



REPORTABLE

Case no: SA15/2016

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

KAI-UWE DENKER

APPELLANT

and

AMEIB RHINO SANCTUARY (PTY) LTD

FIRST RESPONDENT

REGISTRAR OF COMPANIES

SECOND RESPONDENT

THE TRUSTEES OF MICHAEL VILJOEN TRUST

THIRD RESPONDENT

MINISTER OF LANDS AND RESETTLEMENT

FOURTH RESPONDENT

MICHAEL HERCULES VILJOEN

FIFTH RESPONDENT

Coram: DAMASEB DCJ, SMUTS JA and HOFF JA

Heard: 2 November 2017

Delivered: 22 November 2017

Summary: The appellant (Denker) brought an application in the High Court seeking an order declaring that the transfer of his 1% share in a Namibian-registered company owning agricultural land to a foreign national (a trust), was unlawful and invalid. Since it was in breach of s 58(1)(a) for the company, in which a Namibian did not hold a controlling interest, to acquire agricultural land, the acquisition by the company was void. Denker requested the court, in addition to declaring the share transfer invalid, to rectify the share register of the company in terms of s 122 of the Companies Act, 2004 (Act no. 28 of 2004) making him 51% shareholder and the foreign national 49% shareholder. The relief was justified on three principal grounds. The first was that the fifth respondent had misrepresented to him that Namibian law permitted him (a foreigner) to own shares in the company (acquiring agricultural land) in equal proportion (50/50) when in truth that was not permitted by law. The second basis was that the documents evidencing the share transfer were not affixed with stamp duty as required by s 23 and s 10(6) of the Stamp Duties Act, 1993 (Act no. 15 of 1993), read with s 140 of the Companies Act -rendering the transaction void and unenforceable. The third ground was that since a trust was not in law capable of holding shares, the transaction was void because it was a foreign trust which, together with Denker, held the shares in the company.

The fifth respondent and the trustees of the third respondent opposed the application and brought a counter application, relying on the illegality of the transaction and asked the court a quo in terms of s 60 of the Agricultural (Commercial) Land Reform Act, 1995 (Act 6 of 1995), to order the Minister of Land, Resettlement and Rehabilitation to direct a forced sale on public auction. Alternatively, the winding up of the company was sought due to its alleged inability to pay its debts as contemplated by s 349 (1)(f) (read with s 350(1)(a) of

the Companies Act, alternatively that it will be just and equitable to do so in terms of s 349(1)(h), read with s 350 (1)(c) of the Companies Act.

The High Court refused the main relief sought in terms of s 122(1) of the Companies Act. On the contrary, the High Court partially allowed the counter application which sought an invalidation of the purchase of the agricultural land by the company and directed the Minister to order a forced sale under s 60 of the Land Reform Act, premised on the common cause illegality of the transaction in so far as it involved a foreign national acquiring a controlling interest in the company.

On appeal, held that defective instruments of transfer did not necessarily result in a nullity and that the legislature did not intend the transaction to be vitiated by a nullity. Further held that both parties were equally culpable in the creation of the defective instruments of transfer and that justice and equity dictates that none of them benefit to the prejudice of the other.

Held further that the allegation that the appellant was induced to act to his prejudice by a misrepresentation of the law was, on the facts of the case, improbable as the appellant could, without any difficulty, have sought independent professional advice to establish it was wrong and to protect his interests.

Held further that the issue of whether a trust can own shares had become moot.

Held further that since the transaction is invalid for being in breach of s 58(1)(a) of the Land Reform Act, the Minister was obliged to invoke s 60. Appeal dismissed, with costs against the appellant.

APPEAL JUDGMENT

DAMASEB DCJ (SMUTS JA and HOFF JA concurring):

Background

[1] The central dispute in this case concerns what should be the shareholding ratio between two shareholders (one Namibian, the other South African) of a private limited liability company registered in Namibia and which owns agricultural land in the country. As owner of agricultural land, the company concerned is caught by s 58(1)(a) of the Agricultural (Commercial) Land Reform Act 6 of 1995 (the Land Reform Act). It states:

‘Notwithstanding anything to the contrary in any other law contained. . . , no foreign national shall . . . , without the prior written consent of the Minister, be competent –
(a) to acquire agricultural land through the registration of transfer of ownership in the deeds registry. . . ’

[2] As regards a company, the Land Reform Act defines a foreign national as: (i) a company incorporated under the laws of any country other than Namibia; or (ii) a company incorporated in Namibia in which the controlling interest is not held by Namibian citizens.

[3] A controlling interest in a company is in turn defined as ‘more than 50 percent of the issued share capital of the company’. It was settled by this court in *Marot and others v Cotterell* 2014 (2) NR 340 (SC) at 350G-H that for purposes of the Land Reform Act, ownership of 50% in a company by a foreign national constitutes a controlling interest.

[4] If it is established that on the date a company acquired the agricultural land, a Namibian did not hold a controlling interest in co-ownership with a foreign-national, that

acquisition would be *void* and therefore trigger s 60 of the Land Reform Act which, in relevant part, states:

‘(1) Where any agricultural land has been acquired-

(a) by a foreign national in contravention of section 58 (1) (a) or

(b) ...

the Minister may issue an order that such agricultural land be sold, unless the Minister decides to acquire such land in accordance with the provisions of Part IV for the purpose of section 14 (1).’

[5] Section 14(1) of the Land Reform Act empowers the Minister, out of moneys appropriated in the Land Acquisition and Development Fund (established by s 13A), to acquire agricultural land, chiefly to resettle previously disadvantaged Namibians in order to address the ravages of inequality brought about by Namibia’s colonial past.¹

[6] The first respondent, Ameib Rhino Sanctuary (Pty) Ltd (the company), is registered in Namibia. It is common ground that on 22 August 2012 (the date of transfer) the company ostensibly acquired agricultural land constituting Portions A and B of the farm Ameib No. 60, Registration Division ‘H’ in the Erongo Region (farm Ameib). It is also common cause that on the date of transfer of farm Ameib, the share register of the company reflected the appellant (Denker), a Namibian, as holding 50% of its issued shares, while a South African Mr. Michael Hercules Viljoen (Viljoen), held the remaining 50% of the issued shares. A resolution was passed on 22 August 2012, although eventually signed by Denker only on 24 October 2012, revoking the 25 January 2012 resolution and which directed that Denker transfer 1% share to the Michael Viljoen Trust and that the Cobbett Trust transfer 49% shares to the Michael Viljoen Trust. The transfer

¹ Compare the dictum by Shivute CJ in *Schweiger v Muller* 2013 (1) NR 87 (SC) at 93E-G.

was done and the register reflects a 50/50 shareholding split between Denker and the Michael Viljoen Trust.

