IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

CASE NO: 14184/15

In the matter between:

KRUGER INVESTMENTS GROUP LIMITED	First Applicant
KANDVEST PARTNERS LIMITED	Second Applicant

And

NUBERRY HOLDINGS LIMITED	First Respondent
TYRECOR (PROPRIETARY) LIMITED	Second Respondent
FALCK TRADING (PROPRIETARY) LIMITED	Third Respondent
HARJEEV SINGH KANDHARI	Fourth Respondent
NYNA LIMITED	Fifth Respondent
EDONAI SECRETARIAL COMPLIANCE SERVICES	Sixth Respondent

JUDGMENT DELIVERED ON THIS 30th DAY OF OCTOBER 2015

VAN ROOYEN, AJ

[1] The applicants, the first respondent ("Nuberry"), the fourth respondent and the fifth respondent ("Nyna") are *peregrini* in South Africa. The second respondent ("Tyrecor") and the third respondent ("Falck") are companies registered in South Africa.

[2] On 31 July 2015 the applicants, on an *ex parte* basis, obtained a rule *nisi* calling on the respondents and any interested party to show cause, if any, why an order should not be made in *inter alia* the following terms:

> [2.1] Authorising and permitting the first applicant ("Kruger Investments") and the Sheriff, Cape Town, to attach Nuberry's securities and loan claims in Tyrecor and Falck *ad fundandam vel confirmandam jurisdictionem* the relief against Nuberry, referred to in paragraph 5 of the notice of motion (the applicants *inter alia* seek an order declaring that Nuberry holds the said shares and claims in Tyrecor and Falck on constructive trust for the applicants).
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> [2.2] Authorising and permitting Kruger Investments and the Sheriff, Cape Town, to attach the fourth respondent's beneficial interest in Tyrecor and Falck, held through Nuberry, *ad fundandam vel confirmandam jurisdictionem* the relief against the fourth respondent, referred to in paragraph 5 of the notice of motion (the applicants *inter alia* seek an order declaring that, by causing Nuberry to acquire 50% of the shares and claims in Tyrecor, and to acquire the shares and claims of the second applicant ("Kandvest") in Falck, the fourth respondent breached his fiduciary duties as a director of the applicants).

[2.3] interdicting and restraining Nuberry, the fourth respondent and the sixth respondent (the company secretary of Tyrecor and Falck) from alienating, disposing of, encumbering or in any way dealing with Nuberry's securities and the loan claims in Tyrecor and Falck, pending the final determination of the contemplated action referred to in paragraph 5 of the notice of motion.

[3] In essence, if successful in the contemplated action, the applicants will be declared to be owners of the shares and claims in question.

FACTUAL BACKGROUND

[4] The facts are common cause.

[5] The Al Dobowi Group of companies ("the Al Dobowi Group") houses a variety of the commercial interests of the Kandhari family, consisting of the fourth respondent, his brother and their parents.

[6] Kruger Investments (a company incorporated in the Cayman Islands) and Kandvest (a company incorporated in the British Virgin Islands) are part of the Al Dobowi Group. The Al Dobowi Group, through Kruger Investments and Kandvest respectively, holds an equity interest in Tyrecor and had an interest in Falck.

[7] All of the shares in Kruger Investments and Kandvest are held by Al Dobowi Investments Ltd, one of the companies in the Al Dobowi Group. The four members of the Kandhari family each holds 25% of the shares in Al Dobowi

Investments Ltd as well as Kays Group Ltd, another company within the Al Dobowi Group.

[8] For some years certain companies within the Al Dobowi Group, including Kays Group, had a business relationship with Tyrecore and associated companies, in terms of which Tyrecor was appointed as a buyer for the resale of certain tyre products within South and Southern Africa.

