

FORM A
FILING SHEET FOR SOUTH EASTERN CAPE LOCAL DIVISION
JUDGMENT

PARTIES:

2. Case Number: **849/2009**
3. High Court: **Port Elizabeth**
4. DATE HEARD: **30 April 2009**

DATE DELIVERED: **26 May 2009**

JUDGE(S): **D. Chetty**

LEGAL REPRESENTATIVES –

Appearances:

1. for the Applicant(s): **Adv Eksteen/Adv Dyke**
2. for the Respondent(s): **Adv Buchanan / Adv P Scott**

Instructing attorneys:

1. Applicant(s): **Mr G Parker**
(Greyvensteins)
1. Respondent(s): **Mr Spilkin (Spilkins Inc)**

CASE INFORMATION -

1. *Nature of proceedings:* **Urgent Application**
2. **Topic:**

Key Words:

*Contract – Formation of – Dispute of fact –
Whether such real or genuine – All
evidence establishing conclusion of binding
contract – Whether such contract one for
sale of land in terms of Alienation of Land
Act or joint venture agreement – Power of
authority member of close corporation –
Court ordering majority member and
trustees to sign resolution to enable
registration of transfer*

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE – PORT ELIZABETH)

Case No: 849/2009

In the matter between:

MILKWOOD CONSTUCTION (PTY) LTD	First Applicant
MILKWOOD BUSINESS PROJECTS (PTY) LTD	Second Applicant
and	
ERF 1109 MARINA MARTINIQUE CC	First Respondent
CHRISTO ALBERT SWART	Second Respondent
JOHAN BAREND LOTTERING	Third Respondent
SUSANA PETRONELLA LOTTERING	Fourth Respondent
DAPHNE BOTHA	Fifth Respondent

Coram: **Chetty, J**

Date Heard: **30 April 2009**

Date Delivered: **26 May 2009**

Summary: *Contract – Formation of – Dispute of fact – Whether such real or genuine – All evidence establishing conclusion of binding contract – Whether such contract one for sale of land in terms of Alienation of Land Act or joint venture agreement – Power of authority member of close corporation – Court ordering majority member and trustees to sign resolution to enable registration of transfer*

JUDGMENT

CHETTY, J

[1] Erf 1109, Island Palm Drive, Marina Martinique, boasts a luxurious thirty two (32) unit condominium of which thirty (30) have been sold, the purchase price for each varying between R1.7 to R4.1 million rand. It constituted the first phase of a development, styled Milkwood. During February 2009, attorneys Smith Tabata Buchanan Boyes (STBB) addressed a letter to the third respondent informing the latter that they were attending to the registration of transfer of the sold units to the purchasers thereof. Annexed thereto was a draft resolution for signature by the second and third respondents in their capacity as members of a close corporation, Erf 1109 Marina Martinique CC (the CC) which owned erf 1109. The draft resolution, envisaged to be passed at a meeting of the members of the CC viz. the second and third respondents, recorded that: -

“RESOLVED

1. *THAT ERF 1109 MARINA MARTINIQUE CC, apply for the approval of the Sectional Title Plan relating to Milkwood situated on ERF 1109 ASTON BAY.*
2. *THAT CHRISTO ALBERT SWART is hereby authorised to sign:-*

- 2.1 *all the documentation required for registration purposes at the Deeds Office with regard to the Sectional Title Scheme to be registered as*

MILKWOOD which is situated on ERF 1109 ASTON BAY.

2.2 *all Deeds of Sale and related documents for the transfer of the units in the Sectional Title Scheme.”*

- [2] The penultimate paragraph of the letter referred to a development agreement, referred to later in this judgment as “J2”, which formed part of the Milkwood Prospectus in terms of which STBB were obliged to pay the CC R250 000, 00 in respect of each of the thirty (30) units sold. The letter furthermore requested the third respondent to furnish them with his banking details in order that 70% of the money received (R250 000, 00 x 30) be deposited therein. The letter elicited no response. On 9 March 2009 STBB addressed a further letter to the third respondent bemoaning the delay in the passing of the proposed resolution and implored the latter to attend thereto expeditiously. The letter concluded by retracting the earlier offer and advised the third respondent that –

“Ten slotte geliewe kennis te neem dat ons onderneming vir betaling van 70% aan jou soos uiteengesit in ons skrywe van 19 Februarie word hiermee herroep. Die ontwikkelaars se instruksies is dat die volle bedrag aan die Beslote Korporasie betaal sal word soos per die bestaande ooreenkoms. Enige dividende sal deur die lede intern hanteer word.”