[7] It follows that on the date of the company's acquisition of farm Ameib, a Namibian did not hold a controlling interest in the company. It is for that reason illegal and void *ab initio*² and incapable of producing legal rights and obligations. It remains unenforceable. (*Jajbay v Cassim* 1939 AD 537 at 554-555). The litigation initiated by Denker (as applicant in the High Court), and which is the subject of the present appeal, was intended to avoid that consequence.

[8] As will soon become apparent, Denker endeavored to persuade the High Court that, based on (a) the manner (not complying with legislation³) in which he surrendered a 1% share he owned in the company to a foreign-registered trust (the Michael Viljoen Trust); (b) the fact that it was a trust which co-owned the issued shares in the company (which he maintained was not legally permissible⁴), and (c) a misrepresentation of law as to the effect of s 58(1)(a) by Viljoen for whose benefit he surrendered his 1% share to the Michel Viljoen Trust, the company remained under the control of a Namibian and, therefore, did not fall foul of s 58(1)(a) of the Land Reform Act.

[9] In terms of s 23, read with s 10(6) of the Stamp Duties Act, an instrument of transfer must bear a revenue stamp, be dated with the true dates of the signatures of the transferor and transferee and the revenue stamp must be defaced by an authorised

² *Ibid* at 93I-G and at 95A-B.

³ Section 23 read with s 10(6) of the Stamp duties Act 15 of 1993 and s 140 of the Companies Act 28 of 2004.

⁴ Reliance being placed on s 111 of the Companies Act which states: 'A company is not bound to see to the execution of any trust, whether express, implied or constructive, in respect of any share'. Besides, as is common cause, the company's articles of association do not authorise the issuing of shares to a company.

person recording the true date of the defacement before the company may register the transfer. For its part s 140(2) of the Companies Act states:

‘Notwithstanding anything in the articles of a company, it is not lawful for the company to register a transfer of shares of or interest in the company unless a proper instrument of transfer has been delivered to the company, but nothing in this section prejudices any power of the company to register as a member any person to whom the right to any share of the company has been transmitted by operation of law.’

[10] Section 140(4) states that:

‘(4) The registration of any transfer of shares of or interest in a company is subject to the law relating to stamp duty and estate duty.’

[11] It is not in dispute that the instruments of transfer which gave effect to the transfer of 1% share from Denker to the Michael Viljoen Trust and the 49% shares from the Cobbett Trust to the Michael Viljoen Trust, did not bear revenue stamps; the revenue stamps were not defaced by an authorised person to record the true date of the defacement; and bore a date other than the one on which the actual transactions took place. That was in breach of s 23, read with s 10(6) of the Stamp Duties Act and the instruments of transfer were therefore not valid instruments of transfer for the purposes of s 140 of the Companies Act. The documents in question being: the ‘Transfer of Shares, Stock, Debentures or Options’ dated 25 January 2012 in terms of which Denker transferred the one share for no consideration to Viljoen and the ‘Transfer of Shares, Stock, Debentures or Options’ dated 25 January 2012 in terms of which the Cobbett Trust transferred the 49 shares to Viljoen. It is common cause that the relevant instruments of transfer were backdated to 25 January 2012 while the transaction was completed on 24 October 2012. That was done on the instruction of Viljoen with the full knowledge and participation of Denker. His involvement notwithstanding, Denker contends, that the

company was not competent to register the transfer of his 1 % share and to change its register of members on the strength of those instruments.

[12] It is undisputed that at some point before the change in the share register which reflected Denker and the Michael Viljoen Trust as equal shareholders (as evidenced by the transactions done on 25 January 2012, 22 August 2012, 22 August 2012 and 24 October 2012), by agreement between Denker and Viljoen (concluded on 8 July 2010), Denker held 51% of the issued shares, and a trust known as The Cobbett trust (also foreign-registered) held the remaining 49% of the issued shares representing Viljoen's interest.

[13] There is no dispute between the parties that the 51% / 49% split was done on the advice of a lawyer, Mr Erasmus, who advised both Denker and Viljoenas such so as to bring the company within the four corners of s 58(1)(a) as Denker and Viljoen (a foreigner) formed a common intent to, through a special purpose vehicle, the company, purchase farm Ameib. At that time, the two men were *ad idem*, on the strength of lawyer Erasmus' advice, that since Viljoen was a foreign national they needed to structure the shareholding in the company in the ratio of 51% for Denker and 49% for Viljoen.

[14] After the 51/49 split, but before the transfer date, Viljoen informed Denker in January 2012 that he had sourced legal advice to the effect that s 58(1)(a) of the Land Reform Act would not be violated if he and Denker held the shares in the company in equal proportion. It is that information given by Viljoen to Denker and which resulted in the alteration of the share register to reflect a 50/50 per cent shareholding in the company as at the transfer date, that is at the heart of the litigation now before court. According to

Denker, but for the advice given by Viljoen, he would not have transferred his 1% share to the Michael Viljoen Trust.

The relief sought by Denker

[15] Denker approached the High Court on notice of motion to reverse the equal shareholding distribution in the company as at the transfer date to 51/49. He made clear in his founding affidavit that the reversal was necessary to avoid the acquisition of farm Ameib by the company being void as a result of s 58(1)(a). Denker anchored his relief on s 122 (1) of the Companies Act.

[16] According to s 122(1) and (3) of the Companies Act:

‘(1) If –

(a) the name of any person is, without just cause, entered in or omitted from the register of members of a company; or

(b) default is made or unnecessary delay takes place in entering in the register the fact of any person having ceased to be a member,

the person concerned or the company or any member of the company, may apply to the Court for rectification of the register.

