that the transfer of the farm be cancelled and set aside and declared void *ab initio*, alternatively null and void; that the Registrar of Deeds, Mbombela⁶ be ordered to cancel the present title deed of the farm, issue a new title deed in the name of Manyatta and cancel the Notarial Deeds of Servitude. In addition, the applicant seeks costs to be paid by those respondents who opposed the application on an attorney and own client scale.⁷

[12] The applicant sets out the purpose of the application in his founding affidavit as follows:⁸

“This is an Application in which the Applicant seeks an order from the above Honorable Court, inter alia, cancelling and setting aside the fraudulent, unlawful and irregular transfer of and registration of ownership [of the farm], in the name of Nikifon (Pty) Ltd, (the Fourth Respondent), which transfer was registered by the Eighth Respondent on 24 October 2014, and to set aside all subsequent registrations, of unlawful notarial servitudes, registered on 5 May 2016 against the Title Deeds by virtue of there being a defect in the real agreement and fraud as set out below.”

The applicant’s allegations

[13] The background given in the introduction above is contained in the applicant's founding affidavit and are common cause.

[14] The applicant alleges in his founding affidavit that the sale and transfer of the farm was fraudulent, brought about through collusion between the second and fourth to seventh respondents, and therefore there was a defect in the underlying transaction upon which ownership was transferred.

[15] The basis for this allegation is that, at the time of the entering into of the sale agreement and the subsequent transfer, the second respondent purported to act on behalf of Manyatta in circumstances where the second respondent had no authorization to do so from the erstwhile executrix. In addition, the second respondent, purporting to act on behalf of Manyatta signed a power of attorney on behalf of Manyatta and a resolution purporting to be by the members of Manyatta authorizing the second respondent to act in a representative capacity on behalf of Manyatta. In terms of this resolution, the conveyancers were authorized to appear before the Registrar of Deeds on behalf Manyatta to register the deed of transfer into the name of Nikifon.

[16] The applicant's founding affidavit is replete with allegations that the second and the fourth respondents as well as the conveyances acted unlawfully, fraudulently in collusion and also in some instances, in respect of the conveyancers that they acted grossly negligent by not complying with provisions of Deeds Registries Act⁹, the Corporations Act, Companies Act¹⁰, the Administration of Estates Act¹¹ and the regulations promulgated in terms of the aforesaid legislation by transferring the farm into the name of Nikifon without complying with the said legislation.¹²

[17] In addition, the applicant sets out in his founding affidavit¹³ that the conveyancers had a duty do certain things upon receiving the instruction to attend to the transfer including doing a deeds search on the property and a Company Search in order to establish who the

members of the registered owner of the property were. The applicant further alleges¹⁴ that the sixth respondent as the preparer of the transfer / conveyancing documents had a duty to prepare certain documents for signature by the seller including: a power of attorney; a preparation certificate signed by the sixth respondent were in the sixth respondent took responsibility for the correctness of all the facts contained in the power of attorney; a duty to ensure that the person signing on behalf of the close cooperation was duly authorised to do so; and to obtain a power of attorney from the second respondent and the deceased and in the absence of the deceased from the erstwhile executor. All of these lapses in the alleged duties that rested upon the sixth respondent are set out by the applicant to support the allegation that the conveyancers acted fraudulently, in collusion with the second and fourth respondents, alternatively that they acted grossly negligent.

[18] The Applicant alleges¹⁵ that the second respondent had no authorization from the erstwhile executrix to have signed the resolution for the members' signature in which the authorization for the transaction as well as the signing of the powers of the second respondent was set out. The applicant alleges that therefore that the second respondent was never authorized by a resolution for members signature to sign the power of attorney to pass transfer on behalf of Manyatta to Nikifon.

[19] In paragraph 86¹⁶ of the founding affidavit, the applicant says as follows:

“It is therefore with respect, patently clear that the second respondent had never authority to act as a representative capacity on behalf of the first respondent, to sell or cause the transfer of [the farm] and that the Fifth, Sixth and Seventh Respondents had no valid authorization to effect transfer by the Eighth Respondent into the name of the Fourth Respondent, having grossly violated the acts and regulations as set out above”

[20] It is on this these allegations that the applicant alleges that there is a clear and patent defect in the real agreement of sale and the subsequent transfer as Manyatta never had the intention and could not form the intention to sell and transfer the property.