- [3] Spilkins attorneys, ostensibly acting on behalf of the CC and the third respondent, responded to STBB's letter in the following terms –

“We act in this matter on behalf of Erf 1109 Martinique CC and Mr J B Lottering.

Our client has referred to us your letter dated 9 March 2009 addressed to our client but sent by email to Mr Johan Muller.

Both the Close Corporation and our client have been in dispute with Milkwood Construction (Pty) Ltd for a considerable period of time relating to the development by Milkwood Construction (Pty) Ltd on land owned by the Close Corporation.

Despite numerous requests, Milkwood Construction (Pty) Ltd have refused or neglected to address our client's concerns and demands.

Under the circumstances and until all our client's concerns and demands are adequately addressed we are instructed to point out that our client:

- 1. Will not sign the resolution apparently sought by Milkwood Construction (Pty) Ltd.*
- 5. Will not sign the financial statements of the Close Corporation, more particularly inasmuch as there are outstanding issues relating to such financial statements.*

To the extent that it is contended on behalf of Milkwood Construction (Pty) Ltd that a final and binding agreement has been concluded with the Close Corporation we are instructed to point out that this is incorrect.

Kindly note accordingly. We would also request that any further correspondence or communications to the Close Corporation or our client be addressed to these offices.”

- [4] It will be gleaned from the foregoing that the anticipated cooperation foreshadowed in STBB’s letter would not be forthcoming. Consequently, by notice of motion filed on 30 March 2009 the applicants sought relief, on an urgent basis, framed as follows (only relevant portions have been reproduced)–

“2. *Directing the Second and Third Respondents to sign all documentation and to do all things necessary to give effect to the agreement concluded between the Applicants and the First, Second and Third Respondents at the Supertubes Guest House, Jeffrey’s Bay, on 1 October 2004 which is referred to in paragraphs 34 to 37 of the Founding Affidavit of Harold Henry Larsen and, more particularly, to sign the draft Resolution for First Respondent to apply for the approval of the Sectional Title Plan relating to “Milkwood” situated on Erf 1109 Aston Bay, which is annexed to annexure “U1” to the Founding Affidavit.*

3. *Directing the Third, Fourth and Fifth Respondents to sign all documents and to do all things necessary to give effect to the agreement concluded between the Applicants and the First, Second and Third Respondents at the Supertubes Guest House, Jeffrey’s Bay, on 1 October 2004 which is*

referred to in paragraphs 34 to 37 of the Founding Affidavit of Harold Henry Larsen, and more particularly, to sign the draft Resolution of the Johan Barend Lottering Trust authorising the First Respondent to apply for the Approval of the Sectional Title Plan relating to “Milkwood” situated on Erf 1109 Aston Bay, which is annexed to annexure “U1” to the Founding Affidavit.

4. *Directing that the Sheriff for the District of Humansdorp is authorised to sign the Resolutions referred to in paragraphs 2 and 3 above on behalf of the Third, Fourth and Fifth Respondents in the event of the Third, Fourth and Fifth Respondents failing to sign such documentation within 10 days of the date of this order.*
5. *Directing the Third Respondent, alternatively, the Third Respondent jointly and severally with such other Respondents who may elect to oppose this application to pay the costs of the application, including the costs of two counsel.”*

[5] The application is opposed by the third to the fifth respondents and purportedly also by the first respondent, the CC. For the sake of clarity, it is to be observed that the fourth respondent is the wife of the third respondent whilst the fifth respondent, the second respondent's accountant. The third to fifth respondents are moreover trustees of the

JBL Lottering Trust (the Trust), the Trust having acquired the third respondent's interest in the CC during 2005.

