Republic of South Africa

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

Case No. 15628/2015

Before: The Hon. Mr Justice Binns-Ward

Date of hearing: 19-21, 25, 28 April 2022
Date of judgment: 3 May 2022

In the matter between:

DAVID JOHN CUDLIPP N.O.	First Plaintiff
HUSSEINALI HIRJI N.O.	Second Plaintiff
SAMIRA NASSER-HIRJI N.O.	Third Plaintiff
ASHRAFALY MOHAMED N.O.	Fourth Plaintiff
SHAHZIA MOHAMED N.O.	Fifth Plaintiff
MILTIADIS KOUMBATIS N.O.	Sixth Plaintiff
LIAQAT PARKER N.O.	Seventh Plaintiff

and

ALLAN OWEN MAITLAND N.O.	First Defendant
OLIVIER JOSEPH AMEDEE MAUJEAN N.O.	Second Defendant
JOSEPH JACQUES MICHEL MAUJEAN N.O.	Third Defendant
LOUIS MARIES JOSEPH ROBERT MAINGARD N.O.	Fourth Defendant
IMRANNE BUX N.O.	Fifth Defendant
AKTHAR HASSEN GOOLAM HOOSEN SHAIK N.O.	Sixth Defendant

JOSEPH JACQUES MICHEL MAUJEAN N.O.	Seventh Defendant
MARK ANDREW McCALL N.O.	Eighth Defendant
CLAIRE ANNE MAUJEAN N.O	Ninth Defendant
OLIVIER JOSEPH AMEDEE MAUJEAN N.O.	Tenth Defendant
OLIVIER JOSEPH AMEDEE MAUJEAN	Eleventh Defendant
LOUIS MARIES JOSEPH ROBERT MAINGARD	Twelfth Defendant
AKTHAR HASSEN GOOLAM HOOSEN	Thirteenth Defendant

JUDGMENT

BINNS-WARD J

[1] The first, second and third plaintiffs are the trustees of the Hirji Trust who have sued in their capacities as such. The fourth, fifth, sixth and seventh plaintiffs are the trustees of the Ashrim Trust in their capacities as such. They sued as cessionaries of the claims asserted by Huesseinali Hirji and Ashrufaly Mohamed against the Robmain Trust, the AHGH Shaik Family Trust and the OJA Maujean Family Trust 'arising from or relating to' an agreement entered into by the cedents on 28 May 2012 for the purchase of all the issued shares in Green Willows Properties 302 (Pty) Ltd ('GWP 302'). The said agreement was referred to in the deed of cession as the 'Original Agreement' and the forementioned Robmain Trust, AHGH Shaik Family Trust and OJA Maujean Family Trust were collectively described therein as 'the Original Sellers'. The subject matter of the cession was described in the deed as the cedents' 'claim/claims against the Original Sellers arising from or relating to the Original Agreement and certain non disclosures (sic) and similar defaults perpetrated by the Original Sellers'.

[2] The first to fourth defendants are the trustees of the Robmain Trust, who have been sued in their capacities as such. The fifth and sixth defendants are the trustees of the AHGH Shaik Family Trust and seventh to tenth defendants those of the OJA Maujean Family Trust. Messrs Olivier Maujean, Robert Maingard and Akhthar Shaik,

who number amongst the forementioned trustees joined as the first to tenth defendants, have also been joined in their personal capacities as the eleventh, twelfth and thirteenth defendants, respectively. The claim against the last-mentioned three defendants was brought by reason of their alleged liability as sureties for the debts of the sellers under the forementioned 'Original Agreement'.

[3] The agreement that Messrs Hirji and Mohamed, qua 'buyers', concluded with the Robmain, AHGH Shaik Family and OJA Majean Family Trusts, qua 'sellers', was for the purchase of all the issued shares in GWP 302' for the grand sum of R200. Analysis of that apparently simple and straightforward transaction reveals, however, that the sale of shares agreement was merely the mechanism whereby the purchasers were to acquire, through GWP 302, two operating shopping centres in Franschhoek for a total consideration of over R59 million. The sale of shares agreement was an integral part of a complex contractual arrangement between the parties, which fell to be understood with reference to what are described in clause 1.4 (m) of the agreement as the 'Linked Transactions'. The sale of shares agreement was signed by the purchasers on 24 May 2012 and on behalf of the sellers on 28 May 2012.

[4] The 'Linked Transactions' were defined in the sale of shares agreement as 'the transactions recorded in paragraphs 9.1, 9.2 and 9.3 below'.

