

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 1844/2011

In the matter between:-

DIVINE HEIGHTS 5 CC

Applicant

and

GREG & SONS ENTERPRISES CC

First Respondent

GRIMBEEK, VAN ROOYEN AND PARTNERS Second Respondent
INCORPORATED

HEARD ON: 17 NOVEMBER 2011

JUDGMENT BY: HANCKE, J

DELIVERED: 24 NOVEMBER 2011

[1] The applicant seeks an order declaring a written agreement of sale, concluded between the applicant and the first respondent, in respect of immovable property described as portion of Erf 360, Kroonstad, dated 14 February 2005 to be of force and effect and binding on those parties and directing the first respondent to forthwith instruct conveyancing attorneys to effect registration of transfer of the immovable property forming the subject matter of the sale agreement from the first respondent to the applicant.

[2] It appears from the papers that during 2001, the sole member of the applicant, Mr. Seedat and the first respondent concluded a written agreement of sale in respect of the purchase and sale of the said immovable property. Seedat purchased the immovable property through an entity described as Megaphase Trading 256 CC being a shelf corporation bought by Seedat from his erstwhile attorney for the purpose of purchasing the immovable property. Unbeknown to Seedat, his erstwhile attorney in the meantime sold Megaphase to a third party and Seedat was provided with a new shelf corporation, namely the applicant. As a result, on 14 February 2005 the applicant (represented by Seedat) and the first respondent (represented by attorney Gresse) concluded the sale agreement which is the subject of the present application.

[3] It is applicant's case that the suspensive conditions, which were part of the sale agreement, have been fulfilled and further that the full purchase price was paid in cash by the applicant into the trust account of the second respondent, in compliance with clause 2 of the sale agreement. Since approximately 2005, the applicant has been in *de facto* control of the immovable property and has let the immovable property, unchallenged by

the first respondent, to third parties. Further, despite the aforementioned, the first respondent has failed to effect registration of transfer of the immovable property and the applicant has been forced to bring this application for the relief claimed.

[4] The first respondent opposes the application on the following basis:

- (i) At the time of the conclusion of the sale agreement on 14 February 2005 Seedat was not a member of the applicant and therefore unable to represent the applicant in concluding the sale agreement. As a result, the first respondent alleges that the sale agreement does not comply with section 2(1) of the Alienation of Land Act, 68 of 1981;
- (ii) The applicant has no *locus standi* to bring this application in that, at the date of the signing of the notice of motion, the applicant was finally deregistered;
- iii) The first respondent's attorney, Mr. Gresse, was not authorised to conclude the sale agreement on behalf of the first respondent.

[5] It is common cause that the sale agreement was concluded on 14 February 2005 and that Mr. Seedat only became a member of the applicant on 1 March 2005. Ms Robertson, counsel for the applicant, submitted that Mr. Seedat was empowered in law to represent the applicant the moment he acquired the *de facto* ownership of the entire members' interest in applicant in or about November 2004. This he did, according to the argument, when he acquired the shelf corporation (being the applicant), paid for the shelf corporation and secured full transfer of the members' interest in the applicant. She also submitted that when members' interest in a corporation is sold, full rights of ownership vest in the new purchaser even before registration of transfer of the member's interest in the Companies Registration Office. She contended that upon paying the price and fulfilling other conditions relating to the transfer of ownership, the purchaser of the members' interest can act as a lawful owner of or holder of rights attached to the members' interest in the corporation.

[6] Ms Robertson also referred to Henochsberg on the **Close Corporations Act Vol III**, where the following is stated on p.

74:

“It is submitted that, as between a person (A) acquiring an existing member’s (B’s) interest, or portion thereof, delivery of the interest, or such portion, entails a cession by B to A of the right in which it consists ... It is submitted that if A and B sign the amended founding statement for purposes of giving effect to the acquisition, ordinarily and implied cession of the rights will occur upon signature thereof.”

- [7] It is necessary to have regard to section 2(1) of the Alienation of Land Act, which provides as follows:

“(1) No alienation of land after the commencement of this section shall... be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.”