. . .

(3) On any application under the section the Court may decide any question relating to title of any person who is a party to the application to have his or her name entered in or omitted from the register concerned, whether the question arises between the members or alleged members or between members and alleged members on the one hand and the company on the other hand, and generally may decide any question necessary or expedient to be decided for the rectification of the register’. (Emphasis added).

[17] The relevant part of the relief Denker sought reads as follows:

1. An order declaring that the purported registration of transfer of the applicant’s one share to 5th respondent on 25 January 2012 was unlawful and illegal.
2. that the first respondent is directed, pursuant to section 122 of the Companies Act (Act 28 of 2004), to rectify its register of members by deleting the entry indicating a

transfer of one share registered on 25 January 2012 from applicant to the Michael Viljoen Trust.

3. In the alternative to paragraph 2 above –
 - 3.1 To reflect the transfer of one share from applicant to the Michael Viljoen Trust on its true date, namely 24 October 2012;
 - 3.2 to confirm the cancellation of the transfer of the one share from the applicant to the Michael Viljoen Trust; and
 - 3.3 directing the trustees of the Michael Viljoen Trust to execute the necessary instrument of transfer within 14 days and deliver it to first respondent to have the said transfer reversed and the share retransferred to applicant;
- ...'

Counter application

[18] Denker's application (the main application) was opposed by the Michael Viljoen Trust and Viljoen who, together with the trustees of that trust, simultaneously filed a counter application in which they asked for (a) a forced sale of farm Ameib in terms of s 60 of the Land Reform Act based on a breach of s 58(1)(a);(b) provisional winding up of the company on the alternative grounds that (i) because of the illegality the company's substratum had disappeared and the relationship between Viljoen and Denker had irretrievably broken down; and (ii) that the company was unable to pay its debts. In the view I take of the matter on the illegality flowing from a breach of s 58(1)(a), it is unnecessary to dwell on the aspects of the case dealing with winding up. As regards the counter application, I will confine the analysis to s 60 of the Land Reform Act. The latter issue is bound up with the main application and hinges on whether or not Denker made out the case for the relief he seeks.

The evidence

[19] The parties have traversed a great deal of factual material which, I regret to say, is for the most part argumentative and irrelevant. It is necessary that we remind ourselves that motion proceedings are not suited for the resolution of disputed facts.⁵ They are intended for the determination of legal issues based on common cause facts. Unless a respondent's version consists of bald or 'uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable',⁶ the respondent's version must prevail.⁷ (That is the so-called Plascon-Evans test). That is even more apt considering we are here concerned with a s 122(1) of the Companies Act jurisdiction which is supposed to be a robust summary procedure.

Material common cause facts

[20] I will now briefly set out the material common cause facts shorn of the legal spin put on them by the parties. In so far as it is necessary, I will record (and accept) the version of the respondents on the disputed material facts.

[21] Based on discussions they had through email, telephone and face to face contact, Denker and Viljoen came to an understanding sometime in July 2010 to jointly purchase agricultural land in Namibia. Denker identified the land to be bought and shared its attributes with Viljoen who was quite keen to acquire a piece of agricultural land in Namibia. In his founding affidavit, Denker admits that both he and Viljoen knew that there were restrictions on the purchase of agricultural land by non-Namibians. An agreement was however reached that the duo would purchase agricultural land; and would equally

⁵National Director of Public Prosecutions v Zuma 2009 (2) SA 277 at 290 para 26; Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A).

⁶ Ibid.

⁷ Mostert v Minister of Justice 2003 NR 11 (SC) at 21G-H.

contribute to the purchase price and that they would bid for the land up to a maximum amount of N\$ 12 million, with each contributing N\$ 6 million towards the purchase price.

[22] On 8 July 2010, Denker bid at a sale in execution for farm Ameib and his bid was accepted for the amount of N\$10, 3 million. Both he and Viljoen then, in their personal capacities, signed the 'conditions of sale in execution of immovable property' required by the executing deputy sheriff. Those conditions of sale recorded that a nominee would be the eventual acquirer of the land. Viljoen on the same day paid an amount of N\$ 460 000 towards the deputy sheriff's commission and a deposit of N\$ 1 030 000 towards the purchase price. He also transferred N\$ 3 900 000 as security for his share of the joint guarantee and to cover his 50% of the purchase price (N\$ 5 380 000.00). Denker similarly paid 50% of the purchase price of N\$ 5 380 000,00 (N\$ 10 300 000.00 plus N\$ 460 000.00 commission).

[23] On 1 July 2010, Denker and Viljoen purchased a shelf company, then called Bonsai Investment Eighty-Three (Pty) Ltd (Bonsai) and later changed to its present name Ameib Rhino Sanctuary (Pty) Ltd. They had chosen it to be the appropriate 'vehicle' to own farm Ameib.

[24] A resolution was passed on 1 July 2010 appointing Denker and Viljoen as the new directors, and shareholders in the ratio of 51 shares in respect of Denker and 49 shares in the name of the Cobbett Trust nominated by Viljoen. On 26 July 2010, the directors deposed to an affidavit in terms of s 61(1)(a) of the Land Reform Act declaring that the controlling interest in the nominee company is not held by a foreign national and that the land to be transferred is not held by the directors as nominee owner on behalf of or in the interest of any foreign national. The transfer of farm Ameib to the company was only

effected on 22 August 2012 on the strength of that affidavit, two years after the sale in execution.

[25] The affidavit evidence of Viljoen amply demonstrates that the relationship between Denker and himself deteriorated and completely broke down during the year 2013 to the extent that they could not agree on the purpose of acquiring farm Ameib and, importantly, the legal position with regard to the shareholding split. Both parties sought legal advice from their respective legal teams. Towards the end of August 2013, Denker received an opinion from senior counsel that the acquisition of farm Ameib contravened the Land Reform Act. Hence the present litigation.

