R E P O R T A B L E

THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No.: **15845/2020**

Before the Honourable Ms Justice Meer
Hearing: 12 August 2021
Judgment Delivered: 02 September 2021

In the matter between:

INTONGO PROPERTY INVESTMENT (PTY) LTD	First Applicant
RASMUS SVENSSON	Second Applicant
and	
MARK SHANE GROENEWALD	First Respondent
UVT COMPANY (PTY) LTD	Second Respondent
THE REGISTRAR OF DEEDS, CAPE TOWN	Third Respondent
THE STANDARD BANK OF SOUTH AFRICA LTD	Fourth Respondent
COMPANIES AND INTELLECTUEAL PROPERTY COMMISSION	Fifth Respondent

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JUDGMENT

MEER J

Introduction

[1] The Applicants seek to set aside the sale of Erf No 2369 Hout Bay, known as 35 Fisherman's Bend Road, Llandudno ("the property"), from the First Respondent to the Second Respondent, on the basis that the sale of the property was unlawful and fraudulent and is accordingly a transaction tainted by fraud. In addition they seek *inter alia* the following orders: that the First Respondent repay to the Second Respondent any amounts paid to him; that the Third Respondent cancel the deed of transfer and cause the property to be re-registered in the name of the First Applicant and that the Fifth Respondent be directed to remove the name of the First Respondent in its records as the director of the First Applicant, and replace it with that of the Second Applicant.

The Parties

[2] The First Applicant is a company with its registered address in Gauteng. The Second Applicant is a businessman residing in Sweden. He describes himself as a "businessman, director and nominee shareholder of the First Applicant" as well as "the duly authorised representative of the First Applicant". His authorisation, he avers, appears from a resolution of the First Applicant's alleged sole shareholder, Kaj Thomas Moller ("Moller"), who also resides in Sweden. The First Respondent is a businessman who is domiciled in Gauteng. The Second Respondent is a company with its registered address in Gauteng. The First and Second Respondents oppose the application.

[3] The Third Respondent is the Registrar of Deeds, Western Cape. The Fourth Respondent, Standard Bank, is cited as an interested party that has a bond registered in its favour with the Third Respondent over the property. The Fifth Respondent is the Companies and Intellectual Property Commission ("CIPC"). As appears from paragraph [1] above limited relief is sought against the Third and Fifth Respondents and no relief is sought against the Fourth Respondent. These Respondents have not participated in this application.

Application for Postponement

[4] At the commencement of the hearing, Ms Tshabalala for the First Respondent applied for a postponement on the basis of an amendment to the notice of motion brought by the Applicants. The amendment sought a declaration to the effect that the First Respondent had fraudulently appointed himself as director. Ms Tshabalala submitted that her client needed an opportunity to respond to the declaration sought. The postponement application, which was opposed by the Applicants and the Second Respondent, was dismissed with costs for the reason that the First Respondent had already been given an opportunity to respond to the issues raised in the amendment, in his answering affidavit. The First Respondent's fraudulent conduct had been foreshadowed in the existing notice of motion and founding affidavit, and the First Respondent had elected to file an answering affidavit comprising of bare denials. In seeking a postponement he sought a further opportunity to respond, which he was not entitled to. I note, for the purpose of a consideration of costs, that the hearing of the postponement application took no more than approximately twenty minutes to half an hour, if that.

Relevant Background Facts and Pleadings

[5] The property in question was acquired in July 1989 by Amethyst Investment CC. In March 2003 the latter was converted into the First Applicant ('Intongo"), which accordingly became the owner of the property. The shares in Intongo were issued to one Jurgen Ludwig ("Ludwig"), who became the registered shareholder. He also became a director of Intongo together with one James Kotze ("Kotze"). Ludwig's directorship and the registration and subsequent cancellation of the shares in his name are recorded in the relevant CIPC documents.[1]

[6] On 24 April 2003 Ludwig and the aforementioned Moller concluded a nominee agreement[2] which recorded that Moller was the beneficial owner of the Intongo shares and that Ludwig was his nominee. In 2013 the nominee arrangement between Ludwig and Moller ended. Thereafter, on 15 September 2020, Moller is alleged by the

[1] Annexure UVT1 to the Second Respondent's answering affidavit.
[2] Annexure F6 to the Founding affidavit.