[21] The applicant bolsters his case in paragraph 88¹⁷ of the founding affidavit as follows:

“It is also, with respect, clear that the Fifth, Sixth and Seventh Respondents, either fraudulently and in collusion with the Second and Fourth respondents, alternatively in a reckless, alternatively grossly negligent manner, did not comply with their statutory duties and participated in a fraudulent sale and transfer, dispossessing the First Respondent of its only an extremely valuable farm as, at a fraction of its true value”

[22] The applicant repeats at a multitude of places in the founding affidavit the allegations of fraud and collusion that were allegedly committed by the second respondent and the conveyancers. It is not necessary to refer to all the references where the applicant repeats these allegations.

[23] In addition, the applicant relies on the fiduciary duty that rested upon the second respondent to terms of the Corporations Act to act in the best interests of Manyatta. The applicant proceeds to state that the purchase price was never transferred into Manyatta’s bank account and that it is suspected that the money was directly paid into a bank account nominated by the second respondent. According to the applicant, this constitutes theft by the second respondent.

[24] In his founding affidavit, the applicant also cites various provisions of the aforesaid statutes to sustain the relief he seeks. In particular, the applicant relies upon sections 42¹⁸,

43¹⁹ and 54²⁰ of the Corporations Act come to the ultimate conclusion that the sale of the farm is null and void is to be declared as such. Save for the provisions of the Corporations Act the applicant relies upon, it is not necessary for purposes of this judgment to set out all the other provisions of the other statutes the applicant refers to in this regard.

[25] In respect of section 42 of the Corporations Act, the applicant alleges that the second respondent and Nikifon acted in collusion to commit fraud as both knew or reasonably should have known of the fact that the second respondent had not received written consent and was not duly authorized on behalf of the deceased as the deceased had passed away approximately four years before the conclusion of the sale agreement. By selling the farm for well below its market value, so the applicant alleges and by misappropriating the proceeds of the sale, the second respondent breached his fiduciary duty towards Manyatta.

[26] In respect of section 43 of the Corporations Act, the applicant alleges that the second respondent is liable to Manyatta for the purported losses it had suffered.

[27] In concluding the basis upon which the applicant seeks relief the applicant says as follows in the founding affidavit: ²¹

“I respectfully submit that, where the registration of transfer of immovable property is affected pursuant to fraudulent, unlawful and irregular documents and or actions, and where there is no intention on the part of the seller to pass ownership of the immovable property, and where the peremptory requirements of statutes and regulations, such as section 46 of the closed Corporations Act were not comply with, that ownership does not lawfully pass to the person in which name the property is registered, and in this instance that not lawfully and validly pass from the First Respondent to the Fourth Respondent.”

“The registration of Portion 33 of the farm Rietfontein, had taken place as a result of a series of fraudulent and reckless actions by the Second, Fourth, Fifth, Sixth and Seventh Respondents, rendering the registration of the transfer to the Fourth Respondent, void ab initio, alternatively voidable.”

[28] In his replying affidavit, significantly, the applicant confines his cause of action as follows:²²

“I respectfully submit that the applicants claim is one of the vindication (res vindicatio) and therefore the applicants if vindictive reclaim is clearly a claim based on ownership of a thing owned by the first respondent on whose behalf the applicant is entitled to institute proceedings as referred to above, as well as a statutory claim declaring the sale void ab initio, alternatively voidable.

I respectfully submit that it is evident from the Notice of Motion, and the relief sought therein a set out in the Applicant's founding affidavit, that the Applicant seeks a mandamus order in the form of vindictively relief, on behalf of and for the benefit of the First Respondent, from the above Honorable Court, and not merely a declaratory order”

THE OPPOSING RESPONDENTS’²³ VERSION AND DEFENCE

The second respondent’s version

[29] The second respondent filed an affidavit wherein he sets out that he has no income and survives on a government old age pension. He has no meaningful assets and do not have any financial means to oppose the application. For those reasons he does not oppose the application save for pleading that no cost order be made against him. In his affidavit he confirms that he abides the results of the application.

[30] The second respondent gives the history of the property. During the period 1995 to

2005 the members of Manyatta where the second respondent and his son-in-law who each owned 50% of the member's interest in Manyatta. The property was acquired with the financial assistance of a mortgage bond granted by FNB bank.

[31] The arrangement between Manyatta, his son in law and himself was that the second respondent would live on the farm and carry the operational expenses of the farm. The arrangement was furthermore that the son-in-law would carry the monthly mortgage bond instalments which amounted to about R3000 to R3500 per month.

