

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 5514/2011

In the matter between:

F[....] H[....]

PLAINTIFF

and

Y[....] A[....] H[....]
NEIL McHARDY N.O.
ANDRIES GEYSER N.O.

1ST DEFENDANT
2ND DEFENDANT
3RD DEFENDANT

AND

CASE NO: 8486/2015

Y[....] A[....] H[....]

PLAINTIFF

and

FAMOUS VIEW PROPERTIES CC
SHAMIRA BANO AHMED
ABOObAKER ABUL HABIB
FARIDA SULIMAN

1ST DEFENDANT
2ND DEFENDANT
3RD DEFENDANT
4TH DEFENDANT

J U D G M E N T
Delivered on: WEDNESDAY, 18 DECEMBER 2019

Olsen J

[1] The Plaintiff in this matter, Ms F[....] H[....] was married to the first defendant, Y[....] A[....] H[....] by Muslim rites in about 1965. They concluded an ante-nuptial contract, and their marriage was registered as a civil marriage in 1969. They are estranged. It appears that an Islamic divorce took place

around the beginning of 2003. They separated at that stage. But they remained married according to civil law which is why a special plea of prescription raised by the first defendant in this matter has not been pursued.

[2] The second and third defendants are the judicial managers of a company Ajmerwala Propriety Limited. (I will refer to it as “Ajmerwala”.) As counsel put it, the judicial management of that company was a rare example of success in that field. It owned a building known as the “Ajmeri Arcade”, something of a landmark in the Durban city centre. In March 2011 the judicial managers sold the building for a price of R14 100 000. Ajmerwala was a family owned company. The first defendant was a registered member of it, reflected in the company’s records as the holder of 10% of the company’s shares. As a result of the sale of the Ajmeri Arcade a shareholders dividend became payable by the judicial managers. In this action the plaintiff lays claim to the dividend which, according to the company’s official records is one payable to her husband, the first defendant. The money is retained by the judicial managers who will distribute it when the dispute between the plaintiff and the first defendant has been resolved.

[3] Each of the plaintiff and the first defendant gave evidence. Regrettably the plaintiff turned out to be one of the most unsatisfactory witnesses one might come across. Despite the fact the marriage between the parties had in effect ended 15 or more years prior to the trial, it was plain to me that the anxieties and unhappy circumstances which characterised the demise of the relationship between the parties continued to trouble the plaintiff very deeply. I think it fair to say that foremost in her mind when she gave evidence was the belief that this was her opportunity to do something to right what she regarded as the wrongs of the past. Of course the questions put to her by counsel on both sides were not directed at that, but at the issues which appeared material to the question as to who should get the money kept by the judicial managers. On her side the plaintiff regarded each question as an opening to score a point against the first defendant, to illustrate where she had been unfairly treated or to highlight her contribution to the maintenance of the family and the acquisition of property interests. Much of this material had nothing to do

with the dispute which brought the parties to court. On a number of occasions I decided to admonish the plaintiff, as kindly as I could manage consistent with the need to get across to her that she should listen to the questions and answer them if her evidence was to make a contribution to the decision in the case. These pleas fell on deaf ears. Matters were made worse by the fact that on many occasions the plaintiff rambled on in a singularly incoherent fashion, and it proved near impossible to prevent her from doing so. In argument, Mr Broster SC, who appeared for the plaintiff, said that his aim was to present a case which was not dependant on the plaintiff's credibility, and that where issues of credibility did present themselves, I could rely on the plaintiff's evidence only where it was supported by documentary evidence. This approach to the matter was undoubtedly correct.

[4] Mr Broster SC conceded immediately that what was termed the "main claim" had not been proved, but argued that there was nevertheless evidence before the court which illustrated that the plaintiff should succeed in her claim on another basis. Mr Pillemer SC, who appeared for the first defendant, pointed out after he had heard the argument for the plaintiff that the claim made in argument had not been pleaded. That generated an application to amend made from the Bar by Mr Broster. It was opposed. Counsel were asked to submit written argument on the question as to whether the amendment should be granted, the last instalment of which reached me some weeks later.

[5] In order to deal with the application to amend, it is necessary to canvas how the claim was originally pleaded, and to consider some of the evidence tendered in the light of that. This exercise provides the context within which to consider Mr Broster's submission that the new basis for the claim was sufficiently canvassed in evidence, and Mr Pillemer's contention that it was not.