Applicants to have nominated the Second Applicant as his nominee for his Intongo shares by way of a shareholder nomination agreement.[3]

[7] The First Respondent, whom, for convenience, I shall hereafter refer to as Groenewald , had been in occupation of the property since 1 January 2014. In lieu of rental he paid Intongo's bond on the property and all rates. There had been discussions since 2013 for Groenewald to purchase the property.

[8] In May 2015 a sale of shares agreement was concluded between Intongo, represented by Moller, and Groenewald in terms whereof Moller sold the Intongo shares to Groenewald for the South African Rand equivalent of USD850 000. The relevant terms of the sale of shares agreement were:

> 8.1 Moller's shares and loan account in Intongo were sold to Groenewald. "with effect in all respects" from 31 July 2015, which was defined as the effective date. The completion date was defined as the fifth business day following 31 July 2015.
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> 8.2 The purchase price was the ZAR equivalent of USD 850 000, converted at the rate of exchange on the date of payment.
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> 8.3 A deposit of 10% of the purchase price was payable by the First Respondent upon receipt, by one De Bruin, Moller's agent, of the shares' certificate in Intongo, and an irrevocable power of attorney authorising De Bruin to transfer the shares to Groenewald. The power of attorney was to authorise the transfer of the shares, upon payment of the purchase price, and De Bruin was to remain in possession of the share certificate pending the payment of the purchase price. This was specified at clause 4.
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> 8.4 The balance of the purchase price was payable by Groenewald by 31 July 2015 by way of either a single payment or instalments at the discretion of Groenewald and to such accounts as were agreed with Moller.
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> 8.5 To secure the purchase price, Groenewald was to pay 90% of the purchase price into his attorney's trust account within 30 days of the payment of the deposit.

[3] Annexure F3 to the Founding Affidavit.

8.6 Intongo was not to dispose of the property between the signature date and 31 July 2015.

8.7 Ownership of and risk in and benefits attaching to the shares would pass to Groenewald on the completion date provided that all amounts due to Moller in terms of the agreement had been paid.

8.8 On the completion date De Bruin would give Groenewald a number of documents which would enable him to take possession of the shares and loan account of Intongo."

[9] Groenewald paid USD 377 000, which constituted approximately 45% of the total purchase price.

[10] In October 2015, as appears from the relevant CIPC documents,[4] Ludwig's share certificate was cancelled[5] and Groenewald became the shareholder and director of Intongo. The Applicants allege that this occurred fraudulently. In this regard the Second Applicant states in the founding affidavit that Groenewald made use of unsigned documents sent to him by James Kotze Attorneys to have himself appointed as the director of Intongo. Kotze, according to the Second Applicant, had sent the documents to a secretarial services company without the necessary approval and resolution from the Second Applicant because Groenewald had advised that he gave an undertaking to make a full payment for the shares. It is only in his replying affidavit that the contention is advanced by the Second Applicant that Groenewald falsified documents to have himself appointed as shareholder and director.

[11] In 2017 the property was offered to the Second Respondent for sale. The Second Respondent submits that from its point of view, Groenewald was a director of Intongo and Intongo owned the property.

[12] On 31 July 2017 the Second Respondent paid a deposit of R400 000 for the property into the bond account held with Standard Bank, to prevent the bank from foreclosing on the property. The Second Respondent states that Moller and the

[4] Annexure UVT1 *supra*.
[5] See the discussion in para [29] below.

Second Applicant were aware of this payment and although it was not in the name of Groenewald, they assumed it was a payment by him.

[13] On 18 July 2017, shortly before the aforementioned payment of R400 000 by the Second Respondent, Kotze, the Applicants' attorney, wrote to De Bruin, Moller's s agent in the share sale agreement, and provided him with the closing documents for the transfer of the shares, which, according to Kotze, were unused and were prepared at a time when he understood that payment in full was expected from the Groenewald.