[9] During 2005/2006, Kays Group acquired 50% of the issued and authorised shares and certain of the loan claims in Tyrecor from the De Villiers brothers. In terms of a shareholders' agreement concluded between the shareholders of Tyrecor at the time, the initial directors of Tyrecor were agreed to be the De Villiers brothers and the two Kandhari brothers. The fourth respondent's brother subsequently resigned, leaving the fourth respondent as the sole Kandhari representative on the board of Tyrecor.

[10] On 3 April 2012, Kays Group's shares and claims in Tyrecor were transferred to its sister-company, Kruger Investments, which thereafter held the 50% interest in Tyrecor on behalf of the Kandhari family.

[11] Kandvest acquired 50% of the issued and authorised shares and certain of the loan claims in Falck from the De Villiers brothers in 2011. Following the acquisition, 50% of the shares in Falck were held by Kandvest and the remaining 50% by the De Villiers brothers.

[12] At all material times, the boards of Kruger Investments and Kandvest have comprised the fourth respondent and other members of the Kandhari family.

TRANSFER OF SHARES IN TYRECOR TO NUBERRY

[13] In May 2014, Kruger Investments' board resolved to acquire the remaining 50% of the shares and claims on loan accounts in Tyrecor and Falck from the De Villiers brothers, and authorised the fourth respondent to do so on behalf of Kruger Investments.

[14] However, on 4 July 2014, the remaining shares and claims in Tyrecor and Falck were transferred to Nyna and, immediately on transfer, by Nyna to Nuberry.

[15] The fourth respondent is the sole shareholder and sole director of both Nyna and Nuberry.

Kruger Investments' claim:

[16] It is contended by Kruger Investments that, as a director of Kruger Investments, the fourth respondent owed that company a fiduciary duty. A component of that duty required of the fourth respondent to acquire any economic opportunity for Kruger Investments. If, in breach of that duty, an opportunity was acquired not for Kruger Investments but for the fourth respondent, the acquisition ought to be treated as having been made for Kruger Investments.

[17] The 50% shares and loan claims of the De Villiers brothers in Tyrecor were an economic opportunity for Kruger Investments. In addition, in May 2014 the fourth respondent was privy to and part of a decision by the board of Kruger Investments to acquire the De Villiers brothers' 50% shares and loan claims in Tyrecor.

[18] Instead of acquiring the De Villiers brothers' shares and claims in Tyrecor for Kruger Investments, the fourth respondent procured the acquisition on behalf of Nyna and, ultimately, Nuberry.

[19] The fourth respondent used Nyna and Nuberry as his alter ego and those companies had knowledge of the fact that the acquisitions were in breach of the fourth respondent's fiduciary duties as a director of Kruger Investments. Kruger Investments accordingly has a claim against Nuberry directing it to transfer the shares and claims in Tyrecor currently held by it, to Kruger Investments.

[20] In addition, Kruger Investments has a damages claim against the fourth respondent arising from its reduced equity interest (by way of dividends and the like) in Tyrecor and for damages to its business.

TRANSFER OF SHARES IN FALCK TO NUBERRY

[21] On 4 July 2014 Nyna procured from the De Villiers brothers 50 of the 100 issued shares in Falck. The remaining 50% of the shares were held by Kandvest. On the same day the De Villiers brothers' shares were transferred to Nyna and,

immediately on transfer, to Nuberry. Moreover, on that date Kandvest's 50 shares in Falck were transferred directly to Nuberry.

Kandvest's claim:

[22] The position in regard to the transfer of the De Villiers brothers' shares and claims in Falck to Nyna and immediately thereafter Nuberry, is the same as the position regarding the transfer of the shares and claims in Tyrecor. The only difference is the absence of a director's resolution similar to that of the May 2014 resolution passed by the board of Kruger Investments.

[23] The De Villiers brothers resigned as directors of Falck, leaving the fourth respondent as the sole director.

