

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA,
MPUMALANGA DIVISION (MAIN SEAT)**

Case Number: 2896/2021

1. REPORTABLE: YES/ NO
2. OF INTEREST TO OTHER JUDGES: YES/NO
3. REVISED.

12 October 2022

[SIGNED]

DATE

SIGNATURE

In the matter between:

PETERSON, MERVYN HILTON, N.O.

First Applicant

PETERSON, MARY-ANNE, N.O.

Second Applicant

ERIKSSON, DONALD GORDON, N.O.

Third Applicant

In their capacities as trustees of the PETERSON
TRUST IT 401/84

and

BILLINGHAM, MARGARET JESSIE N.O.

First Respondent

BILLINGHAM, NATHAN N.O.

Second Respondent

JACOBS, PITER MULLER N.O.

Third Respondent

In their capacities as trustees of the BILLINGHAM
TRUST IT 402/84

RENDEZVOUS ESTATES (PTY) LTD

Fourth Respondent

(Registration Number 1991/004254/07)

This judgment will be delivered electronically by distributing same by way of email to the parties. In addition, the judgment shall be sent to SAFLII for publication on its website. The judgment shall be deemed to be delivered at 09:00 on 12 October 2022.

JUDGMENT

Roelofse AJ:

INTRODUCTION

[1] This is an interlocutory application in terms of the provisions of Rule 6(5)(g) of the Uniform Rules of Court (the Rule 6(5)(g) application). The applicants in the Rule 6(5)(g) application are the trustees of the Peterson Trust. The first to third respondents are cited in their capacities as the trustees of the Billingham Trust.¹

¹ The first applicant was never a trustee of the Billingham Trust. The respondents raise this as a point *in limine* in their opposing affidavit in the main application (paragraph 11 thereof). The applicants reply that they will join the correct trustee, Mr Dieter Alios Klasse as party to these proceedings when the main application is heard (paragraph 34 of the replying affidavit in the main application).

[2] The fourth respondent is a company with limited liability. The company owns farmland estimated at R 55 million. The Peterson Trust holds 45.5% of the shares in the company. The Billingham Trust holds the remainder of the shares. Prior to 1997, another trust, the Wilson Family Trust, held 9% of the shares in the company and the Peterson and Billingham Trusts each held 45.5% of the shares in the company.

[3] The relief that is sought in the main application is against the company.

LITIGATION

The main application

[4] In the main application, the Peterson Trust seeks specific performance of a term in the company's Articles of Association in terms whereof the shareholders have a right of pre-emption in the event any shareholder wishes to sell its shareholding in the company.² In addition, the Peterson Trust seeks ancillary relief pursuant to the order for specific performance and costs in the event the respondents oppose the application.³

[5] The Peterson Trust alleges in the main application that when the Wilson Family Trust sold its shareholding in the company to the Billingham Trust (the sale) it did so in breach of clause 14.2 of the company's Articles of Association because

² Clause 14.2 of the Articles of Association.

³ The Notice of Motion in the main application reads:

- '1. Directing the fourth respondent through its directors to offer 4.5% of the shares previously held by the Wilson Family Trust to the first to third applicants at a price of R 162 500.00 in accordance with clause 14.2 of the Articles of Association of the fourth respondent within a period of fourteen days from the date of the Court's order.
2. That the first to third applicants have 30 days to accept the offer referred to in prayer 1 above.
3.
4.'

the Peterson Trust was not given the right to pre-emption to exercise and was also unaware of the sale.

[6] In the Billingham Trust's answering affidavit, Ms. Jessie Margaret Billingham, who is a trustee of the Billingham Trust, alleges that the Peterson Trust was aware of the sale and attaches to her answering affidavit a purported resolution by the company authorising the sale (Annexure "M9"). From the resolution, it appears that Mr. Mervin Hilton Peterson, who is a trustee of the Peterson Trust and director of the company, together with the other directors being Mr. I M Billingham and Mr. A J Wilson met on 2 April 1997 and resolved to sell the Wilson Trust's shares to the Billingham Trust. Three signatures appear on the purported resolution.

[7] In its replying affidavit, the Peterson Trust denies that it was aware of the sale when the sale was concluded and alleges that Mr. Peterson was not a signatory to the resolution. Mr. I J Billingham and Mr. A J Wilson, who purportedly co-signed the resolution, has passed away.

[8] The Peterson Trust therefore challenges its knowledge of the sale and its consent thereto in the main application.

The Rule 6(5)(g) application

[9] In the Rule 6(5)(g) application, the Peterson Trust alleges that the dispute over its consent to the sale and the authenticity of the purported resolution is incapable of being decided on affidavit, therefore the need for the Rule 6(5)(g) application.