- [6] It is apparent from the foregoing notice of motion that in essence the applicants seek specific performance of a contract which they contend was concluded during October 2004 between them and the first respondent. The respondents, save for the second respondent, on the other hand, strenuously resist the relief sought averring that no agreement, as contended for by the applicants, was concluded between the parties. Whilst acknowledging that there were various meetings held they maintain that the preliminary discussions yielded no binding agreement and that in any event the agreement purportedly concluded in 2004 is fundamentally different to the agreement which the applicants now seeks to enforce. The respondents thus resist the relief sought on four broad bases viz. (i) the lack of urgency; (ii) the inappropriateness of the applicants proceeding by way of motion where they were aware of a genuine dispute of fact between the parties; (iii) the second respondent's lack of authority to bind the CC and (iv) they contend that the agreement in any event does not comply with the provisions of s 2 (1) of the **Alienation of Land Act** ¹.

Urgency

- [7] It is not in issue that thirty (30) of the thirty two (32) units have been sold and await transfer into the names of the purchasers; that

¹ Act 68 of 1981

guarantees put up will not remain indefinitely; the very real possibility exists that the purchasers may resile from the agreements and that the financial prejudice to the applicants in the case of such eventuality would be considerable. The respondents contend however that whatever urgency there may be, was self created in as much as the applicants have for the preceding two (2) years been aware of the dispute between the parties and cannot now approach the court for relief as a matter of urgency.

- [8] The correct approach to a matter as in *casu* is authoritatively set out in **20th Century Fox Film Corporation v Black Films**² and **Bandle Investments (Pty) Ltd v Registrar of Deeds and Others**³ where it was held that in deciding whether a matter be heard as one of urgency, a court must assume that the applicants' case is a good one and that it is entitled to the relief sought. In my view the matter was inherently sufficiently urgent to warrant a departure from the established rules. In any event, the respondents were afforded more than sufficient time, the issues have been fully canvassed and to dismiss the application on the basis of lack of urgency would be wholly inappropriate.

Real of Genuine Dispute of Fact

- [9] The principle, developed over many decades, is that a court will be loathe to entertain proceedings brought by way of motion when there is

² 1982 (3) SA 582 (W) at 586G

³ 2001 (2) SAV 203 (SECLD) at 213E-F

a genuine, real or *bona fide* dispute of fact. The applicants contend there is none, motion proceedings being the appropriate machinery for the relief they seek. Counsel for the respondents however, took a different view. Mr *Buchanan*, who, together with Mr *Scott* appeared for the respondents, submitted that by electing to proceed by way of motion, the applicants did so at their peril and in the process attempted to conceal the real dispute by the deliberate omission to disclose material information which they have had in their possession for approximately two (2) years. In the course of counsel's address I was referred to a plethora of documentation and information appearing in correspondence emanating from the respondents' attorneys from which, counsel contended, the factual dispute was readily apparent.

- [10] Included amongst the annexures to the opposing papers are a number of letters between attorneys *Muller* and *Spilkins*, an agreement of sale of land, erf 1109 Marina Martinique, by the first respondent (represented by the second and third respondent) to the first and second applicants, an agreement titled "*Erf 1109 Marina Martinique CC, sale of members interest; loan account and shares*" between the first and second applicants relating to the purchase of the third respondent's interest in the first respondent; a memorandum of agreement between the JBL Trust and the second respondent on the one hand and the applicants on the other for the purchase by the latter of the Trust's interest in the first respondent; financial statements of the first applicant; notices of meetings of first respondent scheduled for 6

March 2008 and 18 March 2008; and minutes of the meeting of 18 March 2008 attended by the sole attendant, the third respondent. The aforesaid documents and the flurry of correspondence all relate to the affairs of the respondents *inter se*, all of which, in my view, have nothing to do with the real issue in this matter, viz. the enforceability of an agreement concluded between the applicants and the first respondent. These documents attest to a dispute between the respondents and the first applicant but that dispute has no bearing whatsoever on the real issue in this matter.