[24] It is contended by Kandvest that the De Villiers brothers' shares and claims in Falck were a corporate opportunity which should have been acquired for Kandvest. By diverting this corporate opportunity to Nuberry via Nyna, the fourth respondent acted in breach of his fiduciary obligations as a director of Kandvest.

[25] In respect of the shares which Kandvest itself held in Falck, the fourth respondent not only acted in breach of his fiduciary obligations as a director of Kandvest in procuring the transfer of these shares to Nuberry, but in so doing he disposed of a valuable asset which the company held and did so for his personal benefit.

RESPONDENTS' CASE

[26] In order to found or confirm jurisdiction against a *peregrinus*, a plaintiff must attach property belonging to the *peregrinus* within the jurisdiction of a Court in order to make the judgment against the *peregrinus* effective. [1]

[27] It must be established on a balance of probabilities that the property so sought to be attached, belongs to the debtor. [2]

[28] The respondents submit that the applicants, and not Nuberry (the debtor), are the owners of the shares and loan accounts which the applicants seek to attach. That is so, according to the respondents, because, fundamental to the contention of the applicants, is that the transfer of the De Villiers brothers' shares in Tyrecor to Nuberry via Nyna, as well as the transfer of the Kandvest shares and claims in Falck to Nuberry, were unlawful. According to the respondents, it follows that the property sought to be attached to found or confirm the jurisdiction of this Court is owned not by Nuberry but by the applicants.

[29] The respondents, relying on *Thermo Radiant,* further contend that, in any event, the requirement of effectiveness has not been met.

[30] In *Thermo Radiant* the plaintiff, a South African company, purchased a bakery oven from the defendant, an Australian company, for the sum of R16,180.

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1 *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 (A) at 307A-310H; *Tsung v Industrial Development Corporation of SA Ltd* 2006 (4) SA 177 (SCA) at para [6]

2 *Lendalease Finance (Pty) Ltd v Corporacion De Mercadeo Agricola and Others* 1976 (4) SA 464 (A) at 489B-C

The oven was installed in the plaintiff's bakery and in terms of the agreement between the parties, the sum of R12,944 was paid on delivery. It was agreed that the balance of R3,236 would become payable after the oven had been tested and found satisfactory. The plaintiff averred that the oven was not in accordance with specifications, that neither the quality, nor the quantity of the bread which the said oven was capable of baking was in accordance with the warranties given, and that, despite the repeated requests by the plaintiff, the defendant had failed to remedy the alleged defects. As a result, the plaintiff claimed payment from the defendant of the amount of R22,000 being damages which it had allegedly suffered by reason of the defendant's breach of warranty. The defendant denied liability and, in turn, claimed payment of the sum of R3,236 being the balance of the purchase price. In order to found jurisdiction the plaintiff applied, successfully, to the Court *a quo* to attach, as the only alleged asset within South Africa of the defendant, its claim against the plaintiff for R3,236.

[31] On appeal the attachment was set aside. The majority judgment did so on the basis that it was implicit in the plaintiff's action that the purported claim for payment of the amount of R3,236 did not exist. It was held that, to attach such a claim, would be to allow the applicants in the Court a quo to approbate and reprobate.

[32] In a separate minority judgment it was held that the purpose of an attachment was to enable the Court to pronounce a judgment which will not be void of result. It was held that [3]:

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[3] At 310

"*In the instant case, if judgment is given in favour of plaintiff it will be implicit in that judgment that the latter is not liable to defendant for the balance of the purchase price. The result of such a judgment will also be that plaintiff was, since repudiation of the agreement, not liable for the purchase price. It is only when judgment is given in favour of plaintiff that the question arises whether the Court can give an effective judgment against the peregrine defendant. It follows, therefore, that at the time application was made for the setting aside of the attachment, the only relevant consideration was what the position would be if judgment is given against the peregrine defendant. At that time plaintiff had already repudiated the agreement and it follows, therefore, that when the application was made, it was clear that if judgment is given in favour of plaintiff the effect thereof would be that no debt would be in existence at that time and it follows that no debt was in existence when the edictal citation was served on defendant. The result is that there was no debt in existence when the action was instituted nor will there be when judgment is given in favour of plaintiff. The court would accordingly not be in a position to give an effective judgment in the sense indicated above and the attachment should therefore be set aside.*"

[33] The respondents submit that the above principles apply to the facts of this matter because, if judgment is ultimately given in favour of the applicants, it will be on the basis that the latter are indeed the owners of the property sought to be attached and not the relevant respondents. Consequently, this Court will then not be in a position to give an effective judgment.