Main grounds for Denker's application

[26] Denker based his application to invalidate the transfer of his 1% share, firstly, on an alleged misrepresentation by Viljoen as regards the legality of him owning 50% of the shares which induced him to cede his 1% share as described. It was during January 2012 that Viljoen informed Denker that he received advice that he could as a foreign national under the Land Reform Act hold 50% shares in the company. As Denker put it in his affidavit:

‘Although I was reluctant to sign he insisted that the transfer was above board and legal. It was in those circumstances and based on the advice that he said he had received that I signed. If I had known that the advice was wrong and that it in actual fact meant that the company would be acquiring the farm in contravention of the Agricultural Land Reform Act or that we would require the consent of the Minister to have the farm transferred to the company, I would not have agreed to the transfer or signed any documents. . Had I known then what I know now, that Mr Viljoen's assurance was ill-advised and wrong and that as a result payment was made for property that the company would not be in a position to lawfully acquire, I would most definitely not have agreed to transfer one share to Mr Viljoen and nor would I have signed any documentation to this effect.’

[27] Viljoen retorted thus:

'I did not accompany Denker when he signed the documents at van Zyl. I could therefore not insist on anything or have said that anything was above board. I say that Denker knew that our agreement was all along a 50:50 arrangement. He thought that the advice I received was wrong and jumped at the opportunity to become the majority shareholder. When I told him about the advice I received from Steyn, there was no reluctance whatsoever. He may have been, in his own mind, disappointed that I received the correct advice, but there was no reluctance in the manner as explained by him. . . what Denker fails to mention is that I paid 50% of the purchase price. Yet, he wants the transfer of one share without tendering payment thereof. Also, he complains about stamp duties. Yet he would be 50% liable for payment of such stamp duties. I did not mislead Denker. He misled me. Had I known then what I know now, I would never have agreed to acquire 49% of the shares.'

[28] In addition, Denker relied on the common cause fact that invalid instruments of transfer were delivered to the company to cause the transfer of his 1% share.

[29] The last leg of the attack on the share transfer was that it was illegal to transfer shares in the name of a trust (the Michael Viljoen Trust) as it is not a legal *persona* and thus incapable of owning property.

[30] According to Viljoen, although it was the duty of the company secretary to ensure that the documents were duly stamped, non-compliance with the Stamp Duties Act does not affect the transfer of ownership at all and that the share register was already updated by the Registrar of Companies on 31 January 2012.

The ambit of s 122(1) of the Companies Act

[31] Section 122(1) of the Companies Act, both parties accept, is no different to s 155(1) of the now-repealed Companies Act 61 of 1973 and its statutory predecessors. The power

conferred under the section has been described as vesting in the court a 'summary jurisdiction' 'analogous to a spoliation order'.⁸ Under the section the request to rectify the share register is not granted as of right or for the asking⁹; the remedy is rooted in equity as 'the court is bound to go into all the circumstances of the case and to consider what equity' the party seeking it has established for it to be granted.¹⁰ The application will be denied if the applicant does not apply for rectification with promptitude after becoming aware of the relevant facts.¹¹ The rectification remedy is discouraged where the issues to be decided are complex such that they better lend themselves to resolution by way of action as opposed to motion proceedings.¹²

[32] In the light of the above *dicta* and the *Plascon-Evanstest*, the following observations need to be made because of their importance to the outcome of this appeal:

- a) At the time Viljoen informed Denker that a 50/50 split of shareholding in the company was permissible under s58 (1)(a) of the Land Reform Act, Denker and Viljoen had already received legal advice that no less than a 51/49 split (in favour of a Namibian) would bring the intended transaction within the law. Viljoen's version (which we must accept) is that he invited Denker to obtain independent legal advice to satisfy himself about the correctness of the new advice Viljoen received.
- b) Denker and Viljoen had signed an affidavit required under s 61 of the Land Reform Act in which they declared that a foreign national did not hold a controlling interest in the company.

⁸ Verrin Trust & Finance Corporation (Pty) Ltd v Zeeland House (Pty) Ltd 1973 (4) SA 1 (C) at 10B-E.

⁹ *Ibid.*

¹⁰ Bauermeister v CC Bauermeister and Another 1981 (1) SA 274 (W) at 277E-278A.

¹¹ Pretorius v Natal South Sea Investment Trust Ltd 1965 (3) SA 410 (W) at 420-422.

¹² Verrin *supra* at 10H-11A.

- c) On Viljoen's version Denker offered no protest of any kind to Viljoen's claim to an additional 1% share to make his own shareholding in the company equal to Denker's;
- d) All of the instruments of transfer, with their common cause legal defects, were sanctioned by both Denker and Viljoen;
- e) After the company took transfer of farm Ameib, Denker and Viljoen began to beneficiate the farm by running a lodge and a conservancy.
- f) With the full knowledge of Denker and at times on his demand, Viljoen advanced substantial sums of money for the expenses necessary to sustain the business of the company carried on farm Ameib. In fact these are the sums which Viljoen, in his counter application, says the company is unable to repay after due demand was made.

The High Court's approach

[33] A quo, Ueitele J concluded that the demonstrated legal defects in the instruments of transfer did not have the result contended by Denker and that the share register remained valid as at 22 August 2012 when the company took transfer of farm Aimeb contrary to s 58(1)(a) of the Land Reform Act. He concluded that s 58(1)(a) was breached. He rejected the allegation that Denker's transfer of the 1% share to the Michael Viljoen Trust was induced by Viljoen's misrepresentation.

[34] Since he rejected the relief sought by Denker for rectification and the basis therefor, the learned judge *a quo* declined to consider the question whether the Michael Viljoen Trust could in law hold shares. It then became unnecessary to decide the counter winding

up application. On the basis that the Michael Viljoen Trust's 50% shares in the company had the effect that it held a controlling interest in the company in breach of s 58(1)(a), Ueitele J allowed the counter application in so far as it sought an order directing that the Minister must 'deal with farm Ameib as contemplated in s 60' of the Land Reform Act. The appeal lies against all these conclusions and resultant orders.

Analysis

Invalid instruments of transfer

[35] There is common ground that the relevant instruments of transfer were defective in the respects pleaded by Denker. His case *a quo*, persisted with in the appeal, is that those defects render the transfer of his 1% share to the Michael Viljoen Trust void *ab initio* - with the result that the true state of affairs, in law, is that at the time of the acquisition of farm Ameib by the company, he held the controlling interest in the company. The result is that the acquisition did not fall foul of s 58(1)(a) of the Land Reform Act and paves the way for the rectification of the company's share register in his favour in the ratio of 51% /49%. That is the complaint that the High Court was called upon to adjudicate.