[11] The applicants' case is a fairly simple one – viz. the existence of a valid and binding contract concluded between themselves as the one contracting party and the CC as the other. That contract, the applicants say is embodied in annexures “J1”, “J2” and “J3” to the founding papers. The aforesaid annexures, signed by the second respondent, are extracts from a prospectus numbering fifty seven (57) pages (annexure “G” to the founding affidavit), the preface of which, proclaims that *“The purpose of this Prospectus (referred to as the Investment Memorandum) is to provide the prospective shareholders information regarding the two (2) part share issue pertaining to Milkwood Construction (Pty) Ltd and Milkwood Sales and Promotion (Pty) Ltd”*.

[12] In order to place this prospectus in proper perspective it is apposite to commence at the very beginning with reference to the factual averments. The traditional, widely accepted approach is that where a

dispute of fact does exist, a final interdict should only be granted in motion proceedings if the facts stated by the respondent together with the admitted facts in the applicant's affidavit justify such an order. Where however, it is clear that facts, though not formally admitted, could not be denied, they would be regarded as admitted (**Stellenbosch Farmers Winery Limited v Stellenvale Winery (Pty) Ltd**⁴). In **Plascon Evans Paints v Van Riebeeck's Paints**⁵ Corbett JA modified the rule somewhat. At p 634G-635C, the learned judge of appeal stated as follows:-

"It seems to me, however, that this formulation of the general rule, and particularly the second sentence thereof, requires some clarification and, perhaps, qualification. It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact (see in this regard *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* [1949 \(3\) SA 1155 \(T\)](#) at 1163 - 5; *Da Mata v Otto* NO 1972 (3) SA 858

(A) at 882D - H). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6 (5) (g) of the Uniform Rules of Court (*cf* *Petersen v Cuthbert & Co Ltd* 1945 AD 420 at 428; *Room Hire* case *supra* at 1164) and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg *Rikhotso v East Rand Administration Board and Another* [1983 \(4\) SA 278 \(W\)](#) at 283E - H). Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers (see the remarks of BOTHA AJA in the *Associated South African Bakeries* case, *supra* at 924A)."

⁴ 1957 (4) SA 234 (C) at 235E-G

⁵ 1984 (3) SA 623 (AD)

[13] There is in my view no real or genuine dispute of fact concerning the crucial issue which requires adjudication, viz., the conclusion of the contract referred to in paragraph [11] hereinbefore. Prior to annexures “J1”, “J2” and “J3”, relied upon by the applicants as constituting the agreement concluded between themselves and the first respondent being signed by the second respondent, various exploratory meetings were held between the deponent to the founding affidavit, Harold Henry Larsen (Larsen) and the second and third respondents. The applicants contend that not only the content but the import of various documents generated thereafter attest to the conclusion of a binding agreement between themselves and the first respondent. I propose to consider them chronologically, viz. annexures “E” to “O3” to the founding affidavit.

[14] It is apparent from annexure “E” titled “**agreement**” and signed by Larsen and the second and third respondents that the signatories thereto agreed upon a joint venture to develop a one hundred and twenty (120) unit condominium complex on erf 1109. It envisaged the formation of a development company and stipulated that the agreement would only be binding upon the project materialising.

[15] On 25 July the aforementioned persons met once more, the envisaged project, now named the *Milkwood Development Project*. It explicitly identified the owners of erf 1109 as being the CC represented by the

second and third respondents and envisaged the formation of a company to develop the project. The minutes of the meeting reflect that the signatories thereto approved the following resolutions –