[14] The Second Respondent notes that the first record in the founding affidavit of any demand on Groenewald for the purchase consideration in respect of the share sale agreement is 4 August 2017. This, the Second Respondent notes, is the same day on which Groenewald signed the property sale agreement with the Second Respondent. At the end of 2017 Groenewald paid a further USD66 000 in respect of the share sale agreement. In January 2018, the property was transferred into the Second Respondent's name.

[15] After the further payment by Groenewald at the end of 2017, Moller explored a settlement of the outstanding purchase price owed on the share sale agreement with Groenewald. The Second Respondent states that Moller knew that Groenewald was a director of Intongo, unlawfully in Moller's view, but he did nothing about this until August 2018 when he threatened to remove Groenewald as a director but did not in fact do so.

[16] In October 2018, Moller learnt of the sale of the property. The Second Respondent points out that Groenewald, at that stage, was promising to pay in terms of the share sale agreement and Moller continued to negotiate with Groenewald to obtain payment up to June 2019. He did not during this period try to set aside the sale he had learned of in October 2018. This is not disputed.

[17] The present application was brought in October 2020, some two years after Moller learnt of the sale of the property and some three years after Moller became aware that Groenewald had been registered as the director of Intongo. The Second

Respondent emphasises that it has thus owned the property for more than three years and Moller was aware of its ownership for at least two years, since at least October 2018. Moller, according to the Second Respondent, was not interested in setting aside the property sale agreement. His interest was only to enforce the share sale agreement between himself and Groenewald. It is only when these attempts failed that he directed his attention towards reclaiming the property in the name of Intongo and by allegedly appointing the Second Applicant as his nominee to do so.

Locus Standi

[18] The Second Respondent challenges the *locus standi* of both Applicants to institute this application. Firstly, with regard to the standing of the First Applicant, Mr Babamia for the Second Respondent submitted that it is clear that the First Applicant, Intongo, did not authorise the institution of these proceedings. Groenewald is currently the only director of Intongo, and in his capacity as such it was only he who would have been authorised to bring these proceedings in the name of Intongo. The Second Applicant, he pointed out, is not a director of Intongo and he describes himself as a nominee shareholder of Intongo. This, submitted Mr Babamia, is significant because it is only Intongo that has a claim to a return of the immovable property. The shareholder of Intongo, nominee or beneficial, has no such claim.

[19] Secondly, apropos the standing of the Second Applicant, Mr Babamia submitted that Moller could not have competently appointed the Second Applicant as a nominee shareholder of Intongo or as its director, as he, Moller, was not a registered shareholder. Ludwig is the only registered shareholder disclosed on the pleadings. Moller was never a registered shareholder and never became one after Ludwig's share certificate was cancelled, because from then on, the shareholder was Groenewald. A company, he submitted, referencing the definition of shareholder in section 1 of the Companies Act 71 of 2008 ("the Companies Act"), and the requirement for a shareholder to be entered in the securities register, only concerns itself with the registered owner of its shares. Ms Tshabalala for the First Respondent aligned herself with the submissions by Mr Babamia on *locus standi*.

[20] Mr Khoza for the Applicants countered that as it is not disputed that the First Applicant was the owner of the property and Moller the owner of the shares in Intongo, both Applicants have sufficient interest in the relief at stake and therefore have the requisite *locus standi*. He furthermore submitted that Groenewald's standing to represent the company as the director was impugned because he had fraudulently appointed himself as director.

Discussion

[21] Central to the issues of standing raised by the parties are the questions as to precisely who in law can institute proceedings on behalf of a company, and the purview and position of a shareholder in relation to a company and its assets. I consider the standing of each Applicant in this context.

The Standing of the First Applicant: Who can by law represent the First Applicant?