[6] The first basis for the claim is pleaded as an undertaking. The plaintiff claims that on 28 September 1992 and thereafter on a number of occasions, including 14 April 1997, the first defendant orally undertook to pay to the

plaintiff the amount payable in respect of his interests in Ajmerwala upon the sale of the Ajmeri Arcade. She claims that the amount became due on 24 November 2011 by reason of the sale and transfer of the arcade property. There is no evidence of any undertaking in September 1992. Neither is there any evidence of an undertaking to pay anything on 14 April 1997. The significance of that date is something different. It featured in the case because the documentary evidence establishes that in April 1997 the first defendant instructed the company's accountants to see to the transfer to the plaintiff of his shares in Ajmerwala (Pty) Limited. As a matter of fact the instructions to the accountant were not carried out. There was certainly no undertaking to pay anything to the plaintiff and there is no record of a demand for such payment, until 14 years later when the judicial managers sold the arcade.

[7] The second basis for the claim pleaded by the plaintiff rests on a document which the plaintiff's particulars of claim described as a "nomination". The piece of paper is dated 24 May 2000 at the top right hand corner, and beneath that the following words appear in the first defendant's hand.

'I, the undersigned Yusuf Abdul Habib nominate my lawful wife Farida Habib'.

The first defendant's signature appears at the foot of the page. It is common cause that when he signed the page in May 2000 there was a blank space between the words he wrote in the top portion of the page and his signature at the foot of the page.

[8] The particulars of claim then go on to allege that acting as he had, the first defendant "expressly, alternatively, tacitly, authorised the plaintiff to complete the nomination, by recording her beneficial ownership of" the first defendant's shares and loan account in Ajmerwala.

[9] The plaintiff inserted the words which now appear in the blank space which was originally a feature of the document. As I understand the evidence, the insertion was made in 2011 at a time when the sale or proposed sale of

the Ajmeri Arcade by the judicial managers was known. The words she inserted were the following.

‘as the beneficial and real owner of all the ordinary shares registered in my name in Ajmerwala (Pty) Limited, including my loan account claims against the company. I acknowledge that I will hold all the shares registered in my name, in my capacity as nominee and agent for and on behalf of my wife Farida Habib who shall be entitled to the net proceeds thereof and any loan account on the sale of Ajmeri Arcade’.

According to the plaintiff she wrote these words on the document with assistance from others, whose names she cannot remember. But, she said, she “planned it”. Having heard her in evidence, and considering the words of the insertion, I have no doubt that the plaintiff had professional assistance. The date of the insertion of these words was not revealed in the pleadings.

[10] The document in question was, on the plaintiff’s own version, completed on an authority she alleged she got 11 years earlier. At that time there was no question at all of any “net proceeds” of the sale of the shares of Ajmerwala being realised. The Ajmeri Arcade was, on the evidence before me, something of an heirloom of the first defendant’s family. It was run under the firm hand of the first defendant’s father. The first defendant’s plea with regard to a claim based on the document was that its completion and presentation as an instrument justifying the plaintiff’s claim was an act of fraud. The plaintiff failed to give a definite and clear answer in cross-examination to the question as to whether when she completed the document she thought it was something to which the first defendant would agree. Although the question was put in simple terms, on balance I understood the plaintiff’s evidence to be that whatever authority she claimed to have acquired in 2000 did not continue to subsist in 2011.

[11] There is a dispute between the plaintiff and the first defendant as to the circumstances in which the document I have just discussed came into being. As a matter of fact the plaintiff had another nine blank pages bearing the first defendant’s signature, which she had never filled in. According to her on an