[5] Clause 9 of the sale of shares agreement bore the heading 'Special Terms'. It provided in sub-clauses 9.1 to 9.5 (sub-clauses 9.6 and 9.7 are not relevant for present purposes) as follows:

> '9.1 It is agreed between the parties that the Seller shall cause the Company [ie GWP 302] The to enter into the Sale of Enterprise Agreement annexed hereto as Annexure "B" and to ensure that the parties thereto perform their obligations timeously and fully as therein set out as soon as possible after fulfilment of all suspensive conditions set out in this agreement.
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> 9.2 It is agreed between the parties that the Seller shall cause the Company to enter into the Purchase of Property Agreement annexed hereto as Annexure

"C"[1] and to ensure that the parties thereto perform their obligations timeously and fully as therein set out as soon as possible after fulfilment of all suspensive conditions set out in this agreement.

9.3 It is agreed between the parties that the Seller shall prior to the Effective Date cause the Company to enter into a Sub lease Agreement with GWP241 relating to a portion of the Property commonly known as Lease Area Number 3 for an annual rental inclusive of VAT of R1.00 for the balance of the duration of the period of the Notarial Lease whereby GWP241 shall be liable for all municipal charges relating to the portion, whereby GWP241 shall not be permitted to conduct the business of retail letting on the portion of the Property and otherwise on terms acceptable to the parties.

9.4 It is further agreed between the parties shall, on the Effective Date, advance to the Company a total of R59 000 000.00 plus the costs of transfer, transfer duty and/or VAT which might arise from or be associated with the agreements annexed hereto as Annexures "B" and "C". The Company shall apply these funds to settle the full claim of Investec against the Company and/or GWP241 and for the performance of its financial obligations in terms of the linked transactions. The Purchaser shall be obliged to deliver to the Sellers banker's guarantees reasonably acceptable to the Sellers for such payment within thirty (30) days from fulfilment of all suspensive conditions.

9.5 The Sellers shall prior to the Effective Date deliver to the Purchasers suretyships in format reasonably acceptable to the Purchasers whereby Louis Marie Joseph Robert Maingard, Akthar Hassen Goolam Hoosen Shaik and Oliver Joseph Amedee Maujean bind themselves jointly and severally as surety to the Purchasers for all the obligations of the Sellers arising from or associated with this agreement and to the Company for the obligations of any of the other contracting parties to the Company arising from or associated with the agreements annexed as Annexures "B" and "C" waiving the benefit of division and excussion.

[1] The signed agreement was erroneously referred to in clause 9.2 as 'Annexure "B"', but it was common ground that this was a common mistake amenable to rectification.

The ’Effective Date’ was defined in clause 1 of the sale of shares agreement to mean ‘the date of simultaneous registration in the Deeds Office of all the transactions contemplated in this agreement which require Deeds Office registration’.

[6] The sale of shares agreement was subject to a number of suspensive conditions, including -

1. The confirmation by the buyers within 60 days of the date of signature of the agreement that they were satisfied with the due diligence investigation. The term ‘due diligence investigation’ was defined to mean ‘the due diligence investigation to be undertaken by the Buyers on the affairs of the Company and of the Linked Transactions’.
2. The procurement within 60 days of date of signature of the agreement of a loan ‘on behalf of the Company to enable the Company/the Buyers to honour its obligations in terms of this agreement and the Linked Transactions’.
3. ‘Trade Quick’s (sic) Board of Directors approving in writing the terms of Annexure “C” within a period of ten (10) days from Date of Signature’.

[7] Clause 11 of the sale of shares agreement provided:

‘11.1 In addition to any other warranties given in terms of this agreement, the Sellers give to the Buyers the warranties set out in Annexure “A”. Each of the said warranties constitutes a material representation inducing the buyers to enter into this agreement.

11.2 Save where the context clearly indicates the contrary:

(a) each warranty is given at the Effective Date and at the date of signature of this agreement and is a continuing warranty which will remain in force notwithstanding the fulfilment of any terms and conditions of this agreement;

(b) each warranty is given and shall be enforceable separately.’

[8] Clause 12 of the sale of shares agreement provided:

> 'Indemnity
>
> The Sellers hereby indemnify the Buyers and/or the Company against any loss whatsoever which may arise as a result of a breach or failure of any of the warranties set out in this agreement and in the Schedule of Warranties annexed and against any liability up to the Effective Date. In particular the Sellers indemnify the Buyers against any taxation liability of the Company in respect of its activities up to and including the effective date.'