[32] During 2005, the son-in-law indicated that he wanted out and that he no longer wanted to be a member of Manyatta because he did not want to service the mortgage payment instalments anymore.

[33] The second respondent engaged the deceased and asked him whether he would be interested in taking over the son in law's members' interest. No money was required to be paid for the transfer of the son in law's members interest in Manyatta. The members' interest in Manyatta was subsequently transferred to the deceased on 24 June 2005 without the deceased paying any remuneration for the membership. The second respondent proceeded with the normal day-to-day running of the farm including effecting improvements. Save for the mortgage bond payments, the second respondent carried all the expenses associated with the farm. The second respondent alleges that the deceased, while alive, infrequently paid the mortgage bond instalments. Unbeknown to the second respondent, the outstanding bond repayments were not fully attended to by the deceased.

[34] After the deceased's death, the second respondent was informed by the bank that the bank bond payments were still in arrears. The bank threatened with the repossession of

the property. The second respondent had to make arrangements with the bank regarding the mortgage bonding instalments so that the property would not be repossessed.

[35] At the deceased funeral the heir and the second respondent had a discussion over the farm. The heir informed the second respondent that he was not interested in the farm at all. The second respondent accepted that the heir would leave the running of the farm and all decisions concerning the farm and Manyatta to himself. The second respondent accepted that the heir was not going to pay the mortgage bond instalments as deceased was supposed to do. From there on, the second respondent says that he ran farm and Manyatta as his own.

[36] In paragraph 35²⁴ the second respondent says as follows:

“Neither the Heir, nor the executrix of the deceased estate enquired about the farm or the first respondent. Neither the Heir, nor the first respondent enquired whether they could contribute to the expenses of the farm. Neither the heir, nor the first respondent enquired what profits were made (none was made). They left me to manage the farm and the first respondent as my own.”

[37] The second respondent says that, after a second fire outbreak on the farm he experienced financial difficulties to retain the farm as well as running it on an economically viable basis. He was forced to start working again in formal employment outside the farm to make ends meet. The only viable option left to the second respondent was to sell the farm to get a break-even point. The second respondent denies the allegations of fraud and theft. The money from the sale was used to settle Manyatta’s debt

The conveyancers’ defence and version

[38] The sixth respondent deposed to an answering affidavit. The answering affidavit is deposed on behalf of the fifth and seventh respondents as well.

[39] The conveyancers raise certain preliminary defences including: that the applicant's claim has prescribed; the application does not disclose a cause of action; the motion proceedings above embarked upon or the wrong procedure in view of the foreseeable factual disputes; such discretion a Court as in respect of a derivative action should not be exercised in favour of the applicant.

[40] I briefly deal with the preliminary defences.

Prescription

[41] The conveyancers allege that the applicants claim is a derivative action on behalf of Manyatta that the sale and transfer of the farm be set aside. The right to exercise the provisions of section 46(b)²⁵ of the Corporations Act is a personal right which belonged to the deceased's executrix in her capacity as such. It is not a corporate right which belonged to Manyatta. It is a right that the executrix could potentially have enforced against the second respondent and the other member of Manyatta.

[42] To the extent that the executrix had recourse in terms of section 46(b) of the Corporations Act in that the written consent of a member of a corporation holding at least a member's interest of at least 75%, or members holding together at least that percentage of the members' interests in the corporation is required for a disposal of all or the greater portion of the assets of the corporation or for any disposal of the corporation's immovable property²⁶, the conveyancers allege, the applicant's claim against Manyatta and the second

respondent has prescribed in terms of the provisions of section 11(d) of the prescription Act 68 of 1969, the sale being concluded and given effect to more than three years prior to the application being served.

[43] The conveyancers allege that section 54(1) of the Corporations Act provides for any member of a closed corporation to be an agent of the close corporation. The conveyancers allege that, given the facts set out by the second respondent namely that neither the heir nor the executrix made any claim or showed interest in Manyatta or the farm despite being fully aware of the existence of Manyatta and the farm, the second respondent was authorized to bind Manyatta through the sale agreement. As such, according to the conveyancers, the applicant does not disclose a cause of action for the relief he seeks. In this sense therefore, and in terms of the provisions of section 54(2) of the close Corporations Act, the second respondent had authority to sell the property.

Dispute of fact

[44] The conveyancers refer to various disputes of fact which ought to have been known to the applicant when the application was instituted. It is not necessary for purposes of this judgment to go into bold the disputes of fact that are raised safe to say that in this court's view such disputes that are identified by the conveyancers existed at the time the application was launched.