[34] The respondents contend that it follows that the interim interdict should be set aside as it is inextricably linked to the contemplated action and if this Court

does not have jurisdiction in respect of such action, any interdict pending the determination of the action cannot survive.

ANALYSIS

Ownership

[35] The crucial moment for requiring proof of the ownership in the goods at which attachment is aimed, is the moment when the Judge, hearing an application for attachment *ad fundandam vel confirmandam jurisdictionem,* is requested to issue such an order. [4]

[36] It is common cause that the law of the Cayman Islands (where Kruger Investments is domiciled) and the law of the British Virgin Islands (where Kandvest is domiciled) in relation to the fiduciary obligations of a director, and a company's remedies against its director on breach of that fiduciary duty, is similar to that of English law. It is also common cause that the position in English law is similar to that in our law. The remedies available against those who occupy a fiduciary position and act in breach of their fiduciary duties – whether it be a company against its director, an employer against its employee or a principal against its agent – are essentially similar[5].

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[4] *Numill Marketing CC and Another v Sitra Wood Products Pte Ltd and Another* 1994 (3) SA 460 (C) at 466G-H

[5] *Phillips v Fieldstone Africa (Pty) Ltd and Another* 2004 (3) SA 465 (SCA), at paras [29]-[32].

[37] In the case of a fiduciary who acquires for himself a corporate opportunity in breach of the fiduciary obligation he owes to his "*trust*", it is said that the fiduciary is "*deemed to have acquired*" for the trust [6].

[38] In respect of property acquired in this way, the "*trust*" has a remedy against the fiduciary, requiring the fiduciary to account in respect of the property or corporate opportunity so acquired[7].

[39] The usual meaning of "*deemed*" is "… *an admission that it is not what it is deemed to be and that, notwithstanding it is not that particular thing, nevertheless … it is deemed to be that thing*" (emphasis supplied)[8]. In the context of a claim against the fiduciary, it is a way of describing the rationale for the remedy which the trust has against the fiduciary.

[40] As between the company and its director, a transaction effected in breach of a fiduciary duty is not void, but voidable at the instance of the company while *restitutio in integrum* is still possible [9]. Moreover, where the director has already sold the corporate opportunity to a *bona fide* third party, the company's remedy against a director is limited to a claim to any profits made, or damages suffered in

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[6] *Transvaal Cold Storage Co Ltd v Palmer* 1904 TS 4 at 20; *Phillips v Fieldstone Africa (Pty) Ltd & Another, supra,* at para [31] (the judgment of Heher JA) and para [11] (the judgment of Streicher JA).

[7] *Phillips v Fieldstone Africa (Pty) Ltd & Another, supra,* at para [11] (the judgment of Streicher JA); *Da Silva v CH Chemicals (Pty) Ltd* [2009] 1 All SA 216 (SCA) at para [20].

[8] *Ex parte Strydom NO; In re Central Plumbing Works (Natal) (Pty) Ltd & 3 other cases* 1988 (1) SA 616 (D&CLD) at 620F-G. In *Ex parte Strydom* the Court accordingly held that a provision in a scheme of arrangement, in terms of which the offeror was "*deemed"* to have acquired the claims of creditors, was one whereby it was proposed that the proposer "*should be regarded as having acquired them, regardless of the objective truth of the matter*" (see at 621C).