[9] Item 12 of the schedule of warranties annexed to the sale of shares agreement provided:

> 'To the best of their knowledge and belief the sellers have disclosed to the buyer all facts and circumstances within their knowledge which are reasonably likely to be material to a purchaser of the shares and shareholders loan accounts on the terms and conditions set out in the agreement.'

[10] Annexure B to the sale of shares agreement was a 'Memorandum of Agreement of Sale of Enterprise between Green Willows Properties 241 Proprietary Limited ("the Seller") and Green Willows 302 Proprietary Limited ("the Buyer")'. The document evidenced an agreement concluded between the Green Willows Properties 241 (Pty) Ltd ('GWP 241') and GWP 302 in respect of the sale as a going concern of an operating shopping centre on land leased by GWP 302 from Transnet. It is common ground that the contract annexed as annexure B to the sale of shares agreement was duly implemented and it plays no role in the dispute being litigated in the action.

[11] The matter in contention involves the agreement, a copy of which was attached to the sale of shares agreement as Annexure C. It was the contract referred to in clause 9.2, quoted earlier.[2] That was an agreement concluded between GWP 302 and Tradequick 108 (Pty) Ltd ('Tradequick'). It concerned the sale of another shopping centre, also as a going concern. The *res vendita* was described in the agreement as

[2] In paragraph [5] above.

'the Rental Enterprise as a going concern'. The term 'Rental Enterprise' was defined as 'the rental enterprise carried on by the Seller [ie Tradequick] and includes (1) the Property and improvements and (2) all the Seller's right, title and interest in and to the Leases'. The 'Property' was described as '(1) Erf 714 Huguenot Road Franschhoek (3015 m^2 in extent) with a gross building area of 1469 m^2 held by Deed of Transfer No T 23466/2005' and '(2) Erf 692 La Rochelle Road Franschhoek (535 m^2 in extent) with a gross building area of 260 m^2 held by Deed of Transfer No T 51929/1999'. The purchase price was R29 500 000.

[12] Unbeknown to Messrs Hirji and Mohamed when they concluded the agreement for the purchase of all the shares in GWP 302, Tradequick, represented by Mr Robert Maingard (cited, in his respective personal and representative capacities, as fourth and twelfth defendant in the action), had, on 24 March 2011, entered into a written agreement with Ravenscoe Properties 327 (Pty) Ltd ('Ravenscoe') in terms of which the parties agreed on a reciprocal servitude of right of way approximately five metres wide for the purposes of pedestrian access over Erf 714 Franschhoek and the Remainder of Erf 269 Franschhoek, which at the time the agreement was concluded was about to be transferred into Ravenscoe's name. It was apparent from the deed of that agreement that it was Ravenscoe's intention to develop Erf 269 and the adjoining Erf 268 for mixed commercial and residential uses. A diagram attached to the servitude agreement illustrated the 'proposed buildings' that it was contemplated would straddle Erven 269 and 268 and the 'existing buildings' on Erf 714 which comprised the structure within which Tradequick operated its shopping centre.

[13] The section of the servitutal area that was to traverse Erf 714 ran roughly through the middle of the existing shopping centre, congruently with the position of the arcade in the shopping centre building. The arcade opened off Huguenot Street (Franschhoek's main thoroughfare). It would be necessary, were effect to be given to the right of way granted in terms of the servitude agreement, to break through the wall at the back of the existing arcade in the shopping centre owned by Tradequick to create an opening to the adjoining building that Ravenscoe proposed to erect on the common boundary between

Erven 269 and 268 on the one hand and Erf 714 on the other. The existence of the servitude, if it came into being, would restrict the ability of any owner of Erf 714 to reconfigure the internal space of the existing shopping centre and obviously, would similarly have to be accommodated in any possible future redevelopment of the property.

[14] Messrs Hirji and Mohamed were introduced to the shopping centres ultimately purchased by GWP 302 in the context described above by a Franschhoek estate agent that was marketing them. The two shopping centres were being marketed along with a third centre across the road from the Tradequick centre. Hirji and Mohamed dealt initially with the agent, Mr Dawid Jacobs, and were subsequently invited to negotiate directly with the latter's principal, Mr Robert Maingard.

[15] The three trusts that held the shares in GWP 302 (i.e. the sellers under the sale of shares agreement) had no interest in the Tradequick shopping centre. GWP 302 held the head lease in respect of the Transnet property on which GWP 241 operated the other shopping centre. GWP 302's acquisition of the Tradequick shopping centre was merely for the purpose of satisfying the forementioned structure in terms of which Messrs Hirji and Mohamed determined to acquire both shopping centres in a single corporate entity.