- “1. *Harald Henry Larsen is, to approved terms, hired to work out a plan and be in charge of the Project on Erf 1109.*
2. *The lawyers involved shall be Hennie Mouton and Johann Muller.*
3. *The Erf is today owned by a closed corporation of Johann Lottering and Christo Swart.*
4. *The landowners are willing to, to defined terms, to allow the banks and other lending institutions to use the Erf as security.*
5. *The project shall be organized in the most efficient way, both financially and legal. If companies are needed these shall be bought as shelf companies.*
6. *Board of Directors shall consist of the landowners and key supportive people.*
7. *Time schedule says to have the Investment Memorandum ready for distribution in beginning of September.*
8. *The landowners shall be paid R30,-mill for the Erf 1109, when the project is fulfilled.*
9. *The landowners admit a sellers credit of land, due payable on pro rata part when each flat is sold.*
10. *The landowners shall as a term gain 50% of the net profit of the project.*
11. *It is intended to raise equity by selling 14 shares for R500 000,- in Milkwood Construction Pty and another 70 shares in Milkwood Sales and Promotions Pty Ltd. It is further resolved to try to borrow another R7,-mill to finance Phase 1.*
12. *Harald Henry Larsen presented preliminary figures for the project.”*

It will be gleaned from the foregoing resolutions that all signatories thereto viz. the second and third respondents and Larsen agreed that erf 1109 would serve as security for loans sought and that the development would be driven by two companies.

[16] Pursuant to the agreement two shelf companies, Quickleap Investments 235 (Pty) Ltd, and Sunset Bay Trading 170 (Pty) Ltd, were acquired, a change of name of the aforementioned companies duly being effected, the former to the first applicant and the latter to Milkwood Sales and Promotion (Pty) Ltd. It is not in issue that the registrar of companies declined to approve the name change of the latter shelf company, hence its current appellation, Milkwood Business Projects (Pty) Ltd. Any reference to Milkwood Sales and Promotion (Pty) Ltd in the documentation is in fact a reference to the second applicant.

[17] The investment memorandum, referred to in the introductory paragraph of the meeting aforesaid, and which Larsen was to compile, soon emerged as the Prospectus, its stated purpose *“to provide the prospective shareholders information regarding the two part share issues pertaining to Milkwood Construction (Pty) Ltd and Milkwood Sales and Promotion (Pty) Ltd”*. It is a comprehensive document encompassing fifty seven (57) pages. It fleshes out previous agreements referred to hereinbefore but it is unnecessary to refer to it in any detail save for three sections headed *“Declaration by*

Landowners”, “*Agreement between Landowners*” and “*Milkwood Sales and Promotion (Pty) Limited*” and “*Agreement between Landowners and Milkwood Construction (Pty) Limited*” identified as exhibits “J1”, “J2” and “J3” in paragraph [13] above, to which I will in due course revert. A site layout plan envisaged a four phase development, the first being the thirty two (32) unit condominium.

[18] On 1 October 2004, the board of directors of the applicants met. Minutes of the meeting held on 25 July 2004, referred to in paragraph [15] hereinbefore, were approved, signed and adopted by the signatories. The three sections of the prospectus identified in the preceding paragraph were “*formally adopted and legally adopted and approved*” and it was specifically recorded that “*Two sets of original documents shall be signed by those, whom are authorised to sign and kept on file at lawyer, Johann Muller’s office, in Jeffrey’s Bay*”. The three sections of the prospectus read as follows-

[18.1] Firstly, Declaration of Land Owners

“Declaration of Landowners of Erf 1109 Island Palm Drive, Marina Martinique, Owned by a Close Corporation with members Johan Lottering and Christo Swart

This declaration is part of the total plans of the Milkwood Project and shall act, as a written confirmation of the owners said will.

We, Johan Lottering and Christo Swart, hereby confirm giving the Milkwood Construction (Pty) Limited and Milkwood Sales and Promotion (Pty) Limited the exclusive rights to utilize, build, construct and sell condominium units according to plans approved by the founders of the Milkwood Project.

The Erf 1109, Island Palm Drive at Marina Martinique is completely free of any obligations or liabilities.

If the project for any reason is not started according to the plans, the Land Owners will compensate the initial payment of ZAR 50,000 paid by each investor that is to be used for project preparations, if the land for any reason is partly sold or wholly sold or used for any other purpose.

