



Republic of South Africa

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

Before: The Hon. Mr Justice Binns-Ward

Hearing: 6 June 2022

Judgment: 26 July 2022

Case No. 5035/2017

In the matter between:

**THE TRUSTEES FOR THE TIME BEING OF
THE HUNTER FAMILY TRUST**

Plaintiffs / Respondents

and

DUIN-EN-SEE (PTY) LTD

First Defendant /

Excipient

**TRUSTEES FOR THE TIME BEING OF
THE ELOFF VAN HUYSSTEEN TRUST**

Second Defendant

**TRUSTEES FOR THE TIME BEING OF
THE IYAKHULA II TRUST**

Third Defendant

**TRUSTEES FOR THE TIME BEING OF
THE THYS CILLIERS FAMILIETRUST**

Fourth Defendant

**TRUSTEES FOR THE TIME BEING OF THE
DIE KOS 'N MOERSE LOT TRUST**

Fifth Defendant

TRUSTEES FOR THE TIME BEING OF

THE JAN T BEUKES FAMILY TRUST

EDUAN VAN ZYL HAYMAN N.O.

ANNA HILDEGARD GAGIANO

JACOBUS ANDREAS JOUBERT

HENDRIK VAN HUYSSTEEN

EBENHAESER CORNELIS NEL N.O.

MATTHYS KONRAD RUGTER VAN HUYSSTEEN

Sixth Defendant

Seventh Defendant

Eighth Defendant

Ninth Defendant

Tenth Defendant

Eleventh Defendant

Twelfth Defendant

JUDGMENT

BINNS-WARD J:

[1] In their amended particulars of claim, dated January 2021, the plaintiffs have claimed (as 'Claim A') an order declaring that -

1. the first defendant company (Duin-en-See (Pty) Ltd)) is presumed, in accordance with the provisions of s 4 of the Share Block Control Act 59 of 1980 ('the SBC Act'), to be operating a 'share block scheme' as defined in s 1 of the said Act;
2. the company is a 'share block company' as defined in s 1 of the SBC Act;
3. the shares in the company held by the plaintiffs confer upon them the right to, and an interest in, the exclusive use of Erf 13009, Plettenberg Bay;
4. the plaintiffs are entitled to –
 - 4.1 the exclusive right to occupy, use and benefit from Erf 13009, Plettenberg Bay, and
 - 4.2 refuse to consent to the transfer of Erf 13009, Plettenberg Bay;
5. the company is not entitled to dispose of Erf 13009 without the plaintiffs' consent; and
6. the company is required to comply with the provisions of the SBC Act.

In the alternative to Claim A, they claim (as 'Claim B') an order declaring that -

1. the plaintiffs are entitled to –
 - 1.1 the exclusive right to occupy, use and benefit from Erf 13009, Plettenberg Bay, and

- 1.2 refuse to consent to the transfer of Erf 13009, Plettenberg Bay
2. the company is not entitled to dispose of Erf 13009 without the plaintiffs' consent.

The alternative claim sounds in contract.

[2] The plaintiffs have pleaded the following facts in support of their forementioned claims:

1. Duin-en-See was incorporated in or about 1958 by the company's original shareholders, B. Smit, L.L. Beukes, H. Scholtz, H.G. van Huyssteen and the Rev. P.L. Cilliers, '*as a vehicle to acquire and hold [certain immovable property then known as Portion 75 (a portion of Môreson) of the Farm Brakkloof, later known as Portion 58 of the Farm Brakkloof No. 443, situate adjacent to Robberg Beach, Plettenberg Bay] for the benefit of the original shareholders, who would by means of such shareholding be entitled to*' the benefit in and exclusive use of a defined portion of the land; the said portions, collectively, comprising the entire extent of the aforementioned immovable property.
2. The share capital of the company has at all times comprised of 500 ordinary shares, allotted to the original shareholders as follows:
 - 2.1 B. Smit – 100 shares
 - 2.2 L.L. Beukes 100 shares
 - 2.3 H. Scholtz 50 shares
 - 2.4 H.G. van Huyssteen 150 shares
 - 2.5 Rev. P.L. Cilliers 100 shares.