[16] Mr Hirji explained in his evidence, which was uncontested in this regard, that the purchase of the two shopping centres by him and Mr Mohamed was structured in the manner evidenced by the terms of the sale of shares agreement read with the annexed deeds of agreement in respect of the 'linked transactions' in order to avoid the delay and bureaucratic entanglement that the parties feared would be involved in transferring the leases that GWP 302 had with Transnet to a different entity. The funding required to give effect to the linked agreements, including for the payment by GWP 302 of the purchase price to Tradequick for the enterprise conducted on Erven 714 and 692, was provided by Messrs Hirji and Mohamed, who arranged a loan to GWP 302 from a bank

to cover the greater part of the cost and personally advanced the balance on loan to the company.

[17] The right of way servitude contemplated in the abovementioned agreement between Tradequick and Ravenscoe had not been registered because Ravenscoe had still to acquire ownership of Erf 268 in order to be able to proceed with the contemplated development in respect of which the servitude was intended operate. Ravenscoe also still needed to obtain planning permission for their proposed development. Messrs Mohamed and Hirji were not informed of the existence of the servitude agreement, and its existence went undetected in the due diligence investigation provided for in the sale of shares agreement because of the absence of a registered record of it. It is obvious that Mr Robert Maingard knew about the servitude agreement. He was a director of Tradequick and was the signatory to it on Tradequick's behalf. Mr Joseph Maujean, who was his fellow director should also have known about it. But there was nothing in the evidence to indicate that the agreement would have been of any interest to the Robmain Trust, the AHGH Shaik Family Trust or the OJA Maujean Family Trust or that Messrs Maingard or Joseph Maujean had informed their respective fellow trustees about it.

[18] The duty to make disclosure of the servitude in the context of the transactions linked to sale of shares agreement was owed by the directors of Tradequick to the directors of GWP 302. It is not necessary to make determination to that effect, but I think it is also clear, in the context in which the sale of shares agreement was concluded, that there was a duty on Mr Maingard to have informed Messrs Hirji and Mohamed about it because he must have appreciated that their interest was in the acquisition of the shopping centre and that that was the only reason for them entering into the contract to purchase the shares in GWP 302 and arranging the funds with which that company was to buy the shopping centre. He would also have appreciated that they were also the persons who would be incurring the expense of undertaking the due diligence exercise contemplated in the sale of shares agreement.

[19] It was, however, only on 18 April 2013, after the papers had been lodged at the Deeds Office for the conveyance of the Tradequick erven to GWP 302, that Messrs Hirji and Mohamed were told about the servitude by Mr Dawid Jacobs. Mr Jacobs provided Mr Hirji with a copy of the servitutal agreement later that evening.

[20] Messrs Hirji and Mohamed were advised by their attorneys that they were entitled to cancel the contract on account of the non-disclosure, but they elected not to do so. Mr Maingard told them that he had not thought it material to mention the servitude agreement because he considered that the contemplated servitude would be an enhancement to the Tradequick property. I agree with the opinion expressed by Mr Hirji during his testimony that if that were really so one would have expected Mr Maingard to have highlighted the existence of the agreement for the purpose of marketing the sale of the shopping centre. Maingard declined a proposal by Hirji and Mohamed that part of the purchase price payable by GWP 302 for the Tradequick property be withheld in trust pending determination of the effect of the servitude agreement on its value. Maingard gave Hirji and Mohamed to understand that he would probably be able to procure the cancellation of the servitude agreement, failing which any claim by them arising from the existence of the servitude agreement could be referred for arbitration.

[21] The servitude agreement has not been cancelled and Ravenscoe indicated that it intends to hold GWP 302, as Tradequick's successor in title, to it. It would arguably be entitled to do so because Mr Maingard was also a director of GWP 302 when Erf 714 was transferred to the company; cf. *Bowring N.O. v Vrededorp Properties CC* [2007] ZASCA 80 (31 May 2007); 2007 (5) SA 391 (SCA) at para 16-17.

[22] As mentioned, when Messrs Hirji and Mohamed purchased the shopping centre on Erf 714 on the basis described above, the contemplated servitutal area coincided with the arcade that ran through the middle of the building. The arcade was lined with shops on either side, and apart from as an area to provide pedestrian access to the shops it was a space that was not put to any commercial use. The chain store

supermarket that was the anchor tenant in the centre had its shop off the rear end of the arcade thus denying it the advantage of the high street exposure that frontage onto Huguenot Street could give it.