occasion in May 2000 she was pressing the first defendant to transfer assets to her because he was in debt and owed her a lot of money. The first defendant handed her the page of the type I have described, but she complained that there was not enough space to fill in what she would want to, and in a fit of pique he produced and signed a number of blank pages. The first defendant's explanation is that he was asked by the plaintiff to fill in such a document as he was about to leave for a trip to Saudi Arabia, in case something should happen to him, so that she could take control of his affairs in the manner she deemed fit. There wasn't time to fill in everything so he simply signed and left it blank. That would explain the manuscript text the first defendant inserted on the document: "...I nominate my lawful wife ...". But his version really does not explain the number of blank pages he signed. I find myself unable to resolve the dispute of fact over why the material "blank" document was signed. In some respects the plaintiff's version strikes me as more probable. But I regard her evidence as quite unreliable. Besides the fact that she was a poor witness, on her own evidence she kept these blank pages aside for 11 years before she decided to fill one in once she realised that there was money to be had from the sale of the Ajmeri Arcade. There is no satisfactory explanation for why, if she did receive authority in May 2000 to complete the page in a form which would get her transfer of the shares in Ajmerwala, that was not done there and then, or shortly after the first defendant signed the blank pages. As I have mentioned, in about 2003 the parties separated, and that condition has obtained since. Why did the plaintiff not complete the page then? The inactivity following May 2000 suggests that, if the plaintiff's account of the circumstances in which the blank pages were signed by the first defendant is more or less correct, the plaintiff understood that whatever he said on that occasion was the product of an argument between an unhappy wife and an angry husband, and that there was no serious or real intent behind it.

[12] The third basis upon which the plaintiff's claim was pleaded is related to the ground I have already covered. It is said that the undertaking of September 1992 and the written instruction to auditors of April 1997 justified the plaintiff recording what she described as her "beneficial ownership" of the

first defendant's shares and loan account in the document which I have already discussed. Somewhat confusingly the pleading describes that "beneficial ownership" as something "which became due and payable on the sale of the Ajmeri Arcade from the net proceeds of such sale on the date of transfer, namely 24 November 2011". As I have already said there was no evidence at all of an undertaking in September 1992, or thereafter on a number of occasions. The pleading says nothing at all about how and when beneficial ownership of the shares was acquired by the plaintiff. The transaction in April 1997 had nothing to do with the concept of beneficial ownership, which involves a registered member of a company holding the shares registered in his or her name for the benefit of someone else. What was proposed in April 1997 was the formal transfer of shares by the first defendant to the plaintiff. If that was carried through there would have been no nominee. The plaintiff would have been both the beneficial and registered holder of the shares. (See generally *Smyth v Investec Bank* 2018 (1) SA 494 (SCA) at paras 21 – 23.)

[13] Ultimately, as pleaded, the third basis for the claim rests, like the second basis, on the document, as what is pleaded is a right on the part of the plaintiff to fill in the document as she did.

[14] In my view the evidence did not support any of the bases upon which the plaintiff's claim was pleaded. Recognising as much, as I stated earlier, counsel for the plaintiff sought to amend the particulars of claim to introduce the following claim.

'On or before 14 April 1997 the first defendant orally undertook to cede all his shares and loan account in Ajmerwala (Pty) Limited to the plaintiff and as a matter of fact and of law the cession took place at that time.'

[15] In his supplementary written argument dealing with the application to amend the particulars of claim, Mr Pillemer asked that if notwithstanding the first defendant's opposition, the plaintiff's amendment is granted, the first defendant should be permitted to amend his plea. I think that the proposed

amendment to the plea should be reproduced in full as it is a convenient way of identifying the issues which arise in connection with the plaintiff's proposed amendment.

- '1. The First Defendant denies that an undertaking to cede or transfer shares in itself as a matter of law constitutes a transfer if there is no intention for the transfer to be effected at the moment the undertaking is given.
2. First Defendant denies that he ever had such an intention to transfer ownership prior to completion of the formalities he believed were necessary and avers that he has never had an intention that in law would result in the transfer ownership of the shares in Ajmerwala Pty Limited to the Plaintiff.
3. The First Defendant admits that during April 1997 he took advice from Jeff Jhaveri, his accountant in relation to transferring the shares he owned in Ajmerwala Pty Limited to the Plaintiff and that Jhaveri prepared a letter for him to sign dated 14 April 1997 which was addressed to the auditors of the company instructing them to draft the necessary documents to effect the transfer of the shares and loan accounts in the company to the Plaintiff and to draw the deed of donation.
4. A copy of the letter is attached to the Particulars of Claim.
5. It was the First Defendant's understanding and hence his intention to effect the transfer once the formalities for doing so were completed, namely the formal completion of share transfer forms, the signing of a cession of the loan account and the signing of a written deed of donation by both parties to the transaction.
6. None of the formalities were attended to because the First Defendant agreed to transfer to the Plaintiff and his children the shares in Famous View Properties Pty Ltd which he acquired from his father and brothers and there was agreement that this would replace the proposed transfer of the Ajmerwala shares, which in terms of the agreement to transfer the Famous View Properties shares, then fell away.