Derivative action

[45] The conveyancers state that the court must not exercise its discretion by allowing the applicant to succeed by virtue of a derivative action in the exercise of the courts

discretion because: the heir informed the second respondent that he was not interested in the farm at all; at no stage that the heir or the executrix express any interest for any obligations or claiming any right as member of Manyatta; the second respondent established that the money that was generated from the sale of the farm was utilized to pay Manyatta's debts. Therefore, it will not be in the interest and benefit of the creditors that the proceeds will be used to benefit the disinherited heir. The conveyancers allege that the executrix took no steps to transfer the deceased 50% members interest in the respondent. The applicant himself also did not seek to do so.

[46] In addition, the inventory that was completed by the executrix made no mention of the deceased membership interest in the Manyatta. This is borne out by the inventory of the deceased estate that was completed by the heir.

Defence on the merits and version

[47] In respect of the merits, that is, the manner in which the farm was transferred and the manner in which the conveyancers conducted themselves, they deny any allegation of negligence, fraud, collusion and dishonesty.

[48] The conveyancers' version is that the second respondent told the director of Nikifon and the conveyancers that he owned the farm through Manyatta. The second respondent regarded himself as the owner of the members' interest although the deceased was also registered as a member. The conveyancers confirm that the second respondent alone signed all the documentation for transfer and the sale agreement as well as the documents presented to him by the conveyancers.

[49] The conveyancers allege that the second respondent “...was effectively the only member of Manyatta and that the heir and the executrix regarded him as such. In substantiation of this allegation, the conveyancers allege that no mention is made of the deceased’s 50% interest in the inventory.

[50] With regards to section 46(b) of the Corporations Act, the conveyancers allege that the fact that the executrix did not give consent to sell the farm does not mean that the second respondent did not have the power to sell the farm as section 46(b) regulated a corporation’s internal affairs.

The ninth to eleventh and fourteenth respondent’s defence and version

[51] These respondents were cited as they have an interest in the servitudes that were registered. I deem it not necessary to set out these respondents’ defence and version in detail. However, these respondents raise certain preliminary defences of which the following is pertinent in this application: the applicant lacks *locus standi* for he is neither a member of Manyatta nor has membership been transferred to him; the application is an abuse of process in that factual disputes were foreseeable; the application lacks a cause of action in that the intention of both Manyatta and the fourth respondent was to transfer ownership of the farm to the fourth respondent, therefore there was no defect in the real agreement; prescription in that the right to set the sale aside accrued when the contract was concluded and as such, the cause of action arose and the debt fell due on 18 September 2014 while the application was served on 4 May 2021.

[52] With regards to the allegations of fraud, gross negligence and collusion, these respondents have nothing to offer. It is understandable for they were not involved in the

alleged conduct. These respondents allege that all the applicant does is to speculate and make inferences from the facts corroborated by the documentary evidence.

The fourth and fifteenth respondents' defence and version

[53] The fourth and fourteenth respondents also allege that any possible cause of action which the applicant may have had has become described and that any claim, of the kind set forth in the notice of motion, constitutes a debt which is by now been extinguished as a result of prescription.

[54] The fourth and fifteenth respondents allege that a claim based upon the *rei vindicatio* is not capable of description as such a claim is not a debt as contemplated in the Prescription Act. The fourth and fifteenth respondents allege that, to the extent that the applicant claims the retransfer of the farm to Manyatta, such a claim can only be pursued by an owner, which in this instance is Manyatta and not the applicant.

[55] In the remainder of the answering affidavit, fifth and fourteenth respondents set out the circumstances under which the agreement was concluded. In my view it is not necessary to set out the fifth and fourteenth respondents' version in detail.

DISCUSSION

[56] Most of the facts pertaining to the sale of the farm, the transfer thereof and the registration of the Notarial Deeds of Servitude are common cause. What is not common cause is the allegations of fraud, negligence and collusion that is made by the application

against the second respondent and the conveyancers. In answer to the denial by the conveyancers and the version put up by the second respondent, the applicant, in his replying affidavit says as follows:²⁷

“If the Conveyancers were innocent and had so accepted the fraud of the Second Respondent the Conveyancers, through their grossly reckless and/ or grossly negligent conduct, in dereliction of their duties to comply with the statute and regulations referred to in the Answering Affidavit to the Fourth and Fifteenth Respondents, was the cause that the fraud was perpetrated and further through their non-compliance with the provisions of the close Corporations Act, they caused the transfer to be void ab initio, alternatively voidable.”