[23] I deduced from the general tenor of their evidence that Messrs Hirji and Mohamed are experienced commercial property investors. They considered that the internal layout of the existing building could be reconfigured to improve the income generating capacity of the shopping centre and also generally enhance its ability to attract to passing trade. The most significant means of achieving the improvements would be by expanding the space used by the anchor tenant into the arcade area which, apart from any other consideration, would give the anchor tenant high street frontage. That would be done, of course, by GWP 302, the company in which they had acquired all the shares, and not by them personally.

[24] Implementing the idea of reconfiguring the layout of the shopping centre was not practicable, however, whilst the prospect of the contemplated servitude remained an unresolved issue. To that end GWP 302 managed to conclude an agreement to purchase Erf 268. The owners of Erf 268 were Dr and Mrs Heywood. Dr Heywood and an associate conducted their medical practice from the dwelling house situate on Erf 268. Ravenscoe had already been engaged in discussions with Dr Heywood to acquire Erf 268 in order to proceed with its plan to consolidate the erf with the adjoining Erf 269 for the purpose of carrying out the development of the consolidated erven on the basis adumbrated in the forementioned servitude agreement. The discussions had reportedly included making provision for Dr Heywood to continue practising from rooms in the development Ravenscoe wanted to proceed with on the consolidated erf.

[25] GWP 302 purchased the Heywood property in 2014 for R4 million, which it is common ground was about R750 000 above its open market value. As part of the transaction, the purchaser was also required to give Dr Heywood the right to rent the property for six years to continue conducting his medical practice there at a fixed rental

of R5000 per month, which was considerably less than a market-related rental would have been.

[26] GWP 302 sold the Erf in 2021 for the sum of R5 million. GWP 302 incurred R250 000 in estate agent's commission in that transaction.

[27] The parties agreed before the commencement of the trial that the plaintiffs would proceed only in respect of Claim A2 in the amended particulars of claim. The claim was set forth in the following manner in paragraphs 33-36 of the pleading:

> '33. The buyers were - by virtue of their acquisition of the shares in GWP 302 - the governing mind of GWP 302 after the said acquisition.
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> 34. The enterprise which GWP 302 conducted after the performance of the obligations under POC 1:
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> 34.1 Comprised the shopping centre enterprise as referred to in paragraph 22.4 above , and the Tradequick Rental Enterprise referred to in paragraph 22.6.3 above;
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> 34.2 Was jeopardised by the servitude referred to in paragraph 25 above;
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> 34.3 Threatened - in the absence of steps in mitigation - to reduce the value of their shareholding in GWP 302 by R3 500 000.00.
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> 35. In mitigation of these contemplated damages:
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> 35.1 The buyers procured that GWP 302 acquired Erf 268 from the owner, Dr Alexander van der Horst Heywood ['Heywood'];
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> 35.2 In doing so:
>
> 35.2.1 They precluded the consolidation of Erf 268 Franschhoek with Erf 269 Franschhoek;
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> 35.2.2 They rendered impossible the consolidation of these two erven at the behest of Ravenscoe
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> 35.2.3 They removed the taint of the servitude over Erf 714;
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> 35.3 In order to persuade Dr and Mrs Heywood to sell Erf 268, the buyers:

35.3.1 caused GWP 302 to pay the sum of R1 million over and above the market value of the property, and – in so doing – reduced the value of their shareholding in GWP 302 by R1 million;

35.3.2 caused GWP 302 to lease a portion of Erf 268 comprising 1160 square metres to Heywood and, in so doing, GWP 302 suffered loss in that:

35.3.2.1 The lease will endure from 1 June 2014 until at least 1 June 2020;

35.3.2.2 The rental payable by Heywood is a fixed amount of R60 000 per annum (computed at R5000.00 per month);

35.3.2.3 The market rental for the leased portion would have been R20 000 per month escalating at 8% per annum.

35.4 GWP 302 accordingly suffered a loss of R1 055 960.55, being the present day value (after applying a discount rate of 8%) of the difference between:

35.4.1.1 The sum of R360 000.00 payable by Heywood over the first six years of the lease; and

35.4.1.2 The sum of R1 760 622.97, which would have been payable over the same six year period had the area being let out at a market related rental of R20 000 per month, escalating annually at 8%.

