THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no**: 246/10**

In the matter between:

Stand 242 Hendrik Potgieter Road Ruimsig (Pty) Ltd	**First Appellant**
Nils Brink van Zyl	**Second Appellant**
and	
Christine Petronella Göbel NO	**First Respondent**
Karle-Heinz Göbel NO	**Second Respondent**
Paul Hendrik Barnard NO	**Third Respondent**
Vernon Wilken NO	**Fourth Respondent**
Anna Susanna Wilken NO	**Fifth Respondent**
Gert Ignatius Marais NO	**Sixth Respondent**
Bubesi Investments 196 (Pty) Ltd	**Seventh Respondent**

Neutral citation: ***Stand 242 Hendrik Potgieter Road Ruimsig Pty) Ltd v* Göbel *NO* (246/10) [2011] ZASCA 105 (1 June 2011)**

Coram: **BRAND, LEWIS, MAYA TSHIQI JJA and PETSE AJA**

Heard: **16 MAY 2011**

Delivered: **1 June 2011**

Summary: **The Turquand rule does not apply to s 228 of the Companies Act 61 of 1973.**

ORDER

On appeal from: South Gauteng High Court (Johannesburg) (Lamont J sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

LEWIS JA (BRAND, MAYA and TSHIQI JJA and PETSE AJA concurring)

[1] The issue in this appeal is whether s 228 of the Companies Act 61 of 1973 is qualified by the application of either the Turquand rule or estoppel. In brief, s 228 provides that the directors of a company may not dispose of the whole or the greater part of its assets without the approval of the shareholders. The questions raised have been debated over decades and there are conflicting answers given by the courts. But the debates and authorities precede an amendment (in 2006) to the section that requires that the shareholders' consent or ratification must take the form of a special resolution. Before dealing with the principles I shall set out the background briefly. For the purpose of this appeal the facts are largely not in dispute.

[2] On 30 January 2009 the second appellant, Mr N van Zyl, acting for a company to be formed, Stand 242 Hendrick Potgieter Road Ruimsig (Pty) Ltd (Stand 242), the first appellant, purchased immovable property from the seventh respondent, Bubesi Investments 196 (Pty) Ltd (Bubesi). The property was Bubesi's sole asset. Bubesi was represented by two directors, Mr Karl-Heinz Göbel and Mr V Wilken . The purchase price was some R31 million. The terms of the contract are not germane to the appeal.

[3] The shares in Bubesi are owned in equal shares by two trusts: the Karl-Heinz Göbel Trust and the Deutra Trust. The first three respondents are the trustees of the Göbel Trust and the fourth, fifth and sixth respondents are the trustees of the Deutra Trust. Göbel, the second respondent, is married to the first respondent, Mrs C Göbel. And Wilken is married to the fifth respondent, Mrs A Wilken.

[4] On 2 February 2009 Göbel and Wilken signed a document certifying that they were the directors of Bubesi, and that the sale had been approved by the shareholders 'in a general meeting in terms of section 228 of the Companies Act' or that the property 'does not constitute the whole or greater part of the assets of the company'. Both statements (in the alternative) were false. As I have said, the property was the sole asset of the company, and the other trustees of the shareholding trusts asserted that they were not aware of the sale.

[5] At the time of the sale Bubesi, the seller, was in financial difficulty, and the proceeds of the sale were intended to repay the bondholder over the property. Shortly after the sale various disputes arose between Bubesi and Stand 242. And, despite the conclusion of the agreement of sale, Bubesi let the property to a third party for a period of three years, and an alternative source of finance, related to the new lessee, was found.

[6] It thus became apparent to Van Zyl, representing Stand 242, that Bubesi was not going to perform in terms of their agreement. They accordingly brought an urgent application in the South Gauteng High Court against Bubesi for an order interdicting it from dealing with the property pending an action to be instituted against it. The trustees of the shareholding trusts were not cited as parties. Bubesi opposed the application, relying inter alia on the fact that s 228 had not been complied with. Jajbhay J, without giving reasons, granted the order sought on 30 July 2009.

[7] Apart from Göbel and Wilken, the trustees of the shareholding trusts claimed not to have been aware of the sale, or the order sought, until after it was granted. The trustees and Bubesi thus brought an urgent application (in the same court and under the same case number) seeking a declaratory order setting aside that of Jajhbay J, and an order that there had been non-compliance with s 228 and that the sale was thus unenforceable. Lamont J granted the orders sought, but gave leave to appeal to this court.