It is an assumption that this declaration is adopted of the Board of Directors of both Milkwood Construction (Pty) Limited and Milkwood Sales and Promotion (Pty) Limited.”

[18.2] Secondly, Agreement between Land Owners and Milkwood Sales and Promotion (Pty) Limited

“This agreement is made to secure the financial relationship between Milkwood Sales and Promotion (Pty) Limited and the Land Owners Johan Lottering and Christo Swart. This agreement is part of the total plans of the Milkwood Project.

Effective from July 25th and according to the Declaration of Land Owners dated July 25th 2004, the parties have agreed upon the following:

1. *Milkwood Sales and Promotion (Pty) Limited shall have full responsibility for Sales and Marketing of the condominium units;*
2. *By Sales of condominium units, Milkwood Sales and Promotion (Pty) Limited, shall, after paying Estate Agent commissions and compensations to Land Owners, first compensate Milkwood Construction (Pty) Limited all their actual total cost, before Milkwood Sales & Promotion (Pty) Limited, keeps any profit on their accounts;*
3. *The Land Owners; Johan Lottering and Christo Swart shall be compensated with ZAR 250.000,- for each condominium unit sold as each condominium unit's proportional part of the Erf 1109, Island Palm Drive, Marina Martinique;*
4. *The compensation under item 3 is due payable when Milkwood Sales and promotion (Pty) Limited has received the Sales Amount for each condominium unit into its Bank account on registration of transfer.*

It is an assumption that this agreement is adopted by the Boards of Directors of both Milkwood Construction (Pty) Limited and Milkwood Sales and Promotion (Pty) Limited."

[18.3] and thirdly, Agreement between Land Owners and Milkwood Construction (Pty) Limited

“This agreement is made to secure the financial relationship between Milkwood Construction (Pty) Limited and the landowners Johan Lottering and Christo Swart, and is part of the total plans of the Milkwood Project.

Effective from 25th July 2004 and according to the Declaration of Landowners dated 25th July 2004, the parties have agreed upon the following:

- 1. The landowners accept that Milkwood Construction (Pty) Limited is only a cost centre and that their compensation for sales of land parcels will occur when each flat is paid and registered with its own title.*
- 2. Milkwood Sales & Promotion (Pty) Limited will pay the compensation.*
- 3. The Landowners hereby confirm, without any objections, that Milkwood Construction (Pty) Limited has the right to register a bond of the Erf 1109, Island Palm Drive, Marina Martinique, to secure for investments done on the Erf. It is assumed that this Bond will act as a dynamic mortgage within its nominal value of ZAR 20.000.000, - twenty million-.*
- 4. As part of the total financial plan, the landowners accept without any objections that the Financial Institution giving the loan of ZAR 7,000,000 (Seven Million Rand) has the right to register a bond on Erf 1109, Island Palm Dive, Marina Martinique to secure their interest.*
- 5. It is the assumption that The Bond mentioned under item 4 is fully paid and terminated after fulfilment of Phase 1 of the project or by decisions made by the Board of Directors of Milkwood Construction (Pty) Limited.*

It is an assumption that this agreement is adopted by the Board of Directors of both Milkwood Construction (Pty) Limited and Milkwood Sales & Promotion (Pty) Limited.”

[19] The reproduction of these entire sections of the prospectus was rendered unavoidable by reason of the stance adopted by the third respondent and the argument advanced on his behalf that no binding and valid contract was concluded between the applicants and the first respondent. What is abundantly clear herefrom is that any reference to the landowners equates to the first respondent. The third respondent's case that no agreement was concluded is, as evidenced by the foregoing documentation, patently false. In amplification of his denial he initially alleged that the document at page 47 of annexure “G”, the agreement reproduced in paragraph [18.2] of the prospectus, was unsigned. Annexure “J2”, however, signed by the second respondent, is the very same document. At the meeting held on 7 December 2004, the minutes of the meeting held on 30 October 2004 was approved and signed by the entire board including the third respondent. As adverted to earlier the board resolved that those authorised to sign should sign. It is self evident that the second respondent signed exhibits “J1”, “J2” and “J3” with the express approval of the third respondent.