[9] Kunst *et al, Henochsberg on the Companies Act*, Vol. 1 at 466; Cf *Gundelfinger v African Textile Manufacturers Ltd and Others* 1939 AD 314 at 326.

respect of the transaction [10]. In his concurring judgment in *Robinson v Randfontein Estates Goldmining Co Ltd* [11], Solomon JA put the position as follows (emphasis supplied):

"*Assuming that the defendant was an agent of the plaintiff company at the time of the purchase, and that it was his duty to have bought the property on its behalf, the fact remains that when he bought he was not acting as its agent but was buying on his own account. It was he, therefore, and not the plaintiff company, who became entitled to the property, and when he obtained transfer, it vested in him. It follows that when he sold to the Waterval Trust he was selling not the property of the plaintiff company, but his own. But then the Courts of law step in, when the transaction is challenged and say to the defendant 'we will not allow you to retain the benefit of the property which you acquired by a breach of trust, but we will put the plaintiff company in the same position as [it] would have been in had you discharged your duty; you must therefore refund to [it] the profit which you made out of the transaction' … If the defendant, instead of selling the property* [back to his company] *had retained it for his own use, a similar action would have lain against him to hand over the property to the plaintiff company, on payment of the expense which he had incurred. Or, if he had sold it to someone else, and had made a profit out of the transaction, the plaintiff company would have been entitled to claim from him such profit.*"

[41] If, therefore, the asset in question is no longer in the possession of the director and has been disposed of to a *bona fide* third party, the company's remedy against the director is a limited one for disgorgement of his profit and/or damages. The company cannot simply recover the asset from the third party by way of a *res vindicatio*, as would be the case were the company the true owner of the asset purchased by the director.

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[10] Blackman *et al, Commentary on the Companies Act*, Vol. 2 at 8-162.

[11] *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168, at 241. In *Philips v Fieldstone Africa (Pty) Ltd & Another, supra, Robinson v Randfontein Estates Goldmining Co* was referred to with approval – see at paras [30]-[32] of the judgment.

[42] If, as the respondents submit, a corporate opportunity unlawfully acquired by a director for himself is in fact and in law the property of the company – that is, the opportunity is in law owned by the company, notwithstanding the fact that the company itself had not actually acquired it (and may not even ever have intended acquiring it, and indeed may not even be in a position to acquire it on the terms on which it was acquired by the director) - the company would have the right to recover the asset from innocent third parties to whom the director has in the meantime disposed of the asset. However, that is not our law.

[43] In English law the language employed is somewhat different from our law, but the concept is similar. A company director who acquires property in breach of his fiduciary duties to his company acquires the property "*on constructive trust*" for the company. Like a "*deemed*" acquisition, acquisition of property on "*constructive trust*" does not connote actual acquisition of the property by the company. It denotes something which, for the purposes of the company's remedy against its director, is deemed to be the case.

[44] It is for this reason that, if the property concerned has been on-sold by the director to a third party, "… *the company can recover the property or its value from any person into whose hands it comes <u>if he knew of the breach of duty, or if he knew of facts which should have caused him to suspect that a breach had been committed</u>*". Only in those circumstances can a company recover the property "… *<u>from the person in whom the legal title to it is vested</u>*", that is, from its "*<u>present legal owner</u>*"[12]. If a corporate opportunity acquired by a company

[12] Pennington's *Company Law*, 8th ed (2006) at 740.

director "*on constructive trust"* vested the company with ownership *ipso jure* under English law, the company would be entitled to recover the property from third parties whether or not they had knowledge of the director's breach of duty, or should reasonably have had such knowledge.