[8] There was indeed no special resolution, either authorizing or ratifying the sale to Stand 242, passed by the shareholders of Bubesie. Nor was there any evidence that the trustees of the shareholding trusts of Bubesi were aware of or had consented to the sale. Stand 242 argued that the trustees were Wilken and Göbel and their respective wives, who must have known of the sale and thus consented to it.

[9] It should be noted, however, that Stand 242 has instituted an action for specific performance or damages against Wilken and Göbel for R10.2 million. The question of knowledge and consent will no doubt be tested in that action. The questions before us are thus limited: does the Turquand rule allow the circumvention of s 228 of the Act, or does estoppel preclude reliance on s 228?

[10] Section 228, as amended in 2006,[1] provides in so far as relevant:

'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 by a special resolution of its members*, to dispose of-

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

(b) the whole or the greater part of the assets of the company.

. . . .

1 Amended by s 21 of the Corporate Laws Amendment Act 24 of 2006, which came into effect in 2007.

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

[11] As I have said, the authorities and writers that have considered the question whether the Turquand rule, or estoppel, obviates the need for compliance with s 228 predate the amendment which now requires a special resolution of shareholders for the disposition of the sole asset of a company. Whether the amendment makes any difference to the question of principle is a matter to which I shall turn.

Section 228 and the Turquand rule

[12] The rule, in essence, is that a person dealing with a company in good faith is entitled to assume that the company has complied with its internal procedures and formalities. It emanates from *Royal British Bank v Turquand*[2] and has been accepted as part of South African law at least since *The Mine Workers' Union v J P Prinsloo; The Mine Workers' Union v Greyling*.[3] The purpose of the rule is based on commercial convenience: business might well be impeded if parties dealing with agents of a company had to investigate in all instances whether internal rules had been duly observed.

[13] Section 228 (and s 70*dec*(2) of the Companies Act 46 of 1926, which was in

2 *Royal British Bank v Turquand* (1856) 119 ER 474 (5 E & B 248), confirmed on appeal: (1856) 119 ER 886 (Ex Ch) (6 E & B 327).
3 *The Mine Workers' Union v J P Prinsloo; The Mine Workers' Union v Greyling* 1948 (3) SA 831 (A).

the same terms) was introduced for the protection of shareholders who have given general control of the company to its directors. It is the shareholders themselves who should exercise control over the disposal of the company's major assets. The authorities to this effect are discussed by Cleaver J in *Farren v Sun Service SA Photo Trip Management (Pty) Ltd*.[4] In *Farren* the court held that the Turquand rule did not operate to override the provisions of s 228. While a contract entered into without the shareholders' consent was not void, Cleaver J held,[5] it could not be enforced until the shareholders had consented or ratified the contract for the disposal of the major part of the company's assets. The reason for this is the purpose of s 228: to protect shareholders.

[14] *Farren* is the only decision that has held that the Turquand rule is inapplicable in so far as compliance with s 228 is concerned. There is, however, an obiter dictum of Van Zyl J in *Levy & others v Zalrut Investments (Pty) Ltd*[6] which indicates that there is no reason why the Turquand rule should not apply to s 228 (that case dealt with whether there was compliance with s 228 on the basis that there was unanimous consent of the shareholders). Van Zyl J said that there was no indication 'that the public interest or public policy played any part in the intention of the Legislature when it enacted . . . s 228'. Accordingly there was no reason why a party to a contract, in good faith, need be adversely affected should the company's internal procedures not be followed.

4 *Farren v Sun Service SA Photo Trip Management (Pty) Ltd* 2004 (2) SA 146 (C) para 10.
5 Paragraph 11.
6 *Levy & others v Zalrut Investments (Pty) Ltd* 1986 (4) SA 479 (W) at 487B-F.

[15] In commentary on this view various writers have argued that since no public interest is involved, the equities lie in favour of the innocent third party where the shareholders have given control to the directors. Should the directors act without the shareholders' consent, an action lies against them for breach of their duties. Other commentary has suggested that the purpose of s 228 is to protect the rights of shareholders and that the application of the Turquand rule would defeat those rights. The respective views are discussed comprehensively in *Farren* and I do not propose to repeat them here.[7]

[16] In my view, the clear meaning of s 228 is that the shareholders must give their consent to, or ratify, the disposal of the sole asset, or the major assets, of a company. If the purpose of s 228 is the protection of the shareholders, then the application of the Turquand rule would deprive them of that protection. The section would then serve no purpose. It would be cold comfort to a shareholder, when the company loses its substratum, to be told to sue the directors who have acted without approval.