The current shareholders are the successors in title to the shares '*and related rights and obligations of the original shareholders*'.

3. Contemporaneously with the incorporation of the company, the original shareholders entered into an agreement in the following terms:

- 3.1 they would register and/or acquire the company as a vehicle to acquire and hold for their benefit the parcels (which collectively constituted the property) and their rights in respect thereof, which are described below;

3.2 they would each subscribe for and be issued the shareholding in the company described in paragraph 2.2 above;

3.3 the subscription price paid by the shareholders would be used by the company to acquire the property;

3.4 each shareholding would be allocated a particular parcel (an '*allocated parcel*'), over which each original shareholder and his or her successors in title would enjoy the following rights and benefits (the "*usage rights*"), which attached to the associated shareholding:

3.4.1 the right to the exclusive use, possession and occupation of the allocated parcel;

3.4.2 the right to let out the allocated parcel (or any portion thereof);

3.4.3 the exclusive right to the rental and other fruits derived from the allocated parcel, without having to account therefor to the company or to any other shareholder;

3.4.4 the right to erect dwellings and other associated structures on the allocated parcel;

3.4.5 a right of way to traverse over the other parcels, if reasonably required;

3.5 the parcels allocated to each of the original shareholders (the "*original parcels*") would be as follows:

[the "original parcels" were then described with reference to a plan attached as annexure POC1 to the pleading]

3.6 Each shareholder would bear any and all:

3.6.1 Costs, expenses, levies, services and other charges or imposts ("*payables*") pertaining to his or her allocated parcel(s) (or, should any such payables not pertain to a particular allocated parcel or parcels but to the property as a whole, an aliquot share of such payables proportionate to that shareholder's shareholding);

3.6.2 Costs and charges incurred by the company in relation to (a) his or her allocated parcel and (b) safeguarding of shareholders' interests;

3.6.3 costs and charges incurred by the company in relation to its costs of administration in proportion to that shareholder's shareholding;

3.7 each shareholder would afford rights of way over his or her parcel to the occupiers for the time being of the other parcels, where reasonably required;

3.8 each shareholder would be entitled to bequeath or dispose of his or her shareholding and the usage rights associated with the allocated parcel, subject to the following conditions:

3.8.1 a bequest or disposal to a shareholder's spouse or children would not require the consent of the company or any other shareholder;

3.8.2 a bequest or disposal to any other person would be subject to the provisions of the company's memorandum and articles of association;

3.9 each shareholder would be entitled to divide his or her shareholding and the parcel allocated to that shareholding to the extent permitted by the company's memorandum and articles of association;

3.10 no shareholder would be required or compelled to dispose of his or her shareholding and/or rights to the relevant allocated parcel without his or her consent;

3.11 upon the bequest or disposal by a shareholder of his or her shares, whether by way of a sale, transfer, upon death or otherwise, the transferee would acquire the rights of the disposing shareholder to the allocated parcel associated with his or her shareholding and would become bound by the obligations of that shareholder as set out in [3.6 and 3.7 above]; and

3.12 the company would be party to the agreement.

4. The company and the original shareholders implemented the agreement.

5. Each of the successors in title to the original shareholders took transfer of their respective shares in the company with full knowledge of the terms of

the agreement and, by taking transfer of the shares, assented to the terms of the agreement and became bound thereby.

6. From time to time between 1958 and the present certain of the original shareholders disposed of and divided their shareholdings and related original allocated parcels. Consequently, there are currently 12 shareholders, of which the plaintiffs, collectively, in their capacity as the trustees for the time being of the Hunter Family Trust are one.