36. In the circumstances, the buyers:

36.1 Have suffered damages in the sum of R2 055 960,55 (that is R1 m + R1 055 960,55).

36.2 Have, in writing as set forth more fully below in paragraph 38 below (sic), ceded to the Plaintiffs nomine officio as trustees for the Hirji Trust and Ashrim Trust respectively, their rights to claim from Defendants payment for the damages referred to in paragraph 36.1 above. Therefore, Plaintiffs are entitled to sue the Defendants in Plaintiffs' capacity as cessionaries.'

[28] Somewhat to my surprise, the expert opinion evidence led on both sides was to the effect that the servitude agreement did not have any effect on the open market value of the Tradequick shopping centre in the state in which it was when GWP 302 purchased it. In the context of the uncontested evidence that the price paid by GWP 302 for the centre was in line with the estimated market value of the property it necessarily follows that the transaction did not have any adverse effect on the net asset value of the company. It received fair value for the price it paid for the rental enterprise. The existence of the servitude agreement therefore did not negatively affect the value of the shareholding acquired by Messrs Hirji and Mohamed. GWP 302 could have disposed of the shopping centre at the same value as that at which it had acquired it. The proposition pleaded in paragraph 34.3 of the plaintiffs' amended particulars of claim was accordingly not supported by the evidence.

[29] The evidence established that the basis for the claim was the adverse effect the contemplated servitude would have on GWP 302's ability to optimise the lettable area within the centre by reconfiguring it in a manner that would result in the anchor tenant using the arcade space as part of its retail area. It was mentioned in the course of the trial that, after its acquisition of the Heywood property so as to prevent the servitude agreement from becoming capable of implementation, GWP 302 expended approximately R1,5 million to alter the premises to the desired effect. What was formerly dead space in the arcade is now rented and used to good effect by the new anchor tenant as part of its premises. The rental income generating capacity of the centre has been enhanced as a consequence of the alterations. But the cost of achieving that result was obviously increased by the expenses necessarily incurred to neutralise the effect of the servitude agreement.

[30] The plaintiffs' claim was pleaded in contract, alternatively in delict. The claim pleaded in contract was founded in an alleged breach by the defendants of item 12 of the schedule of warranties attached to the sale of shares agreement, which has been

quoted above.[3] The claim pleaded in delict was founded on the allegedly fraudulent, alternatively, negligent non-disclosure of the servitude agreement between Tradequick and Ravenscoe.

[31] Regarding the claim pleaded in contract, Mr *Voormolen* submitted that the plaintiffs' approach ignores the fact that the seller trusts, as holders of the shares in GWP 302, had no interest in the Tradequick enterprise prior to the conclusion of the sale of shares agreement. He contended that the warranty by the trustees of the seller trusts was given in relation to the sale of the shares and loan accounts in GWP 302. He argued that the fact that Mr Maingard, a trustee of one of the trusts, was also a director of Tradequick did not change the character of the warranty from one given by the sellers as sellers of their shares in GWP 302 into some other warranty, such as a warranty by Tradequick as to the absence of any defect in the property it would be selling to GWP 302 in terms of annexure C to the sale of shares agreement. He submitted that there could be no better illustration of the plaintiffs' misdirection in construing the warranty as pertaining to the characteristics of the Tradequick rental enterprise than to consider its effect on the trustees of the AHGH Shaik Family Trust. The Trust held shares in GWP 302, but there was no evidence to indicate that it had any interest in the Tradequick enterprise or that any of its trustees had knowledge of Tradequick's business.

[32] In my judgment, Mr *Voormolen*'s argument is well made. The sale of shares agreement, in respect of which the warranties were provided, is a separate contract from that in terms of which Tradequick sold the rental enterprise to GWP 302. The fact that the implementation of the one agreement was conditional upon the execution of the other and that the two contracts were expressly described as 'linked' does not derogate from their discreteness. The warranty in the sale of shares agreement did not pertain to the agreement of sale between Tradequick and GWP 302.

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[3] In paragraph [9].

[33] Turning to examine the claim pleaded in delict. The evidence did not sustain the allegation of fraudulent non-disclosure. The disclosure to Messrs Hirji and Mohamed of the servitude agreement prior to the transfer of the property from Tradequick to GWP 302 is irreconcilable with an intention to conceal the fact of its existence. As already mentioned, however, I have no doubt, however, that the directors of Tradequick were under a duty to have made the disclosure when the contract was concluded. They had exclusive knowledge of the agreement in the relevant sense, and the right to have it communicated in the circumstances would be mutually recognised by honest men in the circumstances; cf. *Absa Bank Ltd v Fouche* 2003 (1) SA 176 (SCA) at para 4-5 and the authority cited there. Their conduct in failing to make the disclosure was unreasonable.