[17] In *Farren* Cleaver J considered that the meaning of the words in s 228 were unambiguous: they could not be read so as to allow the Turquand rule to prevail over the rights of shareholders.[8] This is the view adopted by the court below: without the consent of the shareholders the directors had no authority to sell the property, the

7 See also *Henochsberg on the Companies Act* (ed J A Kunst, Professor P Delport and Professor Q Vorster) Vol 1 at 441ff.
8 Paragraph 17.

sole asset of the company, and the sale was unenforceable. Lamont J held that until the statutory requirement (enacted only after *Farren* was decided) of a special resolution was met, the contract for the sale of the Bubesi property was unenforceable.

[18] That brings me to the amendment to s 228 which now requires that the consent or ratification must be given by a special resolution which, to be effective, must be registered within one month of the passing of the resolution.[9] As Henochsberg states:[10]

'Unfortunately, the amendments to s 228 do not address the controversy as to whether a third party to whom an invalid disposal is made is entitled to enforce it against the company by means of the application of the rule in the *Turquand* case since the invalidity or "non-effectiveness" of the special resolution does not entail that the related contract between the company and the third party is, as between them, void or unenforceable . . . .'

[19] Bubesi argued that the introduction of the requirement that consent or ratification take the form of a special resolution underscored the purpose of s 228 – the protection of shareholders. This seems to have been the view also of the court below, for Lamont J said that the requirement of a special resolution, that must be registered to be effective, indicated that the consent to the disposition of the property is more than an internal management act that the Turquand rule is designed to

9 Section 199 of the Act deals with the requirements for the passing of a special resolution and s 200 with the registration.
10 Above at 443.

cover. Third parties, said the court, are not entitled to assume that shareholders participate in management.

[20] Stand 242, on the other hand, pointed out that the reason for the amendment to s 228 was to protect minority shareholders. J L Yeats, in a note on the amendments effected to the Act in 2006,[11] refers to the explanatory memorandum to the amendment bill, and points out that the requirement of a special resolution to embody the consent to the disposal of a company's main asset or assets, is designed to protect minority shareholders, especially where a company is the target of a takeover bid.

[21] Yeats is of the view that the amendment makes no difference to the application of the Turquand rule to s 228. If a special resolution has been passed and registered, then of course the third party would have access to it, or possibly be deemed to have constructive notice.[12] But if the special resolution is not yet registered when enquiries are made, or the resolution ratifies the decision of the shareholders after enquiries are made, then the third party will be in no better position. (Of course if a resolution is not registered within six months of its passing, then it lapses: s 202 of the Act.) I accept that the requirement of a special resolution in this context thus does not assist the third party.

11 J L Yeats 'The Drafters' Dilemma: Some comments on the Corporate Laws Amendment Bill, 2006' (2006) 123 *SALJ* 601 at 610ff.
12 Yeats above at 613.

[22] Accordingly, in my view the requirement of a special resolution does not change the principle as to the application of the Turquand rule to s 228. As I have said earlier, the Turquand rule should not apply to s 228, for if it did, the section would not serve the purpose of protecting shareholders as it is intended to do. I consider that Lamont J in the high court, when following Cleaver J in *Farren*, was correct.

Estoppel

[23] Stand 242 argued also that it had been misled into believing that Wilken and Göbel had the necessary authority to conclude the sale, and had relied on the document signed by them that stated that the disposal of the property 'has been approved by the Shareholders in a General Meeting in terms of s 228 of the Companies Act: or the . . . property does not constitute the whole or the greater part of the assets of the company'. Counsel for the appellants did not persist in the argument based on estoppel, accepting that it was not the shareholders themselves who had made the representation. Moreover, the document was prepared by the conveyancer for Stand 242, not the sellers' representative. In any event, the full facts are not before us. And most importantly, estoppel cannot operate to allow a contravention of a statute: *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd*.[13]

13 *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* 2008 (3) SA 1 (SCA) paras 11-13 and 16.

[24] In the circumstances, I find that the Turquand rule does not override the requirements of s 228 of the Act, and that estoppel did not operate to preclude the respondents from relying on it. Accordingly, the order of Lamont J in the high court must stand.

[25] The appeal is dismissed with costs.

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C H Lewis

Judge of Appeal

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