[22] Section 66 of the Companies Act prescribes:

> *"the business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise."*

Section 1 of the Companies Act defines "board" as *"the board of directors of a company"* and "director" as:

> *"a member of the board of a company, as contemplated in section 66, or an alternate director of a company and includes any person occupying the position of a director or alternate director, by whatever name designated."*

[23] The definitions of "director" and "board" read with section 66 of the Companies Act thus instruct that a director who is also a member of the board of a company, is responsible for the management and direction of the company's business and affairs and for the decision to institute legal proceedings in the name of the company. It follows that where a company has but one director it is only that director who can institute proceedings or authorise the institution of proceedings by an agent.

[24] It is clear from the company documents annexed to the answering affidavit that Groenewald is reflected as the only active director. Neither Moller nor the Second Applicant are recorded as directors. Groenewald has not authorised these proceedings nor has he authorised the institution thereof by the Second Applicant or any other person. As Moller is not recorded as a director, his resolution authorising the Second Applicant to institute proceedings does not suffice to clothe Intongo with the requisite standing.

[25] The unsubstantiated allegations of fraud in the founding affidavit shored up by mainly hearsay allegations of fraudulent signatures in the replying affidavit do not assist the Applicants in their counter argument which seeks to impugn Groenewald's position as director. This is so because, apart from the fact that a party cannot make out a case in reply, the alleged fraudulent representation to the Second Respondent in the contract of sale on which the Applicants rely, did not cause the Second Respondent to act to its detriment, which is an essential element of fraud.[6] See *Basil Read (Pty) Ltd v Nedbank Limited and Another* 2012 (6) SA 514 (GSJ) at paragraphs 24 – 26; *Standard Bank v Coetsee* 1981 (1) SA 1131 (A) at 1145; *Geary and Son (Pty) Ltd v Gove* 1964 (1) SA 434 (A) at 441C – D; Harms *Amlers Precedent of Pleadings* (6 ed) at page 193; and Becks *Theory and Principles of Pleadings in Civil Actions* (6 ed) at paragraph 13.44.

[26] The Second Respondent did not, as the alleged victim of the fraud, seek to set aside the sale. This is a limitation to the principle that fraud unravels everything, as recognised by the Constitutional Court in *ABSA Bank Limited v Moore and Another* 2017 (1) SA 255 (CC) at 39, where Cameron J said:

> *"The maxim is not a flame thrower, withering all within reach. Fraud unravels all directly within its compass, but only between victim and perpetrator, at the instance of the victim. Whether fraud unravels a contract depends on its victim, not the fraudster or third parties."*

[6] The elements of fraud being, (a) a representation, (b) which is, to the knowledge of the representor, false, (c) which the representor intended the representee to act upon, (d) which induced the representee so to act, and (e) that the representee suffered damage as a result. See *Basil Read* at 1145.

[27] In view of all of the above, the First Applicant, Intongo, was not entitled to institute these proceedings and is non-suited. Its alleged interest in these proceedings, referred to by Mr Khoza, does not detract from this and certainly cannot clothe it with standing.

***Locus Standi* of the Second Applicant**

[28] The Second Applicant bases his standing as a nominee shareholder and director, on the appointment by Moller of him in those capacities. "Shareholder" is defined in section 1 of the Companies Act:

> *"'**shareholder**', subject to section 57(1), means the holder of a share issued by a company and who is entered as such in the certificated or uncertificated securities register, as the case may be".*

I note that section 57 deals with anomalous situations[7] and is not relevant for present purposes.

[29] There is no evidence that Moller was a shareholder as defined in the Companies Act. What does appear from the pleadings is that Ludwig was Intongo's registered shareholder from April 2003 and though the nominee agreement between Moller and Ludwig may have been terminated in 2013, there is no evidence that Ludwig transferred the shares in Intongo back to Moller or his nominee as required by their nominee agreement. Moroever, upon the cancellation of Ludwig's share certificate on 8 October 2015, there is no record of Moller becoming a registered shareholder. Instead, it is accepted that the shares went to Groenewald.