7. Prior to 1995, the shareholding originally held by H. Scholtz was divided into two shareholdings, each with an allocated parcel being portion of “original parcel” allocated to Schlotz in the 1958 agreement.

8. The plaintiffs, who hold 25 shares in the company, are the successors in title of Scholtz in respect of one of the products of that division.

9. The plaintiffs came to hold their shares consequent upon the following transactions:

9.1 With the knowledge and approval of the company and all the other shareholders, H. Scholtz sold 25 of his shares, together with the usage rights in respect of part of the parcel of land originally allocated in respect of his 50 shares to Mrs H Hunter ‘*during or about 1961, who thereupon became party to [the aforementioned agreement between the original shareholders and the company]*’.

9.2 The sale agreement between Scholtz and Mrs Hunter was duly implemented, and Mrs Hunter thereby acquired the shares currently held by the plaintiffs ‘*together with the rights and obligations of Mr H Scholtz under the agreement and attaching to the shares transferred*’.

9.3 With the knowledge and approval of all the shareholders of the company and the company itself, Mrs Hunter transferred what would become the plaintiffs’ shares and rights and obligations in respect of the plaintiffs’ parcel to the trustees of the Hunter Family Trust on or about 17 April 1995, who thereupon became party to [the aforementioned agreement, according to its terms].

9.4 From 17 April 1995 the trustees have exercised, and continue to exercise, their rights in respect of the Trust’s parcel in accordance

with the agreement,¹ and have done so with the knowledge, agreement and approval of the company and the company's other shareholders.

10. The plaintiffs and their predecessors effected improvements to the parcel associated with the Trust's shareholding, including the erection of dwelling houses and other structures.

11. The immovable property owned by the company was incorporated into what is now the Bitou Municipality in 1983, and thereupon ceased to be subject to the Subdivision of Agricultural Land Act 70 of 1970, but was zoned for agricultural use.

12. During 2012, the Bitou Municipality notified the company that that the use of the property for residential purposes was incompatible with the land uses permitted by its zoning for agricultural purposes.

13. The company applied for the rezoning of the immovable property from agricultural use to residential use in 2015, whereupon the land was redesignated as Erf 13003.

14. The company thereafter procured the subdivision of Erf 13003 into Erven 13004 to 13019.

15. The shareholders assented to the aforesaid application for subdivision on the basis that:

15.1 the subdivision of the property would not, subject to what is set out in [15.2 and 15.3] below, prejudice the shareholders' rights under the agreement and/or attaching to their shares;

15.2 subdivided erven would be created around the existing dwellings erected on the allocated parcels, thereby preserving shareholders' rights to the dwellings erected upon the respective allocated parcels;

15.3 the company would be entitled to deal with and dispose of the erven created by the subdivision other than those created around the existing dwellings on the allocated parcels.

¹ It is alleged in the amended particulars of claim that the agreement was amended in or about 1987 in respect of the arrangements concerning the division between the shareholders of liability for certain expenses attendant on the company's ownership of the immovable property. The details in this regard do not bear on the determination of the exceptions.

16. Erf 13009 is an erf created on the land constituting the plaintiffs' parcel and is the portion of land on which the plaintiffs' dwelling was erected, and to which the plaintiffs accordingly continued to enjoy their shareholders' rights after the subdivision.

[3] The plaintiffs seek the declaratory relief described in paragraph [1] above because, so they plead, the company intends to dispose of Erf 13009 without the plaintiffs' consent, thereby also depriving them of the right to occupy, use and benefit from the erf.

[4] The first defendant noted an exception to the particulars of claim on three grounds, only two of which have been persisted in.