[34] The duty to disclose the servitude agreement rested on Tradequick as the seller in terms of the agreement it entered into with GWP 302. It was a duty owed to GWP 302, qua purchaser. The contention by the plaintiffs' legal representatives that Mr Maingard had been acting as the seller trusts' agent when he failed to make the disclosure does not bear scrutiny. Maingard's responsibilities and conduct in his capacity as a director of Tradequick were quite discrete from those of the defendant trustees.

[35] It is unnecessary for present purposes to determine whether in the peculiar circumstances, in which Maingard appears to have acted wearing more than one hat in negotiating a composite agreement for the disposal of the two unrelated shopping centres, he had an independent duty in law in his personal capacity to make disclosure of the servitude agreement to Messrs Hirji and Mohamed. Assuming ex hypothesi that he did, would not alter the fact that the claim advanced in para 33-36 of the particulars of claim[4] is predicated on the wrong done to GWP 302 by reason that it, viz. the company, was potentially restricted by the terms of the servitude agreement from being able to optimally use the shopping centre on Erf 714. The claim advanced in the plaintiffs' particulars of claim is predicated on the damages allegedly sustained by GWP 302 as a consequence of the wrong done to it by reason of the non-disclosure. The

[4] Quoted in paragraph [27] above.

company, and not its shareholders, would therefore be the proper party to pursue the claim.

[36] In the circumstances, Mr *Voormolen*'s contention that the plaintiffs' claim, as formulated, was an impermissible claim for reflective loss was well founded. The position in law in this regard was authoritatively stated by Lord Bingham of Cornhill in *Johnson v. Gore Wood & Co.* [2000] UKHL 65 (14 December 2000), [2002] 2 AC 1, [2001] BCC 820, [2001] 1 All ER 481, [2001] PNLR 18, [2001] 1 BCLC 313, [2001] 2 WLR 72 to be encapsulated in the following three principles:

> '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 a 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 make good that loss. So much is clear from *Prudential*,[5] particularly at pages 222-3, *Heron International*,[6] particularly at pages 261-2, *George Fischer*, particularly at pages 266 and 270-271,[7] *Gerber*[8] and *Stein v. Blake*, particularly at pages 726-729.[9]
>
> 2) Where a company suffers loss but has no cause of action to sue to recover that loss, the shareholder in the company may sue in respect of it (if the shareholder has a cause of action to do so), even though the loss is a

[5] *Prudential Assurance Co. Ltd. v. Newman Industries Ltd. and others (No. 2)* [1982] Ch. 204.

[6] *Heron International Ltd. and Others v. Lord Grade, Associated Communications Corp. Plc. and Others* [1983] BCLC 244.

[7] *George Fischer (Great Britain) Ltd. v. Multi Construction Ltd., Dexion Ltd. (third party)* [1995] 1 BCLC 260.

[8] *Gerber Garment Technology Inc. v. Lectra Systems Ltd. and another* [1997] RPC 443.

[9] *Stein v. Blake and Others (No.2)* [1997] EWCA Civ 4002 (13 October 1997); [1998] 1 All ER 724 (CA); [1996] AC 243, [1998] BCC 316, [1998] 1 BCLC 573.

diminution in the value of the shareholding. This is supported by *Lee v. Sheard*, at pages 195-6,[10] *George Fischer and Gerber*.

3) Where a company suffers loss caused by a breach of duty to it, and a shareholder suffers a loss separate and distinct from that suffered by the company caused by breach of a duty independently owed to the shareholder, each may sue to recover the loss caused to it by breach of the duty owed to it but neither may recover loss caused to the other by breach of the duty owed to that other. I take this to be the effect of *Lee v. Sheard*, at pages 195-6, *Heron International*, particularly at page 262, *R. P. Howard*, particularly at page 123,[11] *Gerber* and *Stein v. Blake*, particularly at page 726. I do not think the observations of Leggatt L.J. in *Barings* at p. 435B[12] and of the Court of Appeal of New Zealand in *Christensen v. Scott* at page 280, lines 25-35,[13] can be reconciled with this statement of principle.'