7. The Plaintiff, like First Defendant, understood that to acquire ownership in the shares in Ajmerwala Pty Limited it was necessary for there to be formalities and had no intention to acquire ownership before such formalities were attended to and on or before 14 April 1997 did not have the intention to acquire ownership of such shares.
8. When the opportunity arose for the Plaintiff to acquire the shares in Famous View Properties from the First Defendant she used the agency of her daughter Amina and her relationship with the First Defendant's accountant to get them to persuade the First Defendant to transfer the shares in Famous View Properties to her and laid no claim to the shares in Ajmerwala at that time and never acquired ownership thereof.
9. The proposed transfer of the shares and loan accounts from the First Defendant to the Plaintiff was abandoned by both parties and replaced with the Famous View Properties transaction.
10. Subject to the foregoing the First Defendant denies the allegations in the new amended paragraph 4 of the Plaintiff's Declaration."

[16] The plaintiff's application to amend was made as late as it could have been done in the trial – literally at the last moment. It was not accompanied by a request that leave should be granted to recall witnesses, or perhaps call other evidence, in order to deal with the new basis for the claim. (That would have required a postponement; and so not asking for that privilege prevented the plaintiff from having to confront the proposition that disruption might on its own justify the refusal of the amendment. See *Robinson v Randfontein Estates Gold Mining Company Limited* 1921 AD 168 at 243.) Instead counsel argued for the plaintiff that the issue had already been sufficiently and properly canvassed in evidence, and that the first defendant would suffer no prejudice if the amendment were to be permitted. Mr Pillemer, for the first defendant, argued that the issues had not been fully ventilated at the trial if for no other reason than that the claim had not yet been made; and that such evidence as might have a bearing on the issues raised by the amendment indicated that the claim on the new basis enjoyed no prospect of success.

[17] In support of the argument that the amended claim would be viable, and indeed ought to be upheld, Mr Broster relied principally on the judgment in *Botha v Fick* 1995 (2) SA 750 (A). On Mr Broster's argument *Botha v Fick* holds that if A agrees to cede shares to B, and B accepts the offer, the transfer of what might be called the beneficial interests in those shares passes immediately, and there and then to B. He has argued that on that premise, if in this case it should appear that the first defendant thought that the shares in question had to be transferred to the plaintiff in the register of the company before she acquired ownership of them, he was merely making a mistake of law and, by agreeing to cede the shares, he had brought about an inadvertent immediate transfer of ownership.

[18] In my view the plaintiff reads too much into *Botha v Fick*. The main principle for which that case is cited is the proposition that it is not necessary for a share certificate to be delivered, or for the company's register to reflect a transfer of shares, in order to bring about the transfer of the rights embodied in the shares in the company from one person to another. Accordingly the position with regard to a specific transaction may be that the cession (i.e. the transfer) of the rights in shares may take place *pari passu* with the conclusion of the agreement that the shares will be transferred from one person to another. In such a case no more is required to bring about that the transferee becomes the beneficial owner of the shares.

[19] In *Botha v Fick* the court enquired into the transaction firstly to determine the question as to when it was intended that the rights in the shares would be ceded. The analysis of the facts in that case revealed that it was intended that the transfer would take place not when the agreement to cede was concluded, but very shortly thereafter when the price of the shares was paid. Everything pointed that way. This is to be contrasted, for instance, with *Sefalana Employee Benefits Organisation v Haslam and Others* 2000 (2) SA 415 (SCA), where the court held that there was no indication arising from the transaction, or from admissions of fact, which illustrated that the parties had a similar intention to that found to have existed in *Botha v Fick*.

[20] To my mind the difficulty is that the word “cession” can be used in confusing ways. In the section on cession in LAWSA (authored by PM Nienaber) some effort is made to clarify this. After pointing out that cession (properly so called) belongs in the category “real agreements whereby rights are bilaterally transferred, such as delivery of corporeal or the assignment of immaterial property”, the learned author continued as follows in paragraph 8 (LAWSA, Part 2, 2ed).