The first ground of exception

[5] The first ground of exception in which the defendant persists is that the allegations pleaded in support of the declaratory relief sought in Claim A of the particulars of claim *'are insufficient to trigger the presumption in section 4 of the [SBC Act] and/or to satisfy the definition of 'share block scheme' in section 1 of the Act because –*

1. *for both it is necessary for the relevant right or interest in the use of the immovable property to be provided for in the definition of the relevant class of shares in the company's memorandum of incorporation; and*
2. *the plaintiffs do not aver that this is the case'.*

The defendant's notice of exception proceeded further in respect of this ground as follows:

'Further and in any event:

1. *Section 7(2) of the [SBC Act] provides that **"the articles of a share block company shall provide that a member shall be entitled to the use of a specified part of the immovable property in respect of which the company operates the share block scheme, on the terms and conditions contained in a use agreement entered into between the company and such member"**.*
2. *The amended particulars do not aver that there was compliance with section 7(2) of the [SBC Act].*

3. *The amended particulars also do not aver that there was a signed use agreement as required by sections 7(3) and 7(5) of the [SBC Act].*
4. *In the premises, the amended particulars lack averments necessary to sustain the allegation ... that the company is “**presumed to operate a share block scheme, in terms of section 4 of the [SBC Act] and the allegation that “the company is a share block company as defined in section 1 of the [SBC Act]”.***
5. *As such, the amended particulars lack averments which are necessary to sustain Claim A.’*

The merits of the first ground of exception

[6] Section 4 of the SBC Act provides:

‘For the purposes of this Act a company shall be presumed to operate a share block scheme if any share of the company confers a right to or an interest in the use of immovable property or any part of immovable property’.

[7] A ‘share block scheme’ is defined in s 1 of the SBC Act to mean ‘any scheme in terms of which a share, in any manner whatsoever, confers a right to or an interest in the use of immovable property’. The word ‘scheme’ is not specially defined, and accordingly bears its ordinary dictionary meaning, which - having regard to its contextual employment - is ‘a plan or arrangement for attaining a particular object or putting a particular idea into effect’.² The use in the definition of the expressions ‘any scheme’ and ‘in any manner whatsoever’ express an intention by the legislative draftsman to cast the net widely for the purposes of the Act, the object of which is reflected unambiguously in its long title, viz. ‘(t)o control the operation of share block schemes; and to provide for matters connected therewith’.

[8] The evident legislative intention to give the SBC Act a wide embrace for determining whether an undertaking qualified as a share block scheme is underscored by the breadth of the Act’s special definition of ‘share’, which is defined in s 1 as follows:

² *Oxford Dictionary of the English Language* Version 2.3.0 (239.5), Copyright © 2005–2019 Apple Inc.. The signed text is in Afrikaans, in which the word ‘skema’ is used. ‘Skema’ is defined in HAT (6de uitgawe) in its applicable sense as ‘(taamlik) uitgewerkte plan vir ’n onderneming’.

“share” –

- (a) *means a share as defined in section 1(1) of the Companies Act in relation to a company, and includes a debenture of a company and a right to or an interest in any such share or debenture;*
- (b) *includes any other interest in a company;*
- (c) *does not include a right to or interest in the assets of a company derived from a lease in respect of such assets’.*

The definition of ‘Companies Act’ in s 1 of the SBC Act was substituted by s 224(2) of Act 71 of 2008 to mean ‘*the Companies Act, 2008*’, but it is nevertheless evident that many of the references to ‘the Companies Act’ in the SBC Act are to the 1973 Companies Act, rather than its 2008 replacement.³

[9] ‘Share’ was defined in s 1(1) of the 1973 Companies Act to mean ‘*in relation to a company, ... a share in the share capital of that company and includes stock; and in relation to an offer of shares for subscription or sale, includes a share and a debenture of a company, whether a company within the meaning of this Act or not, and any rights or interests (by whatever name called) in a company or in or to any such share or debenture*’. The term is defined in s 1(1) of the 2008 Companies Act to mean ‘*one of the units into which the proprietary interest in a profit company is divided*’. It appears to be immaterial for present purposes which of the two definitions in the respective Companies Act applies in paragraph (a) of the definition of ‘share’ in s 1 of the SBC Act. It is clear the defined meaning of the term in the SBC Act is wider than that in either of the Companies Acts.