[36] The relevant allegations by Denker appear at paragraphs 20 and 21 of his founding affidavit in the following terms:

'20.

Although none of the aforementioned transfer documents were stamped, it would appear from a printout of the members' Register printed on 31 January 2012 (provided to my attorney under cover of a letter dated 31 January 2014 by Mr Erasmus) that the transfers were in fact registered. I am advised that the company was not legally entitled to register these transfers for the following reasons:

20.1 In terms of section 140 of the Companies Act, 28 of 2004 . . . it is not lawful for a company to register a transfer of shares unless a proper instrument of transfer has been delivered to it. A proper instrument of transfer is one that complies with the law on stamp duty.

20.2 in terms of section 23 (read with section 10(6) of the Stamp Duties Act, 15 of 1993 . . .) an instrument of transfer must be dated with the true dates of the signatures of the transferor and transferee and the stamps must be defaced by an authorised person recording the true date of the defacement before the company may register the transfer.

20.3 As the instruments of the transfer did not comply with either of the aforementioned requirements it was not competent for the company to act on the said instruments and change its register of members based on the said instruments.’

21.

On 22 August 2012, the farm was transferred to the company. I am advised and submit that if at that stage 50% of the issued shares were held by Mr Viljoen (a South African citizen) the company was not one in which Namibians held a controlling interest and was a foreign national (as defined in the Land Reform Act) and it acquired the farm contrary to section 58 of the Land Reform Act as the Minister’s consent was not obtained prior to the transfer. I attach a copy of the Deed of Transfer marked “**Q**” and refer the Court thereto. Inasmuch as there had been an agreement on 18 January 2012 between me and Mr Viljoen in terms of which I was liable to cede and transfer to him one of my shares in the company, this was never completed and in any event not in accordance with a proper instrument of transfer. Mr Viljoen, I submit, never became the holder of that share as this would have required his name being entered into the register of members of the company upon delivery to it of an instrument of transfer which complied with the requirements of the Companies Act and Stamp Duties Act. I submit, that on 22 August, Mr Viljoen at best had a right to claim from me or the company, in case of the latter subject to compliance with legal requirements for a proper instrument of transfer, registration as a member of or holder of shares in the company, and that he was therefore not actually the holder of that share.’(My underlining).

[37] Therefore,Denker relied on non-compliance with s 140 of the Companies Act (without specifying the subsection(s)), as read with the following provisions of the Stamp Duties Act:s 10(6) and s 23 (without specifying the subsection(s)).Having identified the sections relied on by Denker, the learned judge a *quo* went on to state at paragraph 37 of the judgment:

‘. . . Mr Frank who appeared for Denker submitted that no one has the right to be on a register of members of a company, as the transferee of shares unless the transferor has delivered a proper share transfer instrument duly stamped in respect of those shares. He further submitted that without compliance with the applicable legislation no one is entitled to be registered in the share register as a member of the company. The question that needs to be answered is . . . whether the failure to stamp the documents renders the transfer of the shares a nullity’.(My underlining)

[38] In the written heads of argument, it is submitted by Mr Töttemeyer for Denker that the instruments of transfer,in so far as they were not stamped, the true date was not inserted and the prescribed stamp duties not paid,did not comply with s 140(2) of the Companies Act.According to counsel, the court a *quo* in addressing this complaint:

‘[F]ailed to consider section 23(5), read with Item11(3) of Schedule 1 of the Stamp Duties Act, to be read with the definition rendered to “marketable security” (section 23), and section 142, contained in the Stamp Duties Act and read together with section 140(4) of the Companies Act. These provisions create a direct statutory prohibition. A proper instrument of transfer means one that complies with the law. An act contrary to a statutory prohibition results in a nullity.’

[39] During oral argument,Mr Töttemeyer stated that the court a *quo* answered the wrong question. According to him, it should rather have considered whether or not it was competent in law for an instrument of transfer executed against the prescripts of the law to be used to pass a valid transfer of his 1% share to the Michael Viljoen Trust. I wish to make a few observations on this. The first is that in the pleadings no reliance was placed

on s 142 ('manner in which securities may be transferred') of the Companies Act. The second is that in respect of s 23 of the Stamp Duties Act, the particular subsections relied on were not specified. Now on appeal it is said the court *a quo* failed to consider subsection (5) which deals with 'marketable securities'. Similarly, s 140(4) of the Companies Act was not specifically relied on in the affidavit.

[40] Although I accept that a party who relies on a statutory provision need not necessarily refer to the statute or section relied on¹³, provided that where it does not, its case must be formulated in clear terms to enable the opponent, and the court, to appreciate just what the pleader's case is with reference to the provision relied upon. As was said by Trollip JA in *Yannakou v Apollo Club* 1974 (1) SA 614 (A) at 632G:

'Hence, if he relies on a particular section of a statute, he must either state the number of the section and the statute he is relying on or formulate his [case] sufficiently clearly so as to indicate that he is relying on it.'¹⁴

[41] Denker in his founding affidavit specified the sections (and in certain respects the subsections) he relied on and in that way directed the court's attention to them. He chose to leave out one subsection and a section (s 140(4) and s 142- Companies Act) he now relies on in the appeal and criticizes the learned judge of having ignored; while on the other hand he criticizes him for not considering a particular subsection (s 23(5) -Stamp Duties Act) which he had not identified in his pleading. For what it is worth, s 23 of the Stamp Duties Act contains 21 subsections.

[42] I do not think that is a fair criticism. Denker cast his complaint in broad terms of invalidity of instruments of transfer arising from non- payment of stamp duty. The court

¹³Fundtrust (Pty) Ltd (in liquidation) v Van Deventer 1997 (1) SA 710. (A) at 725H-I.