[45] The doctrine of "*constructive trust"* is an equitable remedy which arose in the English Courts of equity. It has been described as follows:

"*Equity is concerned to give effect to equitable interests, bereft of legal ownership. Thus it will place trust property into the hands of a volunteer, where it is not inequitable to do so, and will hold a purchaser for value liable as constructive trustee if he had actual or constructive notice that the transfer to him was of trust property in breach of trust.*" [13] (emphasis supplied)

[46] In *Paragon Finance plc v D B Thakerar & Co* [1999] 1 All ER 400 CA, at 409a-b, the rationale for the doctrine was described as follows:

"*A constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of property (usually but not necessarily the legal estate) to assert his own beneficial interest in the property and deny the beneficial interest of another.*" [14] (emphasis supplied)

[47] Where, therefore, a director has diverted a corporate opportunity, the company may sue the director for its delivery, but is not obliged to do so. Were it the position that the law views the company as the *de jure* owner of the property acquired by its director in breach of his fiduciary obligations, the company would not have an election whether or not to sue the director for delivery.

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[13] *Selangor United Rubber Estates Ltd v Cradock (a bankrupt) and Others (No. 3)* [1968] 2 All ER 1073 (Ch.D) at 1098E.

[14] See too *JJ Harrison (Properties) Ltd v Harrison* [2002] 1 B.C.L.C. 162, CA at para [26]

[48] Counsel for the respondents argued that the case made out by the applicants in their affidavits is that the shares and claims belong to them (not to Nuberry) and that they have therefore failed to meet the requirement that the property which they seek to attach, belongs to the debtor. He pointed out that: (a) the applicants' expert on the laws of the British Virgin Islands and the Cayman Islands refers to the restoration of "*a company's property*" where a director has breached his fiduciary duties; and (b) the rule *nisi* granted on 31 July 2015 contemplates that proceedings be instituted by the applicants for relief which includes an order declaring that the first respondent holds the shares and claims "*on constructive trust for"* the applicants. Counsel further argued that the applicants' assertion in their affidavits that the shares and claims belong to them, accords with the *de jure* position in the British Virgin Islands, the Cayman Islands and South Africa when a director breaches his fiduciary duties. He relied *inter alia* on the following passage from *Gower and Davies' Principles of Modern Company Law* [15] and particularly emphasised the underlined part:

"*Although the directors are not trustees of the company's property (which is held by the company itself as a separate legal person), we have noted at a number of points in this chapter that the courts sometimes treat directors as if they were such trustees. In particular, where a director disposes of the company's property in unauthorised ways, and in consequence the company's property comes into his or her own hands, the director will be treated as a constructive trustee of the property for the company. This means that it can be recovered in rem from the director, so far as traceable; and that the company's claim will have priority over those of the director's creditors (since the property is the company's property, not the director's).*" (underlining supplied)

[15] 9th ed at 615

[49] This argument ignores the fact that, in the applicants' notice of motion, the rule *nisi* granted on 31 July 2015 and the affidavit of the applicants' expert, the references to "*constructive trust for*" the applicants and "*the company's property*" presuppose a declaratory order that the property is considered to belong to the applicants. By implication, Gower too contemplates the intervention of a court to establish "*constructive trust*" before it can be said that the property belongs to the company. That is evident from the observation that "*(a)lthough the directors are not trustees of the company's property (which is held by the company itself as a separate legal person), we have noted at a number of points in this chapter that the courts sometimes treat directors as if they were such trustees"* (underlining supplied).

[50] Similarly, in our law the intervention of a court is required to establish that a fiduciary who in breach of his duty acquired property, is deemed to have acquired it for his "*trust*" before it can be said that the property belongs to the "*trust".* See for example *Robinson v Randfontein, supra,* where it was stated that "…*the Courts of law step in, when the transaction is challenged and say to the defendant 'we will not allow you to retain the benefit of the property which you acquired by a breach of trust…' …".* (underlining supplied)

[51] The principle merely provides a cause of action, not automatic ownership.