[20] His authority to do so has however been impugned and I shall deal with that aspect hereinafter. Suffice it to say that there are, in addition to the foregoing, objectively established facts which demonstrate quite unequivocally that the third respondent's denial that a valid contract

had not been concluded between the applicants and the first respondent is false. During the course of litigation initiated by a Swedish developer who alleged a prior agreement with the first respondent to develop erf 1109, the second respondent deposed to an affidavit, (annexure "L" to the founding affidavit). The import of the affidavit corroborates the applicants' version that a valid contract had been concluded.

[21] Thereafter, financial assistance was sought from First National Bank (FNB) to fund the development. The second respondent, together with the third respondent signed certain limited suretyships. The disagreement which thereafter arose between the first respondent and the bank in consequence of which the bank was jettisoned as the financier in favour of Absa bank clearly did not result in the dissolution of the contract between the applicants and the first respondent. Although the loan from Absa was far in excess of that sought from FNB, it is obvious that the increased funding related to the further development of the other phases of the project.

[22] The high water mark of the second respondent's case that the increased loan and the handwritten addendum penned by attorney Muller to the resolution adopted by the members of the first respondent on 10 May 2007 proves that the 2004 agreement had all but lapsed, fails to distinguish that the resolution was internal to the affairs of the first respondent and in no way impacted upon the contractual

relationship between the applicants and the first respondent. The further submission that exhibit “H” to the founding affidavit likewise proves that an entirely new structure had come into operation likewise fails to recognise that the amount obtained from Absa was sought not only in respect of the first phase of the development viz. the thirty two (32) condominium units but for further development envisaged in the prospectus.

[23] Mr *Buchanan* further submitted that in any event no valid contract was concluded between the applicants and the first respondent by reason of the fact that the second respondent not only lacked the requisite authority to sign annexure “J2” but that the purported agreement was unenforceable for want of compliance with the provisions of the **Alienation of Land Act** (the Act)⁶. In the course of this judgment I found that on a proper construction of the plethora of documentation annexed to the founding affidavit and the evidence adduced that a joint venture agreement to develop erf 1109 had come into being. In my view “no alienation” of land as envisaged in the Act occurred to render the agreement unenforceable. Reliance on the **Alienation of Land Act** merely serves to obfuscate the issues.

Did the second respondent have the requisite authority to sign “J2” on behalf of the first respondent

⁶ Act No 68 of 1981

[24] It is clear that the second respondent was entitled to sign the agreements. In paragraph [19] hereinbefore I adverted to the minutes of the meeting held on 7 December 2004 where the third respondent was party to a resolution authorising “*those who are authorised to sign*” to sign. The second respondent, who holds a 30% members interest in the first respondent, is now alleged to lack the requisite authority to sign on its behalf. S 46 (1) of the **Close Corporations Act**⁷ provides that each member of a close corporation stands in a fiduciary relationship to the close corporation. The legal position is clear. Unless a member is precluded by an association agreement from signing on behalf of the close corporation he is entitled to do so. This special relationship between a member and the close corporation entitling a member to fully participate in the affairs of the close corporation was affirmed by F.H Grosskopf, JA in **Amalgamated Banks of South Africa BPK v De Goede en Andere**⁸ where the learned judge of appeal stated as follows at⁹-

“Artikel 42 van die BK Wet bepaal dat elke lid van 'n beslote korporasie in 'n vertrouensverhouding tot die korporasie staan. Kragtens art 46 (a) van die BK Wet is elke lid geregtig om deel te neem aan die dryf van die besigheid van die korporasie vir sover die Wet self of 'n samewerkingsooreenkoms nie anders bepaal nie. In die onderhawige geval was daar geen samewerkingsooreenkoms nie en was die respondente nie as gevolg van ander bepalings van die BK Wet beperk in hulle reg tot deelname nie. Behoudens die bepalings van art 47 van die BK Wet (wat nie in die onderhawige geval van toepassing is nie) het lede kragtens art 46 (b) van die BK Wet gelyke regte met betrekking tot die bestuur van die besigheid van die korporasie en met betrekking tot die bevoegdheid om die korporasie te verteenwoordig by die dryf van sy besigheid. Die uitsonderings gemeld in art 46 (b) is nie hier ter sake nie. Wat die onderlinge of interne verhoudings betref blyk dit dus dat alle lede, ongeag