[10] In my judgment, there is no merit in the first defendant’s contention that the relevant right or interest in the use of the immovable property had to be provided for in the definition of the relevant class of shares in the company’s memorandum of incorporation. The SBC Act was brought into being to regulate a state of affairs that had obtained since at least the 1950’s whereby, prior to the inception of sectional title ownership of immovable property, persons sought to obtain something akin to separate ownership of parts of buildings. To achieve that object, it was necessary to devise a means of getting around the common law doctrine of *superficies solo cedit*.

³ See, for example, ss 7(3), 7(4), 8(1)(d)(ii), 12(2) and 15(5).

A commonly adopted means of doing so was to use a company as the property owner, with the shares issued in it conferring exclusive use and benefit rights for the holders thereof in respect of identified sections of the property; cf *Rosslare (Pty) Ltd and Another v Registrar of Companies* 1972 (2) SA 524 (D) at 525fin -526A.

[11] The attendant rights and interests of the shareholders vis-à-vis the property-owning company were frequently recorded in the company's articles of association. But that was not the only manner in which they were provided for.⁴ Indeed, it was in recognition of that fact that the legislature determined in s 7(2) of the SBC that a uniform method be adopted. It did so by providing that '*(t)he articles of a share block company shall provide that a member shall be entitled to the use of a specified part of the immovable property in respect of which the company operates the share block scheme, on the terms and conditions contained in a use agreement entered into between the company and such member*'. Recognition by the legislature that some companies that were operating share block schemes at the commencement of the Act, on 1 January 1981, might require to amend their articles of association to comply with the introduction of a uniform method is evident in s 2 of the SBC Act, which in material part provides:

'(1) The Registrar may on application, ..., by a company which at the commencement of this Act operates a share block scheme, exempt ..., such company from any provision of this Act for such period and on such conditions as the Registrar may deem fit.

(2) If a company alters its memorandum or articles to comply with any provision of this Act, no fees shall be payable to the Registrar in respect of such alteration.'

[12] In the current matter, the plaintiffs have alleged that the relevant rights and interests and their integral connection to the originally subscribed for blocks of shares were provided for in an agreement concluded between the original shareholders *inter se*, and to which the company became privy. The juristic effect of an agreement of the sort alleged and the import of a company's articles of

⁴ Sonnekus & Butler, *Sectional Titles, Share Blocks and Time-sharing* at 4-10 [Issue 14] states that before the commencement of the SBC Act share block scheme use rights were '*usually not conferred in the articles but directly by means of a use agreement between the member and the company*'.

association is indistinguishable. Thus, in *Gohlke and Schneider and Another v Westies Minerale (Edms) Bpk and Another* 1970 (2) SA 685 (A) at 692F-G, Trollop JA observed ‘The articles ... merely have the same force as a contract between the company and each and every member as such to observe their provisions (see *Hickman v Kent or Romney Marsh Sheepbreeders’ Association* (1915) 1 Ch.D. 881, the locus classicus on the point and *De Villiers v Jacobsdal Saltworks (Michaelis and de Villiers) (Pty) Ltd* 1959 (3) SA 873 (O) at pp. 876-7).’⁵ The essence of the learned judge’s observation was reflected in s 65(2) of the subsequently enacted 1973 Companies Act. Under the 2008 Companies Act, the matter is regulated by s 15(7). An agreement of that sort made before the commencement of the 2008 Act remains effective as if it had been made in terms of s 15(7) of the currently applicable statute; see para 3 of Schedule 5 to the 2008 Companies Act.