[10] In the Rule 6(5)(g) application, the Peterson Trust is seeking that certain defined disputes of fact an application under case number 2896/2021 (the main application) be referred for the hearing oral evidence, alternatively, that the main application be referred to trial. In the notice of motion in the Rule 6(5)(e)

application, the Peterson Trust pleads that the main application ‘....*be referred to a hearing of oral evidence:*

....in connection with the dispute relating to annexure “M9” to the respondents’ answering affidavit, in particular but not limited to the question whether the Billingham Trust; -

1.1 *Was aware of the sale of the shares of the Wilson Family Trust to the Billingham Family Trust as reflected in annexure “M9” to the answering afdaivt; and/or*

1.2 *Consented to such sale of shares.’*

[11] The Billingham Trust opposes the Rule 6(5)(e) application. The Billingham Trust alleges: that the Peterson Trust’s cause of action has prescribed; material disputes of facts exist of which the Billingham Trust was aware, yet it proceeded with motion proceedings; no dispute exists which cannot be resolved on paper; and, that there is no person to give *viva voce* evidence that is not already before the court on affidavit.

[12] In addition, on the morning of the hearing of this application, the Billingham Trust raised a point *in limine*, not previously raised, that the application is not properly authorised by the Billingham Trust because the supporting affidavit of the third applicant was signed in Melbourne, Australia. The Billingham Trust argued that the affidavit does not comply with the provisions of Justices of the Peace and Commissioners of Oaths Act 16 of 1963 and the regulations promulgated thereunder. In my view, this objection should have come much earlier and properly pleaded in the answering affidavit.

[13] Despite the third applicant's affidavit being commissioned in Australia, the second applicant's affidavit was properly commissioned and no evidence exists over the number of trustees of the Peterson Trust that must act in terms of the trust's deed of trust which would off course determine whether the trust acted or not. In any event, the second applicant deposed to a supporting affidavit in the main application that was commissioned in Fairland, South Africa. The Rule 6(5)(g) application is incidental to the main application which was duly authorised by the third applicant.

[14] This *in limine* defence is dismissed.

ISSUE TO BE DETERMINED IN THE RULE 6(5)(e) APPLICATION

[15] Rule 6(5)(g) of the Uniform Rules provides:

‘Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as to it seems meet with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.’

[16] I must therefore decide, having regard to the relief that is sought by the Peterson Trust and the evidence before me, whether the dispute over the sale is capable of being properly decided on the affidavits that were filed. I am not called upon to decide the main application – that is for another court to be decided on another day. If I decide that the dispute over the sale is incapable of being decided on affidavit, I must proceed to decide what order to give that would lead to a just and expeditious decision of the main application. I have a wide discretion in this

regard.⁴

[17] The Peterson Trust is seeking final relief in motion proceedings. It is trite that *‘.....if 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.’*⁵

[18] In the main application, it is common cause that: the Wilson Family Trust held 9% of the shares in the company; the Wilson Family Trust's shares were sold to the Billingham Trust; clause 14.2 of the Articles of Association granted a right of pre-emption to the shareholders; Mr. Peterson was aware of the sale more than 3 years ago⁶, i.e after period prescribed for extinctive prescription in terms of Section 11(d) of the Prescription Act 68 of 1969.

[19] In the main application the following is in dispute: prescription of the cause of action; the resolution, Mr. Peterson alleging that he never signed the resolution; the authenticity of the resolution; Mr. Peterson's knowledge of the sale at the time the sale was effected; knowledge of the provisions of the Articles by the company's directors; and whether a shareholders' agreement was entered into.

[20] Whether the Peterson Trust's cause of action has prescribed will be determinative of the main application. If the cause of action has indeed prescribed, the main application must be dismissed. The respondents allege that the Peterson Trust's claim has prescribed and therefore no oral evidence can alter the outcome of

⁴ Lombard v Droprop CC 2010 (5) SA 1 SCA.

⁵ Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd. [1984] 2 All SA 366 (A) at paragraph 9.

⁶ Mr. Peterson became aware of the sale in 1998.

the main application. The Peterson Trust denies that its cause of action has prescribed. It relies on the authority of Van Deventer v Ivory Sun Trading 77 (Pty) Ltd⁷ where the Supreme Court of Appeal held that prescription in respect of a claim for specific performance of a right of pre-emption of immovable property commences when an offer to purchase, which complies with the requisite formalities, is made in terms of the right of pre-emption.

[21] The facts in the in this matter differ from the facts in *Van Deventer*. In this matter: shares were the *merx* and not fixed property as in *Van Deventer*; the right of pre-emption is contractual whereas in *Van Deventer* the right of pre-emption was bequeathed and also registered against the title deed; in *Van Deventer*, the offer was made in terms of the right of pre-emption but not exercised while in this matter, there is a dispute whether an offer was made in terms of clause 14.2 of the Articles of Association; and, Mr. Peterson was made to believe by Mr. Billingham that the issue over the sale of the shares would be resolved. Perhaps (although not deciding), sub-sections 12(2)⁸ and 12(3)⁹ of the Prescription Act may be relevant or become relevant when the main application is ultimately heard and decided.

[22] All of these issues in dispute stand to be determined in the main application. In my view, the issues in dispute are central to the determination of the main

⁷ [2015] 1 All SA 55 (SCA).

⁸ Sub-section 12(2) provides:

'If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.'

⁹ Sub-section 12(3) provides:

'A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.'

application.