[57] I must first determine what the applicant’s cause of action is for it is the cause of action as pleaded that will eventually determine whether the relief that is sought may be granted or not.

[58] Initially, the applicant’s cause of action is obscured for his reliance upon a multitude of statutory provisions without disclosing which provision will underpin the relief that he is seeking. The best this court could make out was that the applicant seeks the nullification of the sale agreement on the basis of the absence of a real agreement by Manyatta to effect transfer of the farm to Nikifon as a result of the alleged fraud perpetrated by the second respondent which was facilitated by the conveyancers’ conduct.

[59] During argument, counsel appearing for the applicant rightly accepted that the applicant’s claim is founded upon the *rei vindicatio*. The parties are furthermore in agreement that a claim founded upon the *rei vindicatio* cannot proscribe.

[60] An owner is entitled to reclaim possession of his or her property with the *rei*

vindicatio. In order for this cause of action to succeed, the plaintiff (or in this case the applicant) had to allege and prove ownership of the thing.²⁸

[61] It is common cause that Manyatta was the owner of the farm. The applicant could not allege nor could he prove that he, even in his official capacity, was the owner of the farm. His vindication claim must therefore fail unless he can establish that he is in effect laying claim based on the *rei vindicatio* on Manyatta's behalf, that is, through a derivative action on behalf of Manyatta.

[62] This is exactly what the applicant attempts. The applicant alleges that he is entitled to institute the claim on behalf of Manyatta, in other words, on behalf of the deceased in his capacity as the executor of the deceased's estate. This would constitute a derivative action.

[63] Section 50(1) of the Corporations Act provides for derivative actions. It reads as follows:

“Proceedings against fellow-members on behalf of corporation.—(1) Where a member or a former member of a corporation is liable to the corporation—

(a) to make an initial contribution or any additional contribution contemplated in subsection (1) and (2) (a), respectively, of section 24; or

(b) on account of—

(i) the breach of a duty arising from his or her fiduciary relationship to the corporation in terms of section 42; or

(ii) negligence in terms of section 43,

any other member of the corporation may institute proceedings in respect of any such liability on behalf of the corporation against such member or former member after notifying all other members of the corporation of his or her intention to do so.”

[64] Section 50(1) of the Corporations Act is intended to enable members of a corporation to, on behalf of the corporation, hold members liable to the corporation for any loss suffered by the corporation due to the conduct of those members. “Loss suffered” is not confined to monetary loss, it may also include interdictory or declaratory relief.

[65] In expressing her views on section 50(1) of the Corporations Act, TSHIKI J (as she then was) in Packaging & stapling CC v Fromm System Africa and Others²⁹, at paragraph 21, said as follows:

*“In Volume 3 of Henochsberg 4 , Meskin states:
‘The intention of the Legislature in enacting these provisions [sec 42] is to provide a statutory cause of action for a corporation in respect of breach of fiduciary duty by a member thereof.
The section should be read with section 50(1)(b)(i) in terms of which any other member of the corporation may enforce such cause of action by legal proceedings on behalf of the latter. The two sections together constitute a legislative prescription of that which obtains in the case of a company at common law’.
I agree with the views expressed by Meskin supra.”*

I also agree with Meskin.

[66] A claim in terms of section 50(1) of the Corporations Act is a claim in the hands of the corporation instituted by a member/s against the other member/s of the corporation.³⁰

[67] Although the second respondent is cited in this application, no relief is sought

against him as one of the members of Manyatta. Relief is sought against the other respondents, in particular the vindictory relief is sought against Nikifon. The relief that is sought against the other respondents will only follow if the applicant succeeds in his vindication claim. All of them are third parties in relation to Manyatta.

[68] The point is this - section 50(1) of the Corporations Act envisages derivative actions by member/s on behalf of a corporation against fellow member/s and not third parties. The applicant must therefore be non-suited to the extent that he seeks vindictory relief against third parties.

[69] The applicant says he has a statutory claim declaring the sale void *ab initio*, alternatively voidable. In my view, any such claim has prescribed and, in any event the applicant, in reply and argument confined his claim to a vindictory action.

[70] In respect of the relief claimed pertaining to the registration of the servitudes, same can only be granted if the sale agreement and subsequent transfer of the farm is quashed. For the reasons set out above, the agreement and the transfer remain intact and consequently also the Notarial Deeds of Servitude.