¹⁴Followed in Namibia in *Wasmuth v Jacobs* 1987 (3) 629 (SWA) at 634I.

approached the matter in those broad terms by looking at the scheme of the legislation overall and concluding that nullity was not what the legislature intended. The fact that the learned judge did not make specific reference to a particular provision or a subsection which was not specifically referenced is, firstly, not a misdirection and, secondly does not mean that it was not had regard to by the first instance judge. The pleader, Denker, has only himself to blame for not drawing the court's attention directly to those provisions he now says were not considered. It is not an irrelevant consideration that the remedy pursued is of a summary kind, eschewing determination of complex and difficult issues, making it all the more important for an applicant relying on statutory provisions to be as precise as possible to allow a summary disposition.

[43] On behalf of Denker, Mr Töttemeyer, submitted that the language of s 122(1) permits the court to confine itself to the right to be on the share register independent of the right to ownership of the share; alternatively to inquire into the true ownership of the shares. Next, he submitted that the court *a quo* should have confined itself to the first mentioned 'narrow' issue based on the common cause invalid instruments of transfer which disentitled the Michael Viljoen Trust from being on the share register and to leave it to the parties to later resolve that issue either amicably or through litigation. In that respect, counsel suggested that because the instruments of transfer evidencing the transfer of his share to the Michael Viljoen Trust were invalid, no effective transfer of the 1% share took place.

[44] Mr Gauntlett SC for the respondents submitted that in applying s 122(1), the High Court exercised a discretionary power which can only be interfered with on appeal if there is shown to have been a misdirection on material facts or misconception of legal principle – none of which Denker demonstrated in the appeal. He added that in the context of s

122, the raising of 'black-letter' issues as dispositive of the High Court's equitable jurisdiction is not sound. He next submitted that Denker ignores the equitable nature of the discretion. A manifestation of the latter is that a finding against the correctness of the register will not necessarily lead to an alteration of the register.¹⁵

[45] In reference to the non-compliance with the Stamp Duties Act read with the Companies Act, Mr Gauntlett took the view that several factors militated against Denker obtaining the relief under s 122(1). For starters, the company had recognised the transfer of the disputed share and therefore cannot impeach it.¹⁶ Mr. Denker was complicit in the creation of the defective instruments of transfer which he now relies on for the relief he seeks. He twice authorised the transfer of the disputed share and the Michael Viljoen Trust was accepted by the company as a shareholder. Mr Gauntlett relied for this proposition on *Maceys Consolidated v Charterhoun Rhodesia* 1981 (4) SA 453 (ZR) where the transfer of the disputed shares was not duly completed; the requisite resolutions were not passed; fictitious minutes were generated concerning the shares; transfer forms were not duly completed, and a proper register of shares not kept. At first instance, the High Court refused to grant rectification even in the face of the irregularities. This was upheld on appeal.

[46] As concerns the alleged misrepresentation of law by Viljoen, Mr Gauntlett accepted that if established, it could be a material factor for a court rectifying the share register in terms of s 122(1). He maintained however that Denker had failed to establish that his

¹⁵ *Waja v Orr, Orr N.O and Dowjee Co. Ltd* 1929 TPD 865 at 871.

¹⁶ Henochsberg on Companies Act, vol. 1, at p.1008, para 2.

belief in the representation made by Viljoen was reasonable. In any event, he added, applying *Plascon-Evans*, the facts do not support any misrepresentation being made and that the reliance for the first time on appeal on a lack of consensus vitiating the transfer was not pleaded and therefore not available to Denker.

[47] As regards the ground that a Trust is incapable of owing shares, Mr Gauntlett submitted that the High Court, given the equitable jurisdiction, was not bound to pronounce itself on the matter.

Disposal

[48] The High Court's approach as regards the effect of non-compliance with the Stamp Duties Act accords with the modern trend in interpreting a provision which places an obligation on a legal actor to do something.¹⁷ That approach is to consider if the legislative intent was to visit non-compliance with a nullity. The learned judge approached the matter on correct principle. He held:

'I am of the view that the existence of sections 12 and 13 [of the Stamp Duties Act] is an indication that the legislature did not intend that if a document is not stamped such failure would lead to a nullity of the document. I am of the further view that the court when faced with a document which is not stamped may order that the document be stamped in accordance with the Stamp Duty Act, 1993.'

[49] The issue in the form it has been articulated in oral argument does not absolve Denker from addressing the question whether the High Court was wrong in treating it as a matter to be approached on equity. This is what Ueitele J said:

¹⁷DTA of Namibia and Another v Swapo Party of Namibia and Others 2005 NR 1 (HC) at 11C; Torbitt and Others v International University of Management 2017 (2) NR 323 (SC); R v Soneji [2005] UKHL 49 , R v Knights [2005] UKHL 50.

'A further question that I have to answer here is whether fairness and justice favour Denker thus requiring of me to interpose and order a rectification the register. On the face of it, it seems to me that Denker was the architect of the transaction to purchase farm Ameib with Viljoen, he succeeded in that design and is now trying, by relying on a technicality, to take control of the company because of the difficulties which have subsequently arisen between him and his co-director, Viljoen. I am of the view that it is unconscionable and unjust that Denker must take money from somebody and thereafter attempt to wrestle control of the company from that person. In the circumstances I am not persuaded that justice and equity require that an order for rectification of the register should be made in his matter.'

[50] The question is, was he wrong? As was stated by Stratford JA in *Jeffrey v Pollack and Freemantle* 1938 AD 1 at 18, concerning a provision similar to our s 122:

'The importance of a proper appreciation of the terms of the section is two-fold. In the first place, there is no onus on the person previously on the register to prove his ownership and secondly the Court is not necessarily concerned with ownership at all. . . '(my underlining).

[51] And to borrow from the language of Nicholas J in *Bauermeister*, what equity did Denker have to call for the rectification of the share register under s 122(1)? The High Court was satisfied, not least because of the complicity of Denker in the creation of the instruments of transfer contrary to law, that he had not persuaded it of the justice and equity of rectifying the share register. (Compare *Bauermeister* at 278H). It is trite that a finding that the allotment of the share was irregular does not necessarily mean rectification will be ordered.¹⁸ It is important to stress that the *ratio* for the High Court's conclusion is that the matters about which Denker complain are of his own making just as they are of Viljoen and that justice dictates that he not benefit therefrom to the prejudice of Viljoen. We see no reason to fault that conclusion. Therefore, it is without merit to suggest that the

¹⁸ See Waja Supra.

court a *quodid* not deal with the matter appropriately. We are unconvinced that in approaching the matter as he did Ueitele J was wrong.