[30] In *Oakland Nominees (Pty) Ltd v Gelria Mining and Investment Company (Pty) Ltd* 1976 (1) SA 441 (A) at 453A – B it was said –

> *"Ownership of shares does not depend on registration. On the other hand, the company recognises only its registered shareholders".*

As Moller was not a registered shareholder, he could not competently have appointed the Second Applicant as a nominee shareholder of Intongo, or as its director. Accordingly, for this reason, the Second Applicant too lacks the requisite *locus standi*.

[7] For example where a profit company has one shareholder, where a profit company has one director, where a shareholder is a director of a company, and where a company holds shares in another company.

[31] Moller and the Second Applicant would in any event not have had the requisite standing even had they been shareholders as defined in the Act, for, as has been acknowledged in *Itzikowitz v ABSA Bank Ltd* 2016 (4) SA 432 (SCA) at paragraphs 9 – 11, a company's property belongs to the company and not its shareholders and only the company may sue in respect of loss to property owned by it. No action lies at the suit of a shareholder. In this regard the Court stated:

> *"[9]….The notion of a company as a distinct legal personality is no mere technicality – a company is an entity separate and distinct from its members and property vested in a company is not and cannot be regarded as vested in all or any of its members. Generally, it is of cardinal importance to keep distinct the property rights of a company and those of its shareholders even where the latter is a single entity. The company's property belongs to the company and not its shareholders. A shareholder's general right of participation in the assets of the company is deferred until winding-up, and then only subject to the claims of creditors……..*
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> *[11] More recently, in* Johnson v Gore Wood & Co (a firm) *[2001] 1 All ER 481 (HL), Lord Bingham of Cornhill observed:*
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> *'(1) Where a company suffers loss caused by a breach of duty owed to it, only the company may sue in respect of that loss. No action lies at the suit of the shareholder suing in that capacity and no other to make good a diminution in the value of the shareholder's shareholding where that merely reflects the loss suffered by the company. A claim will not lie by a shareholder to make good a loss which would be made good if the company's assets were replenished through action against the party responsible for the loss, even if the company, acting through its constitutional organs, has declined or failed to made good that loss*.'"

[32] Accordingly, even had they been shareholders, Moller and the Second Applicant would not have had the requisite *locus standi* to set aside the sale of the property. As shareholders, they would not have owned the property of Intongo but the shares therein. I note in passing that a shareholder who takes umbrage at the manner in which a company is conducting itself or its affairs has remedies in terms of sections 161,[8] 162,[9] 163[10] and 165[11] of the Companies Act.

[8] Application to protect rights of security holders.

[33] The Second Respondent took issue with Moller's failure to file a confirmatory affidavit authorising the Second Applicant to act for him. Even had such an affidavit been filed, it would not have cured the defects pertaining to the standing of the Second Applicant alluded to above.

[34] In the light of the aforegoing, I find that the Applicants have not shown the requisite *locus standi* and for this reason alone the application cannot succeed.

[35] It would seem to me that the Applicants have in any event not established the elements of fraud *apropos* the property sale transaction. Apart from the unsubstantiated allegations of fraud, the representation made by Groenewald to the Second Respondent, which is relied upon for the fraud, has not resulted in the Second Respondent acting to their detriment or wanting to set aside the sale. No representation concerning the sale of the property was made to any other person.

[36] It is to be noted that the only representations that were made to Moller pertained to the sale of shares agreement which, as appears from the factual background, was breached. The Applicants' remedy in those circumstances would have been for damages arising from the breach of the sale of shares agreement. It is unfortunate that they resorted instead to this application.

[37] In view of all of the above, I grant the following order:

1. The application is dismissed with costs such to include the costs of two counsel for the Second Respondent and counsel for the First Respondent.
2. The First Respondent shall bear the costs occasioned by the postponement application.

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[9] Application to declare director delinquent or under probation.
[10] Relief from oppressive or prejudicial conduct or from abuse of separate juristic personality of company.
[11] Derivative Actions.

Y S MEER

Judge of the High Court

APPEARANCES

Counsel for Applicants	:	ADV ADRIAN MONTZINGER
Instructed by	:	*MRT Law Inc*
Counsel for Respondents	:	ADV JAWAID BABAMIA SC

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