[13] It follows clearly, in my view, that the agreement pleaded by the plaintiffs would, if established at trial, constitute a manner by which the holding of the respective blocks of shares referred to therein conferred a right to or an interest in the use of identified parts or parcels of the company’s immovable property. It would not be necessary for the relevant right or interest in the use of the immovable property to be provided for in the definition of the relevant class of shares in the company’s memorandum of incorporation in order for the alleged agreement to be effective.

[14] The objects of the SBC Act would be substantially undermined were its provisions construed in the manner suggested by the first defendant’s first ground of exception. The clear intention of the enactment is to draw under the aegis of the legislation all companies that operate share block schemes as defined. As already mentioned, the extremely wide definition of the term ‘share block scheme’ expressly acknowledges that such schemes might be devised in various ways. The essential requirement is some connection between the holding of shares in the company and the holders’ entitlement by virtue thereof to a right or interest in the use of the company’s immovable property. As Grosskopf JA noted in *Van Staden v Fourie* 1989

⁵ See also *De Lange v Presiding Bishop for the time being of the Methodist Church of Southern Africa and another* [2014] ZASCA 151 (29 September 2014); 2015 (1) SA 106 (SCA); [2015] 1 All SA 121 (SCA) at para 52 and fn. 17, and *Itzikowitz v Absa Bank Ltd* 2016 (4) SA 432 (SCA) at para 9.

(3) SA 200 (A) at 211B ‘... *het die Wet te doen met met skemas waarkragtens die houters van aandele in ’n maatskappy ’n reg of belang in die gebruik van vaste eiendom het uit hoofde van hul aandeelhouding, en met maatskappye wat sulke skemas bedryf*.⁶

[15] It may be, now that the Companies Act of 2008 does not provide for companies to have articles of association, that the effect of s 7(2) of the SBC Act is that it is now obligatory for a share block company to provide in its memorandum of incorporation what remains in the express provisions of the subsection required to be provided for in such a company’s ‘articles of association’. Assuming that to be the case would, however, not derogate from the validity and effectiveness of the agreement pleaded by the plaintiffs. The company’s failure to comply with s 7(2) would not imply that that it was not a share block company. The qualification for being a share block company is the conduct by the company of a share block scheme.

[16] Non-compliance with the provisions of s 7 of the SBC Act by a company that conducts a share block scheme could render the company and its directors liable to criminal sanction in terms of s 21 of the Act. Non-compliance does not, however, imply that the non-compliant company escapes the regulatory net of the SBC Act; it remains a share block company within the meaning of the Act; cf. *Van Staden v Fourie* supra, at 212H-213I.

[17] To the extent that the agreement alleged in the particulars of claim does not comply with the provisions pertaining to use agreements in the SBC Act in subsecs 7(3) and (5), similar considerations apply as those discussed in the preceding paragraph.

[18] For these reasons the exception on the first ground falls to be dismissed.

⁶ ‘... *the Act deals with schemes in terms of which the holders of shares in a company have a right or interest in the use of immovable property by virtue of their shareholding, and with companies that operate such schemes.*’ (My translation.)

The second ground of exception

[19] The second ground of exception⁷ is directed at both Claim A and Claim B. It was couched as follows in the first defendant's notice of exception:

'9. Both Claim A and Claim B depend on –

*9.1 the conclusion of what is defined as “**the agreement**” “at or about” 1958, binding the company and conferring the rights and imposing the obligations set out at paragraphs 19.4 to 19.4.5 upon the company's original shareholders; and*

*9.2 the valid transfer of those rights and obligations over what is defined as “**the plaintiffs parcel [of land]** (“**the alleged rights and obligations**”) from Mr H Scholtz to Mrs H Hunter during or about 1961 (“**the 1961 transfer**”); and*

*9.3 the valid transfer of the alleged rights and obligations from Mrs Hunter to the plaintiffs on or about 17 April 1995 (“**the 1995 transfer**”).*

10. Under section 1(1) of the General Law Amendment Act 68 of 1957 (in force at the time of the 1961 transfer), no contract of sale or cession in respect of land or any interest in land would be of any force or effect unless it was reduced to writing and signed by the parties thereto or by their agents acting on their written authority.