Facts and circumstances that negative misrepresentation

[52] I must state at the outset that I agree with Viljoen's objection that since it was not raised on the papers, lack of consensus is not available to Denker as a ground vitiating the share transfer (*Nelumbu and Others v Hikumwah and Others* 2017 (2) NR 433 (SC) at 442A-F).

[53] As regards Viljoen's alleged misrepresentation as pleaded, it is common cause that it relates, not to fact, but to law. There is scant Namibian authority to provide guidance if a misrepresentation of the law by one party can be prayed in aid by the other contracting party.¹⁹ Both parties, however, proceed from what appears in my view to be the correct premise that the innocent party's belief must be reasonable. As has famously been put in South Africa, if the party alleging a misrepresentation of the law:

'is so slack that he does not in the courts' view deserve the protection of the law, he should, as a matter of policy, not receive it'.²⁰

[54] On the papers there is no support for the proposition that Denker's misapprehension of the true legal position, based on Viljoen's advice, was reasonable. As found by the High Court, it is amply demonstrated on the papers that it was not the first transaction in which he was involved in the purchase of agricultural land in collaboration with foreign nationals. He was aware that there is a law which circumscribes the ownership of land by foreign

¹⁹ Pre-independence cases suggest the contrary: *Miller v Bellville Municipality* 1973 (1) SA 914 (C) at 919 AC; *Benning v Union Government (Minister of Finance)*, 1914 AD 420, *Heydenrych v Standard Bank of South Africa* 1924 CPD 335, *Sampson v Union and Rhodesia Wholesale Ltd (in liquidation)*, 1929 AD 468 at 481; *Rooth v The State*, 2 S.A.R. 259 at pp. 262 - 5; *Delponte's Estate v Barnes*, 1910 CPD 118 at pp. 126 and 130; *Cranborne Road Council v Derbyshire Estates Ltd*, 1967 (1) SA 8 (R).

²⁰ *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* 1992 (4) SA 201 (A) at 224E-F.

nationals. That, by itself, must have placed him on guard to seek independent legal advice which, according to him, he did not do. There is no explanation why not, especially if one considers that Viljoen was pursuing a personal interest which Denker should have guarded against. Denker was aware that he had deposed to an affidavit in terms of s 61(1) of the Land Reform Act which similarly should have rung alarm bells and made him more cautious and, crucially, he had the benefit of previous advice that only a 51/ 49 split would do. One would have expected him in those circumstances to seek independent legal advice concerning a transaction in which he was committing himself to investing in excess of N\$6 million. More so when, on his own admission, at the time Viljoen conveyed the new advice, Denker had the benefit of contrary advice that for such a transaction to be valid he, as a Namibian, must have the controlling interest.

[55] What is apparent from the pleadings, based on the common cause facts and the version of Viljoen, is that the dominant motive on the part of both Denker and Viljoen was to find a way around the strictures of the Land Reform Act. Nowhere in the papers is any suggestion made that the unequal 51/49 shareholding split was for a reason other than to bring the commercial transaction between the two men within the ambit of s 58(1)(a). In other words it was, at its core, an artificial arrangement unrelated to the actual (equal) contributions made by them for the purchase of farm Ameib.

[56] It becomes obvious therefore that had it not been for the limitation imposed by s 58(1)(a) on Viljoen, a 50/50 split is what the parties intended. The High Court came to that conclusion, and on the evidential material available to it, it is a conclusion which is not perverse. The High Court correctly concluded on *Plascon-Evans* that it was their intention from the start that they would jointly and in equal shares acquire farm Ameib through a nominee. The eventual re-ordering of the ratio of shareholding from 49/51 to 50/50 must

be viewed in that light. Having thus found, the High Court went on to say that the justice of the case did not justify it coming to Denker's assistance under s 122(1) of the Companies Act.

[57] It is apparent from the papers that if, from the start, the law permitted a 50/50 split, Denker would quite happily have gone along with such a shareholding ratio. In other words, he does not lay claim to the 1% share surrendered to Viljoen on the strength of his own contribution value being higher than that contributed by Viljoen for the acquisition by the company of farm Ameib. What is even more telling, and supports Viljoen's version, is the undisputed fact that the two men accepted (and contributed) equally for the purchase price of farm Ameib. The High Court therefore did not misdirect itself in concluding that Denker failed to establish misrepresentation.

[58] It was suggested in oral argument on behalf of Denker that instead of dealing with the misrepresentation which induced the transfer of Denker's 1% share, the court below concerned itself with the original agreement in terms whereof the parties had agreed to a 50/50 split. The distinction is artificial and does not produce a different legal outcome. As I understand the position, the court declined to upset the agreement to transfer the 1% from Denker to Viljoen because it accorded with what was the original intent of the parties which was altered to fall within s 58(1)(a) of the Land Reform Act.

[59] What makes the allegation of misrepresentation inducing prejudicial action on Denker's part so improbable is the ease with which it could have been exposed as wrong by Denker who labored under no apparent or demonstrable handicap to source professional advice to protect his interests. The advice purportedly relied on by Denker was not colorless disinterested advice on Viljoen's part. It was intended to serve a selfish

commercial interest. This consideration should have made Denker approach it with circumspection. The suggestion that Denker simply accepted Viljoen's advice without more is a proposition which, if accepted by the courts, is potentially a ready-made toolkit for every person who wishes to extricate themselves from inconvenient contracts. Therefore, for reasons of legal policy too, his reliance on misrepresentation of law must fail.

May a Trust own shares?

[60] Having found that (a) Denker failed to establish a misrepresentation, (b) that the invalid instruments of transfer did not render the share transfer a nullity, and that (c) in any event, Denker's complicity in the share transfer made it inequitable for the granting of the relief in terms of s 122, Uietele J took the view that it was unnecessary to decide if a trust could be the holder of shares in a company.