[71] The application must be dismissed on the aforesaid grounds.

COSTS

[72] I see no reason why costs should not follow the result. The conveyancers seek costs *de bonis propriis* on an attorney and client scale against the applicant. In my view, such a

cost order is warranted. What follows is why.

[73] The applicant's cause of action founded upon fraud, gross negligence coupled with direct allegations of collusion between the second respondent and the conveyancers were obviously unsustainable and the allegations were made without any proper consideration of the veracity or gravity thereof. The applicant was acutely aware that neither the heir nor the executrix mentioned the deceased's membership interest in Manyatta. As a matter of fact, the heir himself completed the deceased's inventory. This ought to have forewarned the applicant that there may be a plausible explanation for the heir and executrix's conduct. He should have investigated the exact circumstances regarding the farm and the members' involvement in Manyatta before he chose to make the scurrilous, defamatory and unacceptable allegations against the second and fourth respondents and the conveyancers.

[74] It also is clear that the allegations of fraud and gross negligence were made by the applicant without having regard to what fraud and negligence actually constitutes. Fraud requires intention for fraud is committed when a knowingly false representation is made by one person to another person intending that the representee will act on the representation and the representation must have induced the representee to act in response to the representation.³¹ Negligence is of course something entirely different from fraud. Negligence is constituted when a reasonable person (*diligens paterfamilias*) in the position of the defendant would foresee the reasonable possibility that the conduct (whether an act or omission) would injure another's person or property and cause patrimonial loss; such a reasonable person would take reasonable steps to guard against such occurrence; and the defendant failed to take such reasonable steps.³² It is not possible to commit fraud and to be negligent at the same time in respect of the same act.

[75] The applicant chose to make express allegations of fraud, corruption and other acts of gross negligence against the second respondent and the conveyancers. The applicant has swung his pendulum between fraud and gross negligence coupled with allegations of collusion. This the applicant persisted with in his reply even after the respondents set out their versions. In this regard, the versions of the second, fourth and sixth respondents should have dispelled any notion of fraud and gross negligence.

[76] The sixth respondent, in her answering affidavit, sets out that the applicant used the words “fraud/fraudulent/fraudulently” twenty-three times and the word “collusion” seven times in the founding affidavit. Even after the applicant were given the second, sixth and seventh respondents’ versions, he persisted with his scurrilous and unfounded accusations of impropriety against the sixth and seventh respondents.

[77] I am mindful of the fact that an award of attorney-and-client costs is not easily granted by a court and only awarded on rare occasions where special circumstances are present.³³ In Telkom SA Soc Ltd and Another v Blue Label Telecoms Ltd and Others [2013] 4 All SA 346 (GNP) at para [34] and [35], Fabricius J held:

“Costs are ordinarily ordered on the party and party scale. Only in exceptional circumstances and pursuant to a discretion judicially exercised is a party ordered to pay costs on a punitive scale. Even more exceptional is an order that a legal representative should be ordered to pay the costs out of his own pocket. It is quite correct, as was submitted, that the obvious policy consideration underlying the court’s reluctance to order costs against legal representatives personally, is that attorneys and counsel are expected to pursue their client’s rights and interests fearlessly and vigorously without undue regard for their personal convenience. In that context they ought not to be intimidated either by their opponent or even, I may add, by the court. Legal practitioners must present their case fearlessly and vigorously, but always within the context of set ethical rules that pertain to them,

and which are aimed at preventing practitioners from becoming parties to a deception of the court. It is in this context that society and the courts and the professions demand absolute personal integrity and scrupulous honesty of each practitioner. See Kekana v Society of Advocates of South Africa 1998 (4) SA 649 (SCA) at 655- 656 (also reported at [1998] All SA 577 (SCA) Ed). It is true that legal representatives sometimes make errors of law, omit to comply fully with the Rules of Court or err in other ways related to the conduct of the proceedings. This is an everyday occurrence. This does not however per se ordinarily result in the court showing its displeasure by ordering the particular legal practitioner to pay the costs from his own pocket. Such an order is reserved for conduct which substantially and materially deviates from the standard expected of the legal practitioners, such that their clients, the actual parties to the litigation, cannot be expected to bear the costs, or because the court feels compelled to mark its profound displeasure at the conduct of an attorney in any particular context. Examples are, dishonesty, obstruction of the interests of justice, irresponsible and grossly negligent conduct, litigating in a reckless manner, misleading the court, and gross incompetence and a lack of care.”