[37] In the same matter, Lord Millett explained the position to the same effect as follows:

'A company is a legal entity separate and distinct from its shareholders. It has its own assets and liabilities and its own creditors. The company's property belongs to the company and not to its shareholders. If the company has a cause of action, this represents a legal chose in action which represents part of its assets. Accordingly, where a company suffers loss as a result of an actionable wrong done to it, the cause of action is vested in the company and the company alone can sue. No action lies at the suit of a shareholder suing as such, though exceptionally he may be permitted to bring a derivative action in right of the company and recover damages on its behalf: see *Prudential Assurance Co. Ltd. v. Newman Industries Ltd. (No. 2)* [1982] Ch. 204 at p. 210. Correspondingly, of course, a company's shares are the property of the

[10] *Lee v. Sheard* [1956] 1 QB 192.

[11] *R. P. Howard Ltd. & Richard Alan Witchell v. Woodman Matthews and Co. (a firm)* [1983] BCLC 117.

[12] *Barings plc. (in administration) and another v. Coopers & Lybrand (a firm) and others* [1997] 1 BCLC 427.

[13] *Christensen v. Scott* [1996] 1 NZLR 273.

shareholder and not of the company, and if he suffers loss as a result of an actionable wrong done to him, then prima facie he alone can sue and the company cannot. On the other hand, although a share is an identifiable piece of property which belongs to the shareholder and has an ascertainable value, it also represents a proportionate part of the company's net assets, and if these are depleted the diminution in its assets will be reflected in the diminution in the value of the shares. The correspondence may not be exact, especially in the case of a company whose shares are publicly traded, since their value depends on market sentiment. But in the case of a small private company like this company, the correspondence is exact.

This causes no difficulty where the company has a cause of action and the shareholder has none; or where the shareholder has a cause of action and the company has none, as in *Lee v. Sheard* [1956] 1 Q.B. 192, *George Fischer (Great Britain) Ltd. v. Multi Construction Ltd.* [1995] 1 B.C.L.C. 260, and *Gerber Garment Technology Inc. v. Lectra Systems Ltd.* [1997] R.P.C. 443. Where the company suffers loss as a result of a wrong to the shareholder but has no cause of action in respect of its loss, the shareholder can sue and recover damages for his own loss, whether of a capital or income nature, measured by the diminution in the value of his shareholding. He must, of course, show that he has an independent cause of action of his own and that he has suffered personal loss caused by the defendant’s actionable wrong. Since the company itself has no cause of action in respect of its loss, its assets are not depleted by the recovery of damages by the shareholder.

The position is, however, different where the company suffers loss caused by the breach of a duty owed both to the company and to the shareholder. In such a case the shareholder’s loss, insofar as this is measured by the diminution in value of his shareholding or the loss of dividends, merely reflects the loss suffered by the company in respect of which the company has its own cause of action. If the shareholder is allowed to recover in respect of such loss, then either there will be double recovery at the expense of the defendant or the shareholder will recover at the expense of the company and its creditors and

other shareholders. Neither course can be permitted. This is a matter of principle; there is no discretion involved. Justice to the defendant requires the exclusion of one claim or the other; protection of the interests of the company's creditors requires that it is the company which is allowed to recover to the exclusion of the shareholder. These principles have been established in a number of cases, though they have not always been faithfully observed.'

[38] Lord Bingham's statement of the law has been endorsed by the South African courts, amongst others, in *Itzikowitz v Absa Bank Ltd* [2016] ZASCA 43 (31 March 2016); 2016 (4) SA 432 (SCA) at para 9- 16,[14] *Gihwala and Others v Grancy Property Ltd and Others* [2016] ZASCA 35 (24 March 2016); [2016] 2 All SA 649 (SCA); 2017 (2) SA 337 (SCA) at para 107-110 and *Hlumisa Investment Holdings RF Ltd and Another v Kirkinis and Others* [2020] ZASCA 83 (3 July 2020); [2020] 3 All SA 650 (SCA); 2020 (5) SA 419 (SCA) at para 24-31.

[39] For these reasons the claim cannot succeed. An order will accordingly issue in the following terms:

1. The action for relief in terms of Claim A2 of the amended particulars of claim is dismissed.
2. The plaintiffs shall be liable jointly and severally for the defendants' costs of suit.

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

APPEARANCES

[14] Disapproving the judgments in *McLelland v Hulett* 1992 (1) SA 456 (D), *Kalinko v Nisbet & others* 2002 (5) SA 766 (W) and *McCrae v Absa Bank Limited* unreported judgment of the South Gauteng High Court in case no. 42229/2008 delivered on 7 April 2009.

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