- [8] As far as the authority of a member¹ of a close corporation is concerned, Lewis, AJA stated the following in **NORTHVIEW**

SHOPPING CENTRE (PTY) LTD v REVELAS PROPERTIES

¹ Section 54 of the Close Corporation Act, No 69 of 1984 provides:

- “(1) Subject to the provisions of this section, any member of a corporation shall in relation to a person who is not a member and is dealing with the corporation, be an agent of the corporation,
- 2) Any act of a member shall bind a corporation whether or not such act is performed for the carrying on of the business of the corporation unless a member so acting has in fact no power to act for the corporation in the particular matter and the person with whom the member deals has, or ought reasonably to have, knowledge of the fact that the member has no such power.”

(SCA) at par. [17]

“[17] Section 54(2) does no more than express the usual rules relating to ostensible authority. And s 54(1) simply confers on a member authority to act for a close corporation, as the common law confers on a partner the power to bind the partnership. The section does not regulate the question of written authority for the purpose of s 2(1) of the Alienation of Land Act, as it is assumed s 69 of the Companies Act does. It is clear, however, that, on the reasoning in *Potchefstroom Dairies*,² a member, who by law can represent a close corporation, need not have written authority. *But why should that be true of an agent of the close corporation who is not a member*, as is the case with Christelis?” (My italics)

[9] Being the *de facto* owner does not improve Seedat’s position. It must be kept in mind that since a close corporation is a juristic person, its assets are held by it and even the members are not co-owners thereof.³ As far as the legal status or position of Seedat is concerned, he at that stage only has a personal right against Greeme⁴, the then member of the applicant, and that up

2 Potchefstroom Dairies and Industries Co Ltd v Standard Fresh Milk Supply Co 1913 TPD 506

3 Cilliers and Benade **Corporate Law** (Third Edition) p. 601.

4 Henochsberg *op cit* p. 74.

until Seedat became a member of the applicant, no authority arising by implication of law was conferred by statute upon him to enter into a contract for the sale of immovable property. It is also important to note what was stated in **NORTHVIEW SHOPPING CENTRE (PTY) LTD**, *supra*, at par. [26]:

“The object of s 2(1) of the Alienation of Land Act is to ensure certainty in respect of contracts for the sale of land. That object is not defeated if a functionary of a company or a close corporation or any other juristic entity signs such a contract. There is no uncertainty about the functionary's authority. It derives from law. In Bristowe J's words, the authority 'arises by implication of law'. But where the authority arises from the expression of will (an 'express authorisation') it must be in writing. If it were not, the uncertainty as to the authority would defeat the object of the section.”

[10] It follows therefore that for the present agreement to be of force and effect, the said agreement on 14 February 2005 had to be signed by either the then member of the applicant, Mr. Greeme or by Mr. Seedat, with the written authority of Mr. Greeme.

[11] The applicant in its replying affidavit relies on a resolution of the applicant adopted on 14 June 2011, stating that:

“The Close Corporation hereby ratifies and approves the purchase of the immovable property of sale concluded on 14 February 2005...”

In view of the wording of section 2 of the Alienation of Land Act

“the agent has to have prior authority and thus contracts for the sale of land by agents without authority cannot be ratified, not even in writing”.⁵

Ms Robertson, in my view correctly, conceded that if it is found that the contract is of no force and effect, it cannot be ratified.

[12] In view of what was said above, the agreement dated 14 February 2005 appears to be of no force and effect. This is an unfortunate result, because the applicant paid the full purchase price to the first respondent’s transferring attorneys and the applicant has been in occupation of the property for about six years. Apart from the merits of the application, it is clear that the legal profession, in particular Mr. Gresse of the second respondent, has left the applicant in the lurch by not effecting

⁵ De Villiers and Macintosh **The Law of Agency in South Africa** (Third Edition) by J M Silke. See also **The Law of South Africa** Vol I par. 204.

registration of the said property in the applicant's name for the past six years. It follows that the applicant cannot succeed in obtaining any relief. In view of the conclusion reached by me it is not necessary to deal with the other submissions raised by Mr. Van Rooyen, on behalf of the first respondent.

[13] According the application is dismissed with costs.

S.P.B. HANCKE, J

On behalf of applicant:

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Instructed by:
Webbers Attorneys
BLOEMFONTEIN

On behalf of first respondent:

Adv. P.C.F. van Rooyen SC
Instructed by:
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/sp