[52] The applicants therefore require the intervention of a court before they can exercise the rights of an owner in relation to the shares and the claims. They need to institute court proceedings in which they must prove that the first respondent

owed them a fiduciary duty, that he breached that duty and that the doctrine of "*constructive trust*" applies. Unless they obtain a court order, they are not the owners of the shares and the claims.

Development of the common law

[53] The applicants' counsel argued that, in the event of it being found that the applicants were the owners of the shares and the claims at the time of the hearing of this matter, the common law ought to be developed to permit attachment of the shares and the claims.

[54] Whilst I am mindful of the cautionary note sounded in *Tsung* [16] regarding development of the common law, justice may demand a development of the common law to allow attachment *ad fundandam vel confirmandam jurisdictionem* in a situation such as this, regardless of ownership, particularly when a party will be denied access to our Courts if the attachment is not permitted.

[55] It may be argued that the way has already been paved in *Italtrafo SpA v Electricity Supply Commission* 1978 (2) SA 705 (W) where it was found [17] that the debtor in that matter was the owner of the property sought to be attached or "*had a beneficial interest therein"*, rendering it capable of attachment *ad fundandam jurisdictionem*.

[56] In terms of s 37(9) of the Companies Act, 71 of 2008, Nuberry is entered as a shareholder in the securities registers of Tyrecore and Falck. Pursuant to the

[16] At para [11]
[17] At para 712H

definition of "*shareholder*" in s 1 of the Companies Act, Nuberry is therefore a shareholder for purposes of the Companies Act, having certain rights (such as the right to attend shareholders' meetings and to vote) to the exclusion of the applicants. If the applicants are the owners of the shares, they do not enjoy the full effect of ownership because Nuberry is the registered shareholder. In these circumstances the applicants can only obtain the rights currently held by Nuberry if the applicants are successful in the main application and the securities registers of Tyrecore and Falck are amended to reflect the applicants as shareholders. A judgment in favour of the applicants in the main application will therefore be effective. This is to be distinguished from the situation where it will be "*futile and of no effect*" [18] to attach the property of a third party.

[57] However, I need not determine whether the common law should be developed in this respect as I have already found that Nuberry is the owner of the shares.

Effectiveness

[58] On the authority of a passage from the judgment of Potgieter JA in *Thermo Radiant* [19] the respondents further argue that, if the Court ultimately grants the applicants the relief they seek in the main action, the assets attached will be transferred to the applicants and the Court will then not be in a position to give an effective judgment.

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[18] *Lendalease Finance* at 489C
[19] At 310

[59] The position in *casu* is entirely different from the position in *Thermo Radiant* where the plaintiff sought to attach the defendant's claim in reconvention for R3,236 against the plaintiff. However, on the plaintiff's own case, the defendant did not have a claim against the plaintiff. Consequently, there was nothing that could be attached and nothing that could be used to make a judgment in favour of the plaintiff effective.

[60] By contrast, in the present case, it is not in issue that the shares and claims exist. The identity of the owner is the only issue and I have already found that Nuberry (the debtor) is the owner.

[61] Attachment of the very assets in respect of which the applicants lay claim is consistent with the notion that the Court should be in a position to give an effective judgment. Assuming that the Court in the main action finds for the applicants, it will make an order directing the respondents to ensure that the shares and claims be transferred to the applicants and that the share registers of Tyrecor and Falck are written up to reflect this. If the respondents fail to give effect to such an order, the Court will be in a position to ensure an effective judgment by *inter alia* requiring the Sheriff to do whatever is necessary to effect this transfer and amendment to the share register of Tyrecor and Falck. Attachment will therefore not be "*merely empty symbolism".* [20]

[62] The rule *nisi* granted by this Court on 31 July 2015 is therefore confirmed with costs, including the costs of two counsel where two counsel were employed.

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[20] *Bid Industrial Holdings (Pty) Ltd v Strang and Another (Minister of Justice and Constitutional Development, Third Party)* 2008 (3) SA 355 (SCA) at para [29]

R F VAN ROOYEN, AJ