[23] The facts presented in the main application by both trusts creates, *prima facie*, a balance of probability¹⁰ in the Billingham Trust's favour and therefore leaves doubt as to whether the Peterson Trust is entitled to the final relief it seeks although, in my view (without finally deciding or binding), *prima facie* established.

[24] Motion proceedings are not suitable to determine probabilities because evidence presented on affidavit is considered and issues are determined without the benefit of testing such evidence. All the court has is at its disposal is the evidential material before it in order to determine whether the facts support the relief that is sought. This the court does by evaluating facts that are admitted and those that are denied. The court is called upon to take a robust approach and not merely refer a matter to oral evidence only because the issues are difficult to decide. Of course, some denials do not assist in the determination of the true state of affairs or do not upset the facts that are averred. In those instances, the court is indeed well able to properly decide a case on affidavit.

[25] In Metallurgical and Commercial Consultants (Pty) Ltd¹¹, what I have said above is expressed somewhat differently:

¹⁰ Per Colman J in *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd* 1971 (2) SA 388 (W) at 396 E-G:

'It is the respondent who would fail on the disputed issue if it fell to be decided on the papers; an oral hearing is being granted at its instance, in order to afford it an opportunity of altering, if it can, the incidence of the probabilities as they emerge from the papers, and of displacing the inference which flows from the signed document. Thus, as matters now stand, the applicant needs no oral evidence to strengthen its case; it will need such evidence only if and when the respondent creates, prima facie, a balance of probability in its favour. There is no reason why I should compel anyone to testify. What I should do is give the respondent the opportunity which it has sought, and to give the applicant an opportunity of answering, if he wishes the case made out by the respondent.'

¹¹ See note 10.

‘It is my view, on a consideration of the papers before me, that the probabilities are against the respondent on the issue which I am now considering. I think it undesirable that I should mention the reasons for my view in that regard because, despite the urgings of senior counsel for the applicant, and the admonition of PRICE, J.P. which I have quoted, I do not think that it would be safe or just to deny the respondent the benefit of the oral hearing for which it has asked.

I do not think that in forming that view I have been unduly fastidious or lacking in robustness: and I can but express the hope that I have not shown myself to be deficient in common sense. My conclusion rests upon my experience, and the experience of others before me, which shows that an assertion or a denial which seems very probable or improbable on a reading of a set of affidavits often takes on a different colour when the veracity of the person which has made it is tested by cross-examination. There is the rare case, of course, in which a disputed statement made on affidavit is so manifestly untrue, or so grossly improbable and unconvincing that the Court is justified in disregarding it without recourse to oral evidence.’

[26] As the papers stand now, real disputes of fact arise. The main application therefore cannot be properly decided without a referral to evidence.

[27] What remains to be determined is what order must be given so as to ensure a just and expeditious decision in the main application. Mr. Peterson’s oral evidence and that of Ms. Billingham is still available and may be properly interrogated in order to make probability and credibility findings if need be. So for instance, Mr. Peterson is either mistaken or correct or untruthful or truthful when he avers that the shareholders were aware of the provisions of the Articles of Association and/or that he was unaware of the sale at the time it was executed and/or that a directors’ meeting was not held to authorise the sale and/or the shareholders were not given the opportunity to exercise their right of pre-emption. In my view, the only way in which these issues may be properly interrogated is by ordering Mr. Peterson and Ms.

Billingham to testify and be cross-examined.

COSTS

[28] I am unable to determine now whether the referral of the issues that are defined in the order below to oral evidence would ultimately benefit the determination of the main application. All will depend on the proceedings that are to follow. For this reason, I have resolved reserve the costs in this application for the court determining the main application to decide upon.

[29] In the premises, I made the following order:

- (a) The application under case number: 2896/2021 is referred to oral evidence on the dispute relating to annexure “M9” to the respondents’ answering affidavit in the main application, to the question whether the Billingham Trust and the Peterson Trust; -
 - (i) Were aware of the sale of the shares of the Wilson Family Trust to the Billingham Trust as reflected in annexure “M9” to the answering affidavit; and/or
 - (ii) Consented to such sale of shares;
 - (iii) Whether a meeting of the directors of Rendezvous Estates (Pty) Ltd (the company) was held on 2 April 1997 where the company, through Mr. I.M Billingham, A.J Wilson and M.H Peterson, resolved to sell 9% of the shares held by the Wilson Trust to the Billingham Trust;
 - (iv) Whether the shareholders were aware of clause 14.2 of the of the company’s Articles of Association on 2 April 1997.
- (b) Mr. Mervyn Hilton Peterson and Ms. Margaret Jessie Billingham is directed to give oral evidence in the main application.

- (c) The parties are directed to approach the Registrar of this court with a completed Form B of this Court's Practice Directive for purposes of case managing the main application within 10 (TEN) days of the date of this order.
- (d) The costs of this application is reserved.



Acting Judge of the High Court

DATE OF HEARING:

4 October 2022

DATE OF JUDGMENT:

13 October 2022

APPEARANCES

FOR THE APPLICANTS:

Adv JW Steyn on instructions of Seymore Du Toit and Basson Attorneys

FOR THE RESPONDENTS:

Adv EJ Ferriera SC on instructions of WDT Attorneys Inc.