[78] In my view, the applicant’s conduct warrants censure. His conduct substantially and materially deviated from what is expected from legal representatives. In this matter, the applicant acted both as attorney and client. Therefore, even more, blame for the applicant’s unacceptable conduct only lies with him. There is no reason why the deceased estate should be mulcted in costs. It is the applicant that made the offensive allegations. He must bear the brunt of the punitive costs order.

[79] I invited the parties to make written submissions after the matter was argued over what steps the court should consider if the court finds that the allegations of fraud were without foundation and were found to be meritless. Only the respondents furnished me with their views. The applicant did not heed my invitation. The respondents were of the view that a punitive costs order against the applicant in his personal capacity would suffice. I agree.

In the premises, the following order is made:

1. The application is dismissed.
2. The applicant is ordered to pay the second, fourth to seventh, ninth to eleventh and fifteenth respondents' costs on an attorney-and-client scale *de bonis propriis*.

Roelofse AJ
Acting Judge of the High Court

DATE OF HEARING: 7 October 2021

DATE OF JUDGMENT: 12 November 2021

APPEARANCES

FOR THE APPLICANT: Adv Murphy
INSTRUCTED BY: J.J Badenhorst and Associates Attorneys Incorporated

FOR THE FOURTH AND
FIFTEENTH RESPONDENTS: Adv Van der Merwe SC
INSTRUCTED BY: Braam van Rensburg Attorneys

FOR THE FIFTH TO
SEVENTH RESPONDENTS: Adv Maritz SC
INSTRUCTED BY: Savage Jooste & Adams Incorporated

FOR THE NINTH TO
ELEVENTH AND
FOURTEENTH
RESPONDENTS:
INSTRUCTD BY :

Mr Janse van Vuuren
Luneburg & Janse van Vuuren Attorneys

¹ Portion 33 of the farm Rietfontein 274, Registration Division JT.

² Section 35 provides as follows:

“35. Disposal of interest of deceased member.—Subject to any other arrangement in an association agreement, an executor of the estate of a member of a corporation who is deceased shall, in the performance of his or her duties—

(a) cause the deceased member’s interest in the corporation to be transferred to a person who qualifies for membership of a corporation in terms of section 29 and is entitled thereto as legatee or heir or under a redistribution agreement, if the remaining member or members of the corporation (if any) consent to the transfer of the member’s interest to such person; or

(b) if any consent referred to in paragraph (a) is not given within 28 days after it was requested by the executor, sell the deceased member’s interest—

(i) to the corporation, if there is any other member or members than the deceased member;

(ii) to any other remaining member or members of the corporation in proportion to the interests of those members in the corporation or as they may otherwise agree upon; or

(iii) to any other person who qualifies for membership of a corporation in terms of section 29, in which case the provisions of subsection (2) of section 34 shall mutatis mutandis apply in respect of any such sale.”

³ The fourth respondent.

⁴ Both servitudes were for pipelines to run over the respective properties. The tenth to fifteenth respondents all have an interest in the registration of the servitudes. It is not necessary for purposes of this judgment to indicate each of their involvement or interest in the servitudes and the registration thereof.

⁵ Service of the application was effected upon the respondents between 20 March 2021 and 1 July 2021.

⁶ The eighth respondent.

⁷ The fourth to seventh respondents and the tenth to eleventh and fourteenth respondents filed noticed to oppose the application.

⁸ Paragraph 24 at page 22.

⁹ Act 47 of 1937.

¹⁰ Act 71 of 2008.

¹¹ Act 66 of 1965.

¹² Paragraph 68 of the founding affidavit at page 30.

¹³ Paragraph 70 at page 30.

¹⁴ Paragraph 71 at page 30.

¹⁵ Paragraph 81 at page 33.

¹⁶ Page 33 of the record.

¹⁷ Page 34 of the record.

¹⁸ Section 42 of the Corporations Act reads as follows:

“Fiduciary position of members.—(1) Each member of a corporation shall stand in a fiduciary relationship to the corporation.

(2) Without prejudice to the generality of the expression “fiduciary relationship”, the provisions of subsection (1) imply that a member—

(a) shall in relation to the corporation act honestly and in good faith, and in particular—

(i) shall exercise such powers as he or she may have to manage or represent the corporation in the interest and for the benefit of the corporation; and

(ii) shall not act without or exceed the powers aforesaid; and

(b) shall avoid any material conflict between his or her own interests and those of the corporation, and in particular—

(i) shall not derive any personal economic benefit to which he or she is not entitled by reason of his or her membership of or service to the corporation, from the corporation or from any other person in circumstances where that benefit is obtained in conflict with the interests of the corporation;

(ii) shall notify every other member, at the earliest opportunity practicable in the circumstances, of the nature and extent of any direct or indirect material interest which he or she may have in any contract of the corporation; and

(iii) shall not compete in any way with the corporation in its business activities.