⁷ Act No 69 of 1984

⁸ 1997 (4) SA 67 (AD)

⁹ 74J-75F

hulle ledebelang, in beginsel gesamentlik beheer oor die korporasie mag uitoefen. Dit staan lede egter vry om 'n meer passiewe rol te speel.

Wat die eksterne verhoudings betref bepaal art 54(1) van die BK Wet dat elke lid in beginsel die bevoegdheid het om die korporasie teenoor derdes te bind indien die handeling verband hou met die gewone loop van die korporasie se besigheid, of indien die handeling uitdruklik of stilswyend deur die korporasie gemagtig is of later bekragtig word.

'n Lid van 'n beslote korporasie staan dus in 'n besondere verhouding tot die korporasie. Hy is regtens 'n mede-bestuurder van die korporasie en geregtig om deel te neem aan die dryf van die korporasie se besigheid. Daar moet egter onderskei word tussen die beslote korporasie se besigheid (bv om passasiersdienste te verskaf) en die lid se besigheid (om die beslote korporasie se besigheid te dryf en te bestuur). Wanneer hy as lid 'n regshandeling verrig wat verband hou met die gewone besigheid van die beslote korporasie, tree hy op in sy hoedanigheid as medebestuurder van die beslote korporasie, en dus ook in die loop van sy besigheid as sodanig."

[25] This then brings me to the form of the relief sought by the applicants.

Relief is sought against the second and third respondents personally and against the third, fourth and fifth respondents in their capacity as the trustees of the JBL Trust. The applicants contend that it was an implied, alternatively tacit term of the agreement concluded between the first respondent and the applicants that the second and third respondents would do all things necessary and sign all documents necessary in order to give effect to the aforesaid agreement. That the agreement exists is, as adumbrated hereinbefore, beyond question. The applicants are perforce entitled to the relief sought. Although the second respondent was cited as such he has indicated his willingness to sign all resolutions.

[26] In the result the following orders will issue:-

3. The second and third respondents are ordered to-
 - 1.1 sign all documentation and to do all things necessary to give effect to the agreement concluded between the applicants and the first, second and third respondents at the Supertubes Guest House, Jeffrey's Bay on 1 October 2004;
 - 1.2 to sign the draft resolution reproduced at the foot of paragraph 1 of the judgment for the first respondent to apply for the approval of the sectional title plan relating to Milkwood;
2. The third, fourth and fifth respondents are ordered to-
 - 2.1 sign all documentation and to do all things necessary to give effect to the agreement concluded between the applicants and the first, second and third respondents at the Supertubes Guest House, Jeffrey's Bay on 1 October 2004;
 - 2.2 to sign the draft resolution reproduced at the foot of paragraph 1 of the judgment for the first respondent to apply for the approval of the sectional title plan relating to Milkwood;
3. The Sheriff of the district of Humansdorp is authorised to sign the resolutions referred to in orders 1.2 and 2.2 on behalf of the third, fourth and fifth respondents in respect of the latter persons failing to do so within ten (10) days from the date of handing down of this judgment.

4. The third, fourth and fifth respondents are ordered to pay the costs of this application jointly and severally, the one paying the others to be absolved, such costs to include the costs of two (2) counsel.

D. CHETTY
JUDGE OF THE HIGH COURT

Obo the Applicants: Adv J.W Eksteen SC / Adv B.C Dyke
Instructed by Greyvensteins
St George's House
104 Park Drive
Port Elizabeth
Ref.:- G Parker

Obo the First, Third, Fourth and Fifth Respondents: Adv R.G Buchanan SC /
Adv P.W.A Scott
Instructed by Spilkins Inc
2-5th Floor
Rink Street

*Central
Port Elizabeth*