‘Within the context of cession it is helpful to distinguish between:

- (a) the obligatory agreement creating the right to be ceded;
- (b) the obligatory agreement, also termed the *pactum de cedendo*, to effect a cession in future; and
- (c) the real agreement of cession, variously referred to as the *pactum cessionis*, the transfer agreement, the act of cession or simply as the cession.

The undertaking to cede and the actual cession will often coincide and be consolidated in a single document, if they remain discreet juristic acts. However, because they are frequently merged into one transaction the clear distinction between the obligatory agreement to cede and the actual cession sometimes tends to be smudged. They are nevertheless distinct in function and can be so in time: by the former a duty to cede is created, by the latter it is discharged.”

[21] I think that the proposition may be put this way: that in the case of cession properly so called, as a mode of transfer employed in respect of shares, it takes place when the parties agree it should take place. Nothing more is required, unless of course their agreement or mutual intention is that something more is required. I can see no obstacle at all to an agreement designed to pass shares from the ownership of A to the ownership of B, which provides that that the actual transfer will only take place upon the amendment of the company’s register of shareholders and delivery of the share certificate generated by that. It is a question of fact as to when the parties anticipated the transfer of the shares to have been effected. That, it seems to me, is consistent with the abstract theory of transfer which requires

there to be a “real agreement” the essential elements of which are an intention on the part of the transferor to transfer ownership and an intention on the part of transferee to become the owner of the property. (See *Legator McKenna and Another v Shea and Others* 2010 (1) SA 35 (SCA) at paras 21 – 22.)

[22] The letter of 14 April 1997 already referred to more than once in this judgment in connection with the original pleaded claims reads in its body as follows. (It is addressed to the auditors of Ajmerwala.)

‘I would appreciate if you could kindly transfer my entire shareholding and loan account at the earliest date possible to my wife Farida Habib ... of 95 View Street, Overport, Durban, in the above company. Kindly prepare

- A Share transfer form;
- B Cession of loan account;
- C Deed of Donation;
- D Any other documents deemed to be necessary.

Please phone me, when the documents are ready so that I can have them signed.’

[23] The first defendant’s evidence, which certainly on this score I have no reason to doubt, was that the letter just quoted was prepared and drafted by the first defendant’s accountant (at his office where his daughter worked), a Mr Jhaveri. It was written because the plaintiff had applied pressure on the first defendant, saying that she and their four children needed security. The first defendant told her that she could have the Ajmeri shares which produced R1000 per month for him at that time. That generated the letter of instruction. When he was asked in cross-examination whether when he signed the letter of 14 April 1997 he intended to transfer the shares to the plaintiff, the first defendant replied in the affirmative. That question and its answer perhaps now take on a different hue given the amendment proposed by the plaintiff. However I do not regard the first defendant as having gone so far in evidence as to permit one to draw the conclusion that

- (a) he conceded that he intended the transfer of the shares to take place during his exchange with the plaintiff prior to the letter being sent, there and then (which seems to be what Mr Broster must contend for); or
- (b) that he intended the transfer to be effected the moment he signed the letter of 14 April 1997.

[24] However these exchanges and the conduct of the parties at that time were canvassed in evidence in a most cursory manner. No question was put by anyone to the first defendant as to when he intended to transfer the share to his wife. In the case of the plaintiff no questions on the subject were put at all. It is arguable that the contents of the letter of 14 April 1997 raise more questions than the document answers. Why did the accountant think that a deed of donation was necessary? Was it for record purposes or was it because the intention was that transfer would take place later, when the company's register was corrected and the share certificate delivered, which meant that the donation was executory and therefore had to be reduced to writing if it was to be enforceable by the plaintiff in the case of default on the part of the first defendant? Does the fact that the first defendant asked the auditors of Ajmerwala to attend to the formalities of the transfer "at the earliest date possible" not suggest that the first defendant's intention to transfer extended only to a transfer on the date upon which these formalities were complete? On this subject nothing is known as to what the plaintiff's intention might have been. I also throw into the mix of this uncertainty my difficulty in accepting Mr Broster's proposition that one can inadvertently transfer shares from one person to another. That, it seems to me, undermines the doctrine of real agreements.