11. The plaintiffs do not allege that the 1961 transfer complied with these requirements. As such, the amended particulars lack averments necessary to sustain Claims A and B.

*12. Similarly, under section 2(1) of the Alienation of Land Act 68 of 1981 (in force at the time of the 1995 transfer) no alienation of land (defined to include “**any interest in land**”) shall be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.*

13. The plaintiffs do not allege that the 1995 transfer complied with these requirements. As such, the amended particulars lack averments necessary to sustain Claims A and B.'

⁷ The second ground of exception described in this judgment was actually the third ground of exception pleaded in the first defendant's notice of exception, but the defendant did not persist in its heads of argument or at the hearing with the second of its three pleaded grounds of exception.

[20] Section 1(1) of the General Law Amendment Act provided:

'No contract of sale or cession in respect of land or any interest in land (other than a lease, mynpacht or mining claim or stand) shall be of any force or effect if concluded after the commencement of this section unless it is reduced to writing and signed by the parties thereto or by their agents acting on their written authority'.

In the context of a discussion of its import, the subsection was referred to by Watermeyer J in *Brink v Stadler* 1963 (2) SA 427 (C) as *'this difficult section'*.⁸ In *Bonnet en Andere v Snaar Dorpontwikkelaars (Edms) Bpk en Andere* 1978 (4) SA 212 (D), Howard J referred to the question whether the occupation rights of a purchaser of shares in a company operating a share block scheme constituted an 'interest in land' for the purposes of Formalities in respect of Contracts of Sale of Land Act 71 of 1969 (which was the governing legislation in the period between the currency of the relevant provisions of the General Law Amendment Act and those of the Alienation of Land Act) as *'one to which the answer was by no means clear'*.⁹

[21] Section 2(1) of the Alienation of Land Act 68 of 1981, which has been applicable since 19 October 1982, is to essentially the same effect as s 1(1) of the forementioned General Law Amendment Act.

[22] In my view, it is clear from the particulars of claim that the contract that the plaintiffs rely upon for the purposes of both claim A and claim B is one between themselves, qua shareholders, and the company – a so-called 'shareholders' agreement'. The action was instituted for the enforcement of the rights that they allege attach to the shares the Hunter Family Trust holds in the company. The antecedent transactions in 1961 and 1995 that culminated in the Trust's acquisition of the shares were not contracts in respect of the sale of land or for the cession of rights in land. They were sale of share agreements.¹⁰ The company did not cede any

⁸ At 428 *in fine*.

⁹ The learned Judge expressed himself in these words (at p. 216F) *'Die antwoord op hierdie vraag is glad nie voor die hand liggend nie'*.

¹⁰ The character of the transaction in terms of which Mrs Hunter transferred her shares to the Hunter Family Trust is not clear on the pleading, but I am prepared to assume in favour of the excipient first defendant that it was a sale or donation.

rights in its property under those transactions and, when the sale of shares agreements were implemented, the sellers, when they transferred their shares to their respective successors in title, as an integral part of the transaction ceded their rights in the shares, *not* in the company's property.

[23] The shareholders' agreement alleged in the particulars of claim was one that obliged the company to conduct its business in respect of the ownership of its land in the stipulated manner. It determined that the company was to operate a share block scheme and how it was to do that. It did not *alienate* any of the company's rights in the land. The shareholders' rights were personal to them and fell to be exercised by them, qua shareholders, against the company. It did not give them any interest in the company's immovable property other than through the company. So, if the company were wound up, the shareholders' agreement would not inhibit the ability of the liquidators' to dispose of the property free of encumbrance or (otherwise than in the case of a lessee) afford to the shareholders any rights in the company's property that they could exercise against its successor in title to the property.