(3) (a) A member of a corporation whose act or omission has breached any duty arising from his or her fiduciary relationship shall be liable to the corporation for—

(i) any loss suffered as a result thereof by the corporation; or

(ii) any economic benefit derived by the member by reason thereof.

(b) Where a member fails to comply with the provisions of subparagraph (ii) of paragraph (b) of subsection (2) and it becomes known to the corporation that the member has an interest referred to in that subparagraph in any contract of the corporation, the contract in question shall, at the option of the corporation, be voidable: Provided that where the corporation chooses not to be bound a Court may on application by any interested person, if the Court is of the opinion that in the circumstances it is fair to order that such contract shall nevertheless be binding on the parties, give an order to that effect, and may make any further order in respect thereof which it may deem fit.

(4) Except as regards his or her duty referred to in subsection (2) (a) (i), any particular conduct of a member shall not constitute a breach of a duty arising from his or her fiduciary relationship to the corporation, if such conduct was preceded or followed by the written approval of all the members where such members were or are cognisant of all the material facts.

¹⁹ Section 43 of the Corporations Act reads as follows:

“Liability of members for negligence.—(1) A member of a corporation shall be liable to the corporation for loss caused by his or her failure in the carrying on of the business of the corporation to act with the degree of care and skill that may reasonably be expected from a person of his or her knowledge and experience.

(2) Liability referred to in subsection (1) shall not be incurred if the relevant conduct was preceded or followed by the written approval of all the members where such members were or are cognisant of all the material facts.

²⁰ Section 54 of the Corporations Act reads as follows:

“Power of members to bind corporation.—(1) Subject to the provisions of this section, any member of a corporation shall in relation to a person who is not a member and is dealing with the corporation, be an agent of the corporation.

(2) Any act of a member shall bind a corporation, whether or not such act is performed for the carrying on of business of the corporation unless the member so acting has in fact no power to act for the corporation in the particular matter and the person with whom the member deals has, or ought reasonably to have, knowledge of the fact that the member has no such power.

²¹ Paragraphs 156 and 157 at page 53.

²² Paragraphs 97 and 98 at page 1040.

²³ The fourth to seventh, ninth to eleventh and fourteenth and fifteenth respondents delivered notices of intention to oppose the application.

²⁴ Paragraph 35 at page 531.

²⁵ Section 46(b) of the Corporations Act provides:

“subject to the provision of section 47, members shall have equal rights in regard to the management of the business of the corporation and in regard to the power to represent the corporation in the carrying on of its business: Provided that the consent in writing of a member holding a member’s interest of at least 75 per cent, or of members holding together at least that percentage of the members’ interests, in the corporation, shall be required for—

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- (i) *a change in the principal business carried on by the corporation;*
 - (ii) *a disposal of the whole, or substantially the whole, undertaking of the corporation;*
 - (iii) *a disposal of all, or the greater portion of, the assets of the corporation; and*
 - (iv) *any acquisition or disposal of immovable property by the corporation;*

²⁶ It is common cause that the farm constituted the greater portion of CC's assets.

²⁷ Paragraph 38 at page 649.

²⁸ See: *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* [1993] 1 All SA 259 (A).

²⁹ (966/2010) [2010] ZAECPEHC 80 (23 November 2010).

³⁰ See: *VRM Boerdery CC and Another v Van Zyl* (3554/2013) [2014] ZAECGHC 46 (28 May 2014).

³¹ See: *HULETT AND OTHERS v HULETT* [1992] 2 All SA 308 (A) at pages 325 and 326; *RUTO FLOUR MILLS (PTY) LTD v MORIATES AND ANOTHER* [1957] 3 All SA 28 (T).

³² See: *KRUGER v COETZEE* [1966] 2 All SA 490 (A).

³³ See: *L F BOSHOF INVESTMENTS (PTY) LTD v CAPE TOWN MUNICIPALITY; CAPE TOWN MUNICIPALITY v L F BOSHOF INVESTMENTS (PTY) LTD* [1969] 1 All SA 430 (C).