[25] I conclude that the grounds upon which this new basis for the plaintiff's claim are based have not been fully canvassed in this case. That is unsurprising given that no one was aware of the fact that a claim would be made on this basis.

[26] In any event, it is worth observing that there is an answer to the claim proposed to be made, readily available on the evidence. At this time (1996 – 1997, and for some time prior to that) the plaintiff and first defendant resided on a property which was called the “Famous View Property” during the trial. It was owned by a company. The shares in the company were owned by the first defendant’s family (his brothers and his father). The first defendant was raising issues in the family, and presumably particularly with his father, about how it was, given what the Ajmeri Arcade was, that it only generated an income for him at R1000 per month. The first defendant’s father then offered to allow the first defendant to have the house, as the first defendant put it “to keep me quiet”. A number of transfers of shares would be necessary in order to bring this about.

[27] Subsequently and in the presence of the accountant Jhaveri (since deceased) the daughter of the parties, Amina, asked the first defendant on behalf of her mother to give her mother the house, as she wanted that rather than the Ajmeri Arcade shares. This would give her and the children security. Initially, when he accepted this arrangement the first defendant understood it to be that the shares would be transferred into five names, those of the four children and the plaintiff. But as it transpired they were transferred to the plaintiff only. According to the first defendant the plaintiff agreed to take the shares presenting the interests in the whole of the Famous View Property in preference to the first defendant’s minority shareholding in Ajmerwala. In evidence the first defendant said that he made it clear to the plaintiff that if she took the Famous View Shares that was the end of the matter - “that is it”.

[28] If one applies the theory of transfer of shares contended for by Mr Broster to the second transaction, then on the only acceptable evidence before me the Ajmerwala shares were ceded back to the first defendant. (It does not seem to make any difference whether one puts it that way, or says that the agreement to cede to the plaintiff was cancelled.)

[29] On the only acceptable evidence before me the plaintiff's claim to the Ajmerwala shares only resurfaced some 14 years later when it was known that in view of the sale of the arcade, money would become payable to the shareholders. The fact that nothing was done in the meantime does not support the proposition that the plaintiff regarded herself as having acquired her shares in Ajmerwala by cession in 1997.

[30] I accordingly conclude that whilst it is correct that the issues raised by the plaintiff's proposed amendment, and the consequential amendment the first defendant would have to make if the plaintiff's amendment were granted, were not fully canvassed in court as they would have been had these issues been pleaded at the outset, on the available evidence the claim would in any event have been unsuccessful. In the circumstances there is no justification for granting the plaintiff's application to amend.

[31] This case came to trial after a considerable delay following the institution of action in 2011. As I understand it this was largely because a conditional settlement was brokered, and when it appeared that it was not coming to fruition, another action, this one under case number 8486/15 was launched. Without going into any detail as to how that case unfolded, it was eventually consolidated with the present one for the purposes of trial on the basis, I was informed at the opening of the trial, that all I had to decide was the question of costs. I see no reason at all why the costs of that later action should not follow the costs of the present one. But it should be noted that no time at all was taken over case number 8486/15 during the course of the trial.

[32] Two counsel were employed on both sides and both sides agreed that a costs order in this case should include the costs of two counsel.

[33] No submissions were made to me concerning any costs which may have been reserved in this case or Case No. 8486/15. If there were such, and any dispute regarding them cannot be resolved, arrangements may be made through my Registrar for me to hear and determine these issues.

I accordingly make the following order.

1. The plaintiff's application to amend her particulars of claim from the Bar is dismissed with costs, such costs to include those incurred in the preparation and delivery of written argument on the issue as to whether the amendment should be allowed.
2. The plaintiff's claim is dismissed with costs.
3. The plaintiff in the present action is ordered to pay the first defendant's costs in the action under Case No. 8486/15.
4. The costs orders set out above include the costs of two counsel where employed.

OLSEN J

Date of Hearing: MONDAY, 05 AUGUST 2019;
TUESDAY, 06 AUGUST 2019;
WEDNESDAY, 07 AUGUST 2019; and
WEDNESDAY, 14 AUGUST 2019

Final Heads: TUESDAY, 10 SEPTEMBER 2019

Date of Judgment: WEDNESDAY, 18 DECEMBER 2019

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