[24] The manner in which the first defendant's second ground of exception was framed acknowledges that there is nothing to distinguish the alleged contracts for purposes of the plaintiffs' claims, whether under Claim A or Claim B. The alleged contracts are very recognisably a composite of the two types of agreement referred to in s 16 of the SBC Act (viz. (i) a contract for the acquisition of a share and (ii) a use agreement). It is noteworthy that the legislature, which must be presumed to have been aware of the formalities in respect of the sale of land legislation already in force when the SBC Act was enacted, provided in s 16 that a '*contract for the acquisition of a share and a use agreement ...entered into after the commencement of this Act, shall be reduced to writing ...*'. That seems to imply an understanding by the legislature that prior to the commencement of the SBC Act such agreements were not required to be in writing. Indeed, were the position otherwise, s 16 of the SBC Act would be superfluous. And had the legislature considered that there was any relevant basis for distinguishing the effect of s 1(1) of the General Law Amendment Act and its successor in the Formalities in respect of Contracts of Sale of Land Act 71 of 1969 in this regard, one would have expected it to have addressed any such distinction expressly when framing s 16 of the SBC Act.

[25] Accordingly, the first defendant has failed to persuade me that the alleged agreements in terms of which the Hunter Family Trust acquired and holds the shares were subject to the formalities prescribed in either the General Law Amendment Act or the Alienation of Land Act.

[26] The alleged 1995 transaction, in terms of which 25 shares then held by Mrs Hunter were acquired by the Hunter Family Trust, was, however, not effected in a manner compliant with ss 16 and 17 of the SBC Act. The non-compliance was not a ground of exception by the first defendant, but the applicable provisions were touched on in the course of argument. The plaintiffs' counsel argued correctly in my judgment, that the situation was addressed by s 18(2) of the SBC Act, which provides in material part as follows:

'...., and a contract for the acquisition of a share which does not comply with the provisions of section 16 or 17, whether or not in a substantial respect, shall not be effected by such defect if the purchaser has discharged his obligations in terms of the contract and the seller has transferred the relevant share to the purchaser, and shall in such case be deemed from the conclusion thereof not to be affected by the defect.'

[27] The forementioned provisions of s 18(2) of the SBC Act are, in the respect relevant, equivalent to those in s 28(2) of the Alienation of Land Act, which provides:

'Any alienation which does not comply with the provisions of section 2(1) shall in all respects be valid ab initio if the alienee had performed in full in terms of the deed of alienation or contract and the land in question has been transferred to the alienee.'

Thus, even were the alleged 1995 transaction subject to the Alienation of Land Act, as contended by the first defendant, it would not be bereft of force and effect once the parties to it had fully implemented their contract, as alleged in the amended particulars of claim.

[28] The provisions of s 28 of the Alienation of Land Act and s 18(2) of the SBC Act appear to me to be consistent with the common law. An executory oral agreement in respect of the alienation of land is unenforceable by virtue of its non-compliance with the prescribed formalities, but such an agreement does nonetheless give rise to natural obligations, which, if discharged, give rise to legally cognisable results; cf. *Wilken v Kohler* 1913 AD 135 at 144, *Kriel v Terblanche NO en Andere* 2002 (6) SA 132 (NC) and *Legator Mckenna Inc and Another v Shea and Others* 2010 (1) SA 35 (SCA). The same considerations would apply in respect of the performance of an alienation of land or any right or interest therein that was subject to the General Law Amendment Act.

[29] In the result, the first defendant's exceptions are dismissed with costs, including the fees of two counsel.

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES

First defendant / excipient's counsel:	Alfred Cockrell SC Piet Olivier
First defendant / excipient's attorneys:	Hayes Incorporated Cape Town
Plaintiffs / respondents' counsel:	D. Irish SC G. Quixley
Plaintiffs / respondents' attorneys:	Corporate Law Alliance c/o Freddie Human Attorney Claremont

MacGregor Erasmus Attorneys
Cape Town