[61] Denker relies on s 111 of the Companies Act and the silence of the company's articles of association on the ownership of shares by a trust, for the proposition that the Michael Viljoen Trust cannot in law hold shares in the company. I will assume for the purposes of the appeal (without deciding) that a trust is incapable of holding shares, even as nominee, in a company. That said, as a court of appeal we are bereft of the views of the High Court which, in the exercise of its discretion, chose not to deal with the matter.

[62] As correctly pointed out by Mr Gauntlett, there is no suggestion by Denker that the discretion was improperly exercised – a consideration which makes it intolerable for us on appeal to guess on what basis the judge's approach stands to be impugned. The reality remains that even if the share register were to be excised of the Michael Viljoen Trust as a registered shareholder, it does not follow that Denker is, by that fact, entitled to be

reflected – which is the order he seeks - as the holder of the shares being removed from the Michael Viljoen Trust. As already demonstrated, the version of Viljoen is the one that must prevail on what share Denker became entitled to when the parties agreed to the purchase of farm Ameib. That version does not support the claim that he was entitled to 51% of the shares in the company. Therefore, even on the scenario that the trust is no longer reflected as a shareholder in the company's share register, Denker would still not be the holder of 51% of the issued shares in the company.

[63] The result is that, just as the High Court did, we find it unnecessary to decide whether or not the Michael Viljoen Trust, *qua* trust was properly registered as the holder of shares in the company - including the 1% share surrendered to it by Denker. Against that backdrop, the question as to who should be the holders of the shares otherwise held by the trust is one so fraught with difficulty which the parties will more appropriately have to ventilate by way of action. That is a prospect foreshadowed by Mr Töttemeyer when he suggested in argument that the court had a discretion not to determine the ownership of the shares and rather leave it to the parties to fight the issue out at a later stage.

Section 60 of the Land Reform Act

[64] Mr Töttemeyer submitted that in the event that the appeal fails, this court should nevertheless allow the appeal in respect of the High Court's order directing the Minister to proceed under s 60 of the Land Reform Act. Counsel argued that a finding that s 58(1)(a) had been breached does not necessarily mean that the Minister must exercise the power given by s 60. According to counsel, the Minister has a discretion whether or not to invoke the section and, at all events, after complying with Art. 18 of the Constitution by affording

an affected party *audi*. As I will demonstrate, Mr Töttemeyer seeks to read into s 60 rights of *audidehors* those contained in that section.

[65] Mr Gauntlett took the contrary view, maintaining that once s 58(1)(a) has been breached, the Minister is obligated to apply s 60 and has a discretion only in so far as he may choose to expropriate the land or order a forced sale.

[66] Section 60 contains elaborate provisions as regards the process to be followed when the Minister, instead of expropriating the land, chooses to order a forced sale.²¹ In the first place, it requires of the Minister to, in his notice, afford the foreign national the opportunity to provide within 90 days of the notice ‘an agreement of sale or disposal otherwise of the land concerned to a person who is not by law disqualified from acquiring it.’ Only if that fails is the Minister empowered to order the sale of the land. Mortgage-holders and others with encumbrances and other real rights over the land must all be given notice of the Minister’s notice.²² Due process has therefore been weaved into the procedure to be followed for a forced sale.

[67] On the contrary, where expropriation is the alternative chosen by the Minister, Part IV of the Land Reform Act applies which, similarly but for different outcomes, contains detailed provisions, including the rights of the affected persons and third parties with interests in the land.

[68] In interpreting s 60, one has to have regard to the safeguards punctiliously weaved into s 60 and to the effect produced by s 58(1)(a). Section 58(1)(a) makes clear that it is ‘not competent’ for a company in which a foreign national holds a controlling interest to

²¹ Section 60 (2) and (3).

²² Section 60 (4).

acquire agricultural land in Namibia. In other words, if such a transaction passes through the Deeds Registry, it is *pro-non-scripto*. It is not capable of conferring rights and obligations as the law presumes it not to have occurred. What the purpose will be of an Art. 18 representation to the Minister as contended by Mr Töttemeyer is therefore not clear to me; and in any event, is not supported by the scheme of s 60 which has its own in-built *audi* provisions, depending on what route the Minister chooses to follow. If the suggestion is that s 60 affords the Minister a choice to validate an illegal transaction (in other words to make it lawful) otherwise than as contemplated in s 60 (2), I cannot agree. That the Minister has no alternative other than to either expropriate the land or to order a forced sale is, under the scheme of s 60, an ineluctable legal consequence.

[69] The legislature clearly appreciated the consequences of non-adherence with s 58(1)(a): If the transaction is deemed not to have occurred, the land in question remains in legal limbo. It cannot revert to the previous owner because he or she was duly paid and has no claim in law to the land. Since the State under the Land Reform Act has the right of first refusal²³, it is given the option to buy the land. If it chooses to, it must comply with the provisions of Part IV of the Land Reform Act. The scheme of s 60 recognises though that the State may either not be interested in buying the land concerned, or it may not have the resources to buy the land. In the latter event, and to meet the interests of those who put up the funds to purchase the land- a forced sale is contemplated.

[70] Denker had not made out the case that Art. 18 overrides the *audi* provisions which the legislature had deliberately built into s 60 to meet the peculiar circumstances of illegality arising from non-compliance with s 58(1)(a).

²³Section 17 of the Land Reform Act.

[71] I conclude, therefore, that the court *a quo* did not err in making the order it did (which we hereby confirm) – directing that the Minister proceed in terms of s 60 of the Land Reform Act.

Costs

[72] Costs must follow the result as between the respondents and the appellant. As for the Minister (fourth respondent), it has not been demonstrated that he acted unreasonably in taking the attitude that it was premature to proceed under s 60 and that he would rather await the outcome of the court process. No costs will therefore be ordered against the Minister.

The order

[73] In the result:

1. The appeal is dismissed with costs against the appellant, to include costs consequent upon the employment of one instructing and two instructed counsel.
2. There shall be no costs against the fourth respondent.

SMUTS JA

HOFF JA

APPEARANCES:

APPELLANT:

R Töttemeyer (with him D Obbes)

Instructed by ENS Africa Namibia, Windhoek

THIRD & FIFTH:

RESPONDENTS

JJ Gauntlett SC QC (with him J Schickerling)

Instructed by Francois Erasmus